

No. 1-09-1262

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 08 CR 8944
)	
ROBERT HULLUM,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

Held: Where the victim's identification of defendant was positive, the judgment was affirmed; where defendant's conviction for aggravated kidnaping was not incidental to the offense of robbery, the judgment was affirmed; where the mittimus incorrectly shows that defendant was convicted and sentenced to unlawful restraint, the judgment was modified.

Following a bench trial, defendant Robert Hullum was convicted of aggravated kidnaping, vehicular hijacking, aggravated battery, and robbery, and sentenced to respective, concurrent prison terms of eight, seven, five, and seven years. On appeal, defendant contends that he was not proved guilty beyond a reasonable doubt because the victim's identification of

him was unreliable. In the alternative, defendant contends that his conviction for aggravated kidnaping must be vacated because the asportation of the victim was incidental to his conviction of robbery. Defendant also maintains that the mittimus should be amended to conform with the trial court's oral pronouncement that his unlawful restraint conviction merged with the aggravated kidnaping conviction. We affirm as modified.

At trial, the victim Paza Ponce Estrada testified that at about 7 p.m. on April 18, 2008, he was driving a black van. When Estrada stopped at the intersection of Ashland Avenue and 47th Street in Chicago, defendant, who was wearing a white t-shirt, approached Estrada's van, put what Estrada thought was a gun to his head, and told Estrada that he was going to rob him. A second man, wearing a black sweater with a hood, came in through the passenger door and took Estrada to the back of the van where he hit him. Defendant got into the driver's seat, took Estrada's wallet, and drove around for about an hour and a half to two hours. During that time, the offenders obtained Estrada's "PIN," so that they could use his "ATM" card. When the van stopped at a gas station, defendant went into the back of the van and hit Estrada. The second man went to the "ATM" to withdraw money using Estrada's card. The offenders drove the van to a store across the street, and the second man attempted to take out more money. After the offenders were unable to withdraw more money, they let Estrada out of the van, which they took. Estrada stated that he was able to view defendant's face for about five to six minutes during the incident. Estrada called the police, and, about an hour and a half later, they informed him that his van was recovered. On April 19, 2008, Estrada went to the police station, viewed a line-up, and identified defendant.

Officer Brian McDevitt testified that at about 9:40 p.m. on April 18, 2008, he was at 5300 Ashland Avenue when he observed a black van that had crashed into a light pole. The two occupants of the vehicle, one of whom was defendant, exited the van and ran away. McDevitt

apprehended defendant, who was wearing a white t-shirt, after a short chase. McDevitt's partner detained the second man. McDevitt learned that the van in question was involved in a vehicular hijacking about an hour and a half prior to the accident. When McDevitt spoke to Estrada on the night in question, Estrada told him that one of the offenders pressed an unknown metal object against his head when his van was hijacked.

The parties stipulated that on April 18, 2008, two withdrawals in the amount of \$201.75 were made from the account linked to the "ATM" card that was taken from Estrada. Those withdrawals were made at the first gas station where Estrada was taken by the offenders. Four additional charges were made to the "ATM" card at different gas stations. The parties then entered by way of stipulation a DVD with two separate surveillance videos from gas stations. The videos portrayed the victim's van, an individual getting in and out of the van, and the same individual withdrawing money. The parties stipulated that the individual was not defendant.

On behalf of the defense, Detective James Anderson testified that he spoke to Estrada on April 18, 2008, following the incidents in question. Estrada described the first offender to Anderson as a 21-year old black man, five feet, nine inches tall, 170 pounds, bald, brown eyes, wearing a brown sweater and dark jeans. The second offender was a 22-year old black man, five feet, nine inches tall, 170 pounds, short hair, brown eyes, wearing sweat pants and a black hooded sweatshirt. Estrada told Anderson that the offender who put what he thought was a gun to his head was not defendant. Estrada also told Anderson that the person who went to the "ATM" to retrieve money was defendant. Anderson prepared a report for this case where he identified the offenders by "offender 1" and "offender 2" because neither of the offenders were initially identified. After Estrada positively identified defendant, Anderson amended his report and crossed out "offender 2," and wrote "offender 1" in its place. Anderson indicated that he was not sure who he was referring to as "offender 1" and "offender 2" in his report, and may have

"flip-flopped it."

Following the evidence, the trial court found defendant guilty of vehicular hijacking, robbery, kidnaping, aggravated kidnaping premised on holding Estrada for ransom, aggravated battery, and unlawful restraint. The court indicated that unlawful restraint merged with kidnaping, and kidnaping merged with aggravated kidnaping. In finding defendant guilty, the court stated that Estrada described defendant, who he positively identified in a line-up, as the driver of the van. When defendant crashed the van, he showed consciousness of guilt and ran away.

On appeal, defendant challenges Estrada's identification of him as one of the offenders, arguing that there were crucial discrepancies between defendant's actual description and the description that Estrada provided to police following the robbery. Defendant maintains that the State's evidence did not establish guilt beyond a reasonable doubt, especially where Estrada's in-court identification of defendant was unreliable.

Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

Unless an eyewitness identification by a single witness is vague or doubtful, the identification by a single witness will sustain a conviction provided that the witness viewed the

accused under circumstances that would allow a positive identification to be made. *People v. Sullivan*, 366 Ill. App. 3d 770, 782 (2006). In assessing the reliability of the identification, the court considers the following factors: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).

Applying these factors to the evidence in this case, we conclude that the court could have found beyond a reasonable doubt that Estrada's identification of defendant was reliable. *Sullivan*, 366 Ill. App. 3d at 782-83.

Here, defendant maintains that Estrada's identification of defendant does not meet the five factors enumerated in *Lewis*. We disagree. The evidence presented showed that Estrada had an adequate opportunity to view defendant. Estrada testified that he was able to view defendant's face for about five to six minutes, and he was with defendant inside of the van for almost two hours. After the offenders released Estrada, they crashed his van into a light pole and were detained by police the same evening. The following morning, Estrada went to the police station, viewed a line-up, and positively identified defendant as the person who kidnaped him.

We disagree with defendant's assertion that Estrada's in-court identification of defendant was so inconsistent with the prior description of the offenders he provided to police, that it raised a reasonable doubt of his guilt. Defendant specifically points to Estrada's testimony at trial that defendant was wearing a white t-shirt, which contradicted his prior description to police that one offender was wearing a brown sweater, and the other a black hooded sweatshirt. Defendant also indicates that Estrada's physical description of the offenders did not match him where Estrada was wrong about his age, height, weight, dress, hairstyle, and omitted any mention of facial hair.

Defendant particularly emphasizes the fact that Estrada described defendant as bald when, at the time of the incident, he had hair. Moreover, Anderson testified that Estrada told him on the night of the incident that defendant was the man who went to the "ATM," which the parties agree was not true.

Estrada's inconsistent descriptions of defendant following the incident do not establish that Estrada's identification was vague or doubtful. To the extent that there are inconsistencies between what Estrada told police regarding defendant's description, and what he testified to at trial, only the weight of his testimony is affected. See *People v. Romero*, 384 Ill. App. 3d 125, 133 (2008) (where the description of the defendant did not match the defendant's physical description, the court held that the discrepancies were not fatal). Moreover, we note that there was confusion in the report generated by Anderson regarding which offender committed which acts, and thus Anderson's testimony regarding Estrada's description of defendant being the individual who used the ATM is not certain.

Most importantly, Estrada made a positive identification of defendant the morning following the incident, and there is no indication in the record that Estrada wavered in making the identification. Illinois law has consistently held that the presence of discrepancies or omissions in a witness' description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made. *People v. Slim*, 127 Ill. 2d 302, 309 (1989); see, e.g., *People v. Zambrano*, 188 Ill. App. 3d 432, 441-442 (1989) (finding that although the witness failed to give a specific description of his assailant, and contradicted his initial description of defendant's clothing at trial, a reasonable doubt was not raised where a positive identification was made). Therefore, the inconsistencies in Estrada's description of defendant do not establish that his identification of defendant was insufficient.

Defendant next contends that his conviction for aggravated kidnaping must be vacated

where the asportation of Estrada was entirely incidental to the offense of robbery.

To determine whether an asportation rises to the level of kidnaping as a separate offense, courts consider the duration of the asportation, whether the asportation occurred during the commission of a separate offense, whether the asportation that occurred is inherent in the separate offense, and whether the asportation created a significant danger to the victim independent of that posed by the separate offense. *People v. Watson*, 342 Ill. App. 3d 1089, 1098 (2003).

Applying these factors to the instant case, we find that the asportation satisfies the duration factor. Estrada testified that he was forced into the back of his van by two offenders, and was told that he was going to be robbed. After taking his wallet, the men drove defendant around for approximately two hours, stopping at several "ATMs" to withdraw Estrada's money. See *People v. Casiano*, 212 Ill. App. 3d 680, 687 (1991) (holding that a one and a half block walk at knife point was sufficient for asportation).

In considering whether the asportation occurred during the commission of a separate offense, defendant maintains that when the facts and circumstances of the case are considered in their totality, it is clear that the gist of this case was the robbery, such that the asportation of Estrada occurred during the commission of the robbery. The State, however, maintains that the robbery, *i.e.*, the taking of Estrada's wallet and its contents, occurred soon after the offenders commandeered his van. According to the State, the asportation and detention of Estrada was only essential for what occurred after the robbery, *i.e.*, the effort to obtain additional money by using Estrada's "ATM" card.

In evaluating whether separate acts were committed in this case, we find *People v. Lurks*, 241 Ill. App. 3d 819 (1993), instructive. In *Lurks*, the defendant and a second man grabbed the victim, forced her into an alley, and took her ring. The men then took her to a nearby abandoned

building where they raped her and removed a knife from her bag. Defendant was convicted of aggravated sexual assault, aggravated kidnaping, and armed robbery. On appeal, the defendant contended that his aggravated kidnaping conviction should be vacated because the asportation was incidental to the robbery. He specifically maintained that the robbery was not complete until the second man removed the knife from the victim's bag. This court held, however, that the defendant showed two separate acts of robbery, not one continuing robbery. *Lurks*, 241 Ill. App. 3d at 826. The first act of robbery preceded the asportation, and the second act occurred after the asportation was complete. *Lurks*, 241 Ill. App. 3d at 826. We thus found that the aggravated kidnaping was sufficiently distinct from the other offenses to support the separate conviction. *Lurks*, 241 Ill. App. 3d at 826.

Similarly, in this case, the robbery, *i.e.*, the taking of Estrada's wallet, occurred before the asportation began. After Estrada's wallet was taken, the offenders had the "ATM" card and Estrada gave them his "PIN." The aggravated kidnaping occurred during which defendant was essentially held for ransom and forcibly taken to several gas stations where the offenders used his "ATM" card to withdraw money. Therefore, the asportation and detention of Estrada was only essential for what occurred after his wallet was taken, and thus the second factor was satisfied. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 226 (2009) (holding that because the asportation occurred prior to, rather than during the crime, the second factor was satisfied).

In evaluating the third factor, we note that in order for asportation or detention to be inherent in a separate offense, it must constitute an element of that offense. *People v. Quintana*, 332 Ill. App. 3d 96, 108 (2002). Here, the third factor is satisfied where the forced movement of Estrada from one location to another is not inherent in the offense of robbery. See 720 ILCS 5/18-1 (West 2008). After defendant took Estrada's wallet, defendant drove him to several locations and used Estrada's "ATM" card to withdraw money. Estrada could have been released

after his van and wallet were taken from him. We thus disagree with defendant's claim that the detention of Estrada was required to complete the robbery.

Finally, the fourth factor is satisfied because the asportation of Estrada posed a significant danger which was independent of the robbery. A victim confined within a moving vehicle is subject to the possibility that an accident might occur, or the victim might injure himself attempting to escape. Furthermore, the chances of being transported to a deserted place also substantially increase the risk of harm above that present in a robbery alone. *People v. Thomas*, 163 Ill. App. 3d 670, 679 (1987). Therefore, forcibly taking control of Estrada's van and driving him around created a potential risk of harm to Estrada that was substantially increased above that necessarily present in the crime of robbery itself.

Based on these factors, we conclude that the evidence was sufficient to sustain a conviction for aggravated kidnaping separate from the offense of robbery.

In reaching this conclusion, we find *People v. Smith*, 91 Ill. App. 3d 523 (1980), relied on by defendant, distinguishable from the case at bar. In *Smith*, 91 Ill. App. 3d at 529, the defendants' restraint and detention of their victim was necessary to the commission of robbery where they forced themselves into the victim's car and drove the victim around before robbing him. We thus reversed the aggravated kidnaping conviction. *Smith*, 91 Ill. App. 3d at 529. Here, however, defendant's wallet was taken, and then he was essentially held for ransom and driven against his will to several locations where the men took money out of his account with his "ATM" card. It was not necessary for defendant to confine Estrada in order to take his wallet. Instead, defendant confined Estrada after the robbery, in order to obtain additional money.

We further reject defendant's argument that there is an "inequity inherent" in permitting defendant to be convicted of aggravated kidnaping, where he committed the lesser offense of robbery. As stated above, defendant committed both the offenses of robbery and aggravated

kidnaping. Because a defendant who commits more than one criminal act in a criminal episode may be prosecuted for more than one offense (*People v. Muhammad*, 257 Ill. App. 3d 359, 369 (1993)), we find no injustice in finding defendant guilty of both robbery and aggravated kidnaping.

Defendant finally contends, and the State concedes, that his mittimus must be corrected to reflect the trial court's finding that defendant's unlawful restraint conviction merged into aggravated kidnaping. A reviewing court has authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug 27, 1999), to correct a mittimus to accurately reflect a defendant's convictions. *People v. Matthews*, 362 Ill. App. 3d 953, 968 (2005).

Here, the parties correctly agree that the mittimus should be corrected to reflect that the unlawful restraint offense merged into aggravated kidnaping. It is well settled that where the common law record conflicts with the report of proceedings, the report of proceedings controls. *People v. Peebles*, 155 Ill. 2d 422, 496 (1993). Here, the trial court explicitly stated that the unlawful restraint offense merged into the aggravated kidnaping conviction. However, the mittimus indicates defendant was sentenced to three years' imprisonment for unlawful restraint. Therefore, the mittimus should be corrected to reflect that there was no sentence or conviction for unlawful restraint.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed; mittimus corrected.