

2011 IL App (1st) 091813-U
No. 1-09-1813

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FIRST DIVISION
August 8, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 26651
)	
TONY SPENCER,)	The Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Where the victim had a clear view of the assailant's face and unequivocally identified defendant as gunman, the evidence was sufficient to support defendant's conviction, and lineup in which defendant wore clothing similar to attacker and distinct from that worn by other participants was not impermissibly suggestive; the trial court's judgment was affirmed.

¶ 1 Following a jury trial, defendant Tony Spencer was

convicted of armed robbery and was sentenced as a habitual criminal to natural life in prison. On appeal, defendant contends the evidence was insufficient to establish his guilt because he did not match the description of the offender or resemble the person shown on surveillance video, the victim had a brief period to view the offender, and the police lineup at which he was identified was suggestive. Defendant also asserts the trial court erred in denying his motion to suppress the lineup identification because he wore clothing distinct from that worn by the other lineup participants. We affirm.

¶ 2 Defendant was convicted of robbing Ralph Craig, a Chicago police sergeant, at gunpoint at an automated teller machine (ATM) near Washington and Loomis streets in Chicago. Before trial, defendant filed motions to quash his arrest and suppress his identification.

¶ 3 At the hearing on the motion to quash, Chicago police officer Anthony Gibbons testified that at about 3 a.m. on November 22, 2003, he received a radio report of shots fired. The parties stipulated the first message, sent at 3:12 a.m., described the offender as a black male between 6 feet 1 inch and 6 feet 2 inches tall and weighing about 200 pounds, wearing "blue gray sweats" and a black jacket. Officer Gibbons spotted a man who met that description wearing a gray sweatshirt and carrying a black jacket. A second message, issued at 3:39 a.m., described a

black male who was 30 years old and weighed 200 pounds with a "short Afro" haircut and wearing a black jacket and gray sweatpants.

¶ 4 The suspect fled upon seeing the police car. Officer Gibbons pursued the suspect, who dropped his jacket, and a weapon in the jacket became visible to the officer. The suspect was apprehended by police while Officer Gibbons remained with the jacket. The court denied defendant's motion to quash his arrest, stating the police had probable cause to arrest defendant based on the firearm in his jacket.

¶ 5 At the suppression hearing, Chicago police detective Patrick Deenihan testified he met with Craig between 3:15 and 3:30 a.m. after the robbery. Detective Deenihan said Craig described the robber as a black male between 6 feet and 6 feet 2 inches tall and weighing between 180 and 200 pounds. Craig said the man wore a black coat with a gray hooded sweatshirt underneath and was armed with a semi-automatic handgun. The written report of Craig's description indicated that he said the offender was between 25 and 30 years old and "clean shaven."

¶ 6 Defendant was arrested at about 4:30 a.m. and was placed in a lineup viewed by Craig. Detective Deenihan testified the lineup included defendant and four black men that "to the best we could" matched defendant's physical characteristics. Defendant wore blue pants, a gray sweatshirt and a gray or white

T-shirt. The four other participants wore black coats or black sweatshirts. Craig identified defendant in the lineup as the robber.

¶ 7 The trial court denied defendant's motion to suppress the lineup identification, stating, *inter alia*, that although defendant was the only person wearing a gray sweatshirt, the other lineup participants wore dark coats, which also was clothing described as being worn by the robber. The court noted: "There is no requirement that I'm aware of to dress everybody in the lineup in the way as described by the victim." The court stated the lineup composition did not improperly suggest that defendant should be identified as the offender.

¶ 8 At trial, Craig testified that on the night of the offense, he was not in uniform and drove an unmarked squad car. As Craig withdrew \$10 from the ATM, which was located in an illuminated vestibule, defendant entered the area, approached Craig from behind, and said, "Give me your money or I will kill you." Craig turned around to face defendant, who wore a black jacket and a gray hood. Craig testified he could see defendant's face despite the hood. Craig said the area also was lit from a nearby streetlamp.

¶ 9 Craig said defendant pointed the gun directly at him and "got as close as a foot from my face, face-to-face." After Craig handed defendant the \$10, defendant ordered him to empty

his pockets. As Craig did so, his police star and ID fell on the ground. When defendant recognized those items, defendant patted Craig down for a weapon while still continuing to hold his gun. Craig testified defendant "came within a foot of my face" while reaching around his waist to search for a weapon.

¶ 10 Craig was carrying a weapon in his waistband that defendant failed to detect in his search. When defendant's gun "dipped," Craig pushed defendant, drew his own weapon and fired twice at defendant while defendant faced him. Craig injured his knee while firing, and defendant exited the vestibule and fled. Craig reported the crime on the radio of his unmarked squad car parked nearby.

¶ 11 Craig said he chose defendant from the lineup because he "recognized his face from the incident" and also because he wore a gray hooded jacket. The State entered into evidence several still photographs taken from surveillance video, and Craig described what occurred in each photo. The surveillance video was shown to the jury and admitted into evidence, along with a photograph of the lineup.

¶ 12 On cross-examination, Craig said he turned around and faced defendant when defendant first spoke to him. Craig stated he was focused on the gun in defendant's hand. Craig could not describe defendant's hairstyle because of the hood he wore; however, Craig could see defendant's face and said defendant had

a "slight, thin mustache" and "some facial hair." Chicago police officer Timothy Parker, who placed defendant in custody, described defendant as having a mustache and a "scruffy" beard. Chicago police officer Adrienne Seiber testified she and her partner, who were in a squad car, received the radio report regarding the ATM robbery and spotted a man meeting the suspect's description. Officer Seiber said that when she asked the man to "come here," he fled. The officer identified the man in court as defendant.

¶ 13 Detective Deenihan conducted the lineup identification between 6:30 and 7 a.m. Based on Craig's description of the offender, the detective selected men in custody in the police station as "fillers" in defendant's lineup. Defendant chose his position in the center of the lineup, and the men wore the clothing they had on when they were arrested. Defendant was not wearing his black jacket because it was being inventoried as evidence in the case. Detective Deenihan acknowledged the other lineup participants were wearing clothing under their black coats or jackets but he did not ask them to remove their outer garments.

¶ 14 On appeal, defendant first contends the State failed to prove his guilt beyond a reasonable doubt. He argues: (1) he did not resemble either the person shown in the surveillance video or

the physical description of the offender; (2) the identifications of him by Craig and a police officer were unreliable; and (3) the remaining evidence was insufficient to establish his guilt.

¶ 15 When reviewing the sufficiency of the evidence of a criminal conviction, the task of a reviewing court is to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Ward*, 215 Ill. 2d 317, 322 (2005). Under this standard, this court will not substitute its judgment for that of the trier of fact on issues of the weight of the evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). A conviction will only be reversed when "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010).

¶ 16 Defendant contends several differences exist in the characteristics of the man pictured in the ATM surveillance video and Craig's description of the attacker, when compared to defendant's own appearance. Defendant argues the man in the video was "distinctly clean-shaven" and had a "small angular nose and thin lips," and defendant points out Craig described his assailant as clean-shaven and between 25 and 30 years old. In

contrast, defendant said he was 42 years old at the time of the offense and had a mustache and "connected goatee," "pronounced lips" and a "wide nose."

¶ 17 As defendant acknowledges, the identification of the accused by a single witness is sufficient to sustain a conviction if the witness viewed the perpetrator under circumstances permitting a positive identification, even if that testimony is contradicted by the accused. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009); *People v. Slim*, 127 Ill. 2d 302, 207 (1989). The inability of a witness to precisely describe a suspect's physical characteristics is not fatal to an identification but simply affects the weight to be given that testimony, and discrepancies between a witness' description of the accused and the defendant's physical appearance do not, in and of themselves, generate a reasonable doubt as long as a positive identification has been made. *People v. Holmes*, 141 Ill. 2d 204, 240-41 (1990). The failure to accurately describe an offender's facial hair or any other single characteristic is not fatal to an otherwise positive and credible identification. *Slim*, 127 Ill. 2d at 310. It was the province of the jury as the trier of fact to compare the description provided by Craig and determine if the man who was pictured in the surveillance video and chosen in the police lineup reasonably met that description.

¶ 18 Defendant next asserts Craig's identification of him in

the lineup was unreliable. To determine whether an identification is reliable, courts look to several factors, including: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of any prior descriptions of the suspect by the witness; (4) the level of certainty by the witness at the time of the confrontation; and (5) the length of time between the crime and the confrontation. *People v. Lacy*, 407 Ill. App. 3d 442, 459-60 (2011), citing *People v. Brooks*, 187 Ill. 2d 91, 129-30 (1999). No single factor is dispositive, and the identification's reliability is based on the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Defendant's challenge to the identification in this case involves the first three factors only. As to the opportunity and degree of attention that Craig paid to his assailant, defendant argues Craig could not view his attacker at length. Defendant contends Craig viewed the offender's face only for about eight seconds, based on a time stamp on the surveillance video, and defendant further points out that according to Craig's own testimony, he was focused on the gun and escaping the offender. Defendant also contends that as shown in the video, the hood worn by the assailant cast a shadow "on a substantial portion of [the attacker's] face."

¶ 19 The evidence presented at trial established that Craig

viewed defendant's face at close range under sufficient lighting. Craig testified defendant was about a foot away from his face at one point as he searched Craig for a weapon. Identifications based on a view of an offender that last only a few seconds have been found reliable. See, e.g., *People v. Brooks*, 187 Ill. 2d 91, 130 (1999) (witness viewed defendant for "a second or so" during shooting); *People v. Williams*, 118 Ill. 2d 407, 413 (1987) ("[t]hat the victim saw her attacker's face for only several seconds did not preclude her from making a positive identification"). Although defendant argues Craig likely focused on the gun and not on the gunman's face, Craig had a clear view of defendant as he reached in Craig's waistband to search for a weapon.

¶ 20 As to the third factor, the accuracy of any prior descriptions of the suspect, defendant reiterates the differences between his physical features and Craig's account of his assailant's characteristics. He contends Craig's description of his attacker as "clean-shaven" weakens the reliability of his identification in light of defendant's facial hair. The failure of a witness to mention a physical characteristic such as a mustache or facial hair does not render an otherwise positive identification unreliable. *Williams*, 118 Ill. 2d at 414.

¶ 21 Defendant does not discuss the fourth or fifth factors. We observe that Craig's identification of defendant in the lineup

was unequivocal, and the time span between the offense and the identification was about four hours, which is not an unduly long period.

¶ 22 As a general rule, the reliability of a witness's identification of a defendant is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007) (applying factors). The three factors discussed by defendant all weigh in favor of the reliability of Craig's identification of defendant. Regarding defendant's attempt to independently analyze the surveillance video on appeal at length, the video was presented into evidence, and the jury was able to analyze its content as well as the still photographs.

¶ 23 Defendant argues, however, that although the jury's determination is entitled to deference, this court may reverse a conviction upon finding the State's evidence insufficient to establish his guilt, and defendant points to "substantial weaknesses and conflicts" in the State's case. The evidence presented here was not so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt in this case. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Defendant was apprehended in the vicinity of the offense, while carrying a weapon and a black coat. Defendant met the description of Craig's attacker, and Craig's unwavering identification of defendant was based both on his facial features

and his clothing.

¶ 24 Defendant further argues the remaining evidence offered by the State, other than the identification testimony, did not establish his guilt beyond a reasonable doubt. He contends no proceeds of the robbery were recovered from him and he points out he did not confess to the crime. A lack of physical evidence in a case does not raise a reasonable doubt where the defendant has been positively identified as the offender. *People v. Reed*, 396 Ill. App. 3d 636, 649 (2009). Furthermore, sufficient evidence to convict can exist even without a defendant's inculpatory statement, and defendant in this case has provided no authority to the contrary.

¶ 25 Defendant also challenges Officer Seiber's identification of defendant as an unreliable showup identification. Defendant did not object to the officer's testimony at trial. Furthermore, even aside from that evidence, the identification testimony of Craig was sufficiently reliable to support his conviction.

¶ 26 Defendant's second main contention on appeal is that the trial court erred in denying his motion to suppress Craig's identification in the police lineup. Defendant argues his gray sweatshirt matched the description of the offender and that attire distinguished him from the four "fillers" in the lineup who wore black coats. He contends the lineup could have been

made more neutral by having the "fillers" remove the black coats and be shown in the shirts they wore underneath.

¶ 27 In a motion to suppress identification testimony, the defendant bears the burden of proving a pretrial identification was impermissibly suggestive. *Gabriel*, 398 Ill. App. 3d at 348. An identification can be suggestive if the defendant is required to wear distinctive clothing worn by the suspect in the crime. *Gabriel*, 398 Ill. App. 3d at 349, citing *United States v. Wade*, 388 U.S. 218, 233 (1967).

¶ 28 Craig testified his attacker wore a black coat with a gray hooded sweatshirt underneath. Although defendant was dressed differently than the four "fillers" in the lineup, police are not required to find matching clothing for all participants of a lineup. See *People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999) (citing numerous cases finding lineups not impermissibly suggestive even if defendant is only person wearing clothing similar to that worn by suspect). Indeed, here, all of the men in the lineup with defendant wore clothing similar to that worn by the offender; the attire of the four "fillers," who wore black coats, matched the attire described by Craig, as did defendant's gray hooded sweatshirt. That defendant was the only person wearing a gray hooded sweatshirt did not render the composition of the lineup unduly suggestive.

¶ 29 Defendant nevertheless maintains that suspects should

not appear to be "substantially different" from the "fillers" in a lineup, citing section 107A-5(c) of the Code of Criminal Procedure (725 ILCS 5/107A-5(c) (2004)). Defendant points out that statutory section was adopted in 2003, after *Peterson* and similar decisions were issued, and he argues the "substantially different" standard therefore supercedes the earlier case law.

¶ 30 The statute to which defendant refers states, in pertinent part:

"Suspects in a lineup or photo spread should not appear to be substantially different from "fillers" or "distracters" in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." 725 ILCS 5/107A-5(c) (2004).

¶ 31 This court has discovered no published decisions defining the term "substantially different" as used in this statute, and defendant has not directed us to any such case law. Since 2003, this court has held that participants in a lineup are not required to be physically identical. *Gabriel*, 398 Ill. App. 3d at 348; *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). To the extent that defendant suggests the rules stated in *Peterson* and the cases cited therein are nullified by the statute, we

reject that contention in the absence of any contrary authority.

¶ 32 To suppress an identification based on a violation of due process, a court must find both that (1) the confrontation was unduly suggestive and (2) the identification was not independently reliable, which is measured by applying the factors we have set out above. *Lacy*, 407 Ill. App. 3d at 459. We have concluded in our analysis of the previous issue that Craig's identification of defendant was reliable under those factors.

¶ 33 Accordingly, the judgment of the trial court is affirmed.

¶ 34 Affirmed.