

No. 1-09-3514

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).

FIFTH DIVISION
May 20, 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. 08 CR 19524
)	
NICOLAS VERA,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

HELD: Eyewitness testimony of robbery victim who saw defendant at close range just before her chain and medallion were taken from her neck sufficed to prove him guilty beyond a reasonable doubt despite his alibi witnesses. Force described as an "attack" on victim and her chain was sufficient force to establish robbery instead of mere theft. Defendant was not denied effective assistance of counsel by trial attorney's failure to seek continuance to obtain testimony of witness where affidavit of the witness established that her key testimony would have been inadmissible hearsay.

Following a bench trial, defendant Nicolas Vera was found guilty of robbery in the forcible taking of a chain from the

victim's neck and was sentenced to four years in prison. Defendant contends on appeal that there was insufficient evidence to prove him guilty of robbery beyond a reasonable doubt. He alternatively contends that the force used in taking the chain was not enough to establish a robbery, but only a theft. Finally, defendant contends that he is entitled to a new trial based on ineffective assistance of counsel because his attorney failed to seek a continuance in order to obtain the testimony of a key witness. Defendant asserts that this witness would have supported his claim that on the day of the robbery he did not have the van he allegedly used in the robbery because it had previously been stolen.

At trial Jacqueline Ortiz testified that on September 2, 2008, around 9:15 or 9:20 a.m., she was walking with her daughter on 38th Place in Chicago. She passed within three or four steps of a man leaning against a tree and speaking Spanish on a cell phone. She then "felt that he attacked me from behind like me [sic] attacked my chain." The chain had a religious medallion on it and was around her neck. The man ran with the chain to a van parked by an alley. Ortiz described the van as white, with a black line on it and temporary plates. When a woman came to see if Ortiz was alright, Ortiz recited the plate number to her and she wrote it down. The prosecution established that these plates were registered to a van owned by the defendant. On September

1-09-3514

17, 2008, Ortiz viewed a lineup and identified defendant as the man who took her chain. One basis of her identification was the man's voice, which she remembered "very well." The police had each member of the line-up recite a phrase which she remembered the defendant saying. She recognized defendant's voice immediately. Ortiz also identified defendant at trial.

Gloria Galeana testified that on the day in question she was walking on Pershing Avenue when a white van came from the alley, passing two or three steps from her. She saw that the driver had a "weird" eyebrow, with some sort of cut or scar. Later that day at her home the police showed her a series of photographs from which she identified that of defendant as the man she had seen. Galeana testified that in the photograph only defendant's left eyebrow had "shaved" parts. On September 17, 2008, Galeana identified defendant in a lineup. She testified that the eyebrow "scarring" was visible in a photograph of the lineup and that it was an accurate depiction of what defendant looked like on September 17. Galeana also identified defendant in court as the man she saw driving the white van that day.

Galeana recalled that it was 8:35 a.m. when she saw defendant in the van. She could remember the time because a crossing guard had remarked to a girl Galeana was escorting to school that she was five minutes late, and Galeana knew that school began at 8:30 a.m. Galeana also testified that on the day

1-09-3514

she saw defendant driving the van she could see his neck and he had no tattoos there.

Chicago police officer Steve Lipkin investigated the robbery. The victim gave him the temporary license plate 259K706, which he determined was registered to a white minivan belonging to defendant. On September 17, 2008, he arrested defendant in front of defendant's home. The white van previously assigned the temporary plate numbers given to him by the victim was there, although it now bore different permanent plates. Although Lipkin recalled that defendant had the keys to his van, it appeared that defendant was attempting to start the van without the keys by using the battery cable or wires under the hood.

Without objection from the defense, the prosecution introduced vehicle records from the Secretary of State indicating that a 1990 Oldsmobile Silhouette with the license plate observed on defendant's van by Officer Lipkin previously had a temporary license number identical to the one given Lipkin by the victim.

Testifying for the defense was Umberto Lachuga, who worked with defendant at Chicago Metal Fabricating at 37th and Rockwell. Lachuga recalled that defendant had tattoos on both sides of his neck. But he denied that defendant had lines shaved into his eyebrows at that time. On the day in question the two men took their work break together, beginning at 9 a.m. At 9:18 or 9:20

1-09-3514

a.m. defendant left to go home because he had injured his hand by hitting himself with a "metal part." Defendant came by Lachuga's department, seeking a ride home. He left the premises with another worker named Jose. Lachuga testified that during the month of September 2008 he had seen defendant with a white minivan.

Michael Litro was the plant's manager at trial and at the time in question. Although employees usually punched their own time cards when they came and went, defendant's card would not have been available at 9 a.m. because that was when the accounting department reviewed them. Litro identified defendant's punch card as one on which he had signed defendant out at 9 a.m., writing "doctor" above his initials. Litro could not recall why defendant had left but he surmised that defendant's excuse must have been the need to see a doctor. Defendant was not a regular employee; he was from a temporary worker agency. Litro had not actually seen defendant that day, relying instead on what defendant's supervisor John Acosta told him.

On cross-examination it was established that the plant had a strict policy about punctuality. Thus on that day defendant had punched in at 6:27 a.m. but his starting time was rounded to 6:30 because employees were expected to arrive five minutes before

starting time, which was 6 a.m. If an employee left at five minutes before 9 a.m. they would be docked five minutes.

John Acosta testified that on the day in question defendant asked to leave work because he had hurt his wrist. Acosta signed defendant's production card, indicating that defendant left work at 9 a.m. He did not see defendant after that time. Acosta explained that a production card was different from a punch card, as it was used to inform the particular department the time an employee started, his job number, and his specific job. Acosta admitted that defendant's production card for that day erroneously stated that he had started work at 6 a.m. He also admitted that he failed to document defendant's injury in any fashion.

Jose Cabrera testified that he had given defendant a ride from the plant that day. He spoke to defendant at 9:17, two minutes after their break ended. Defendant asked for a ride home because he did not have his van and he had hurt his wrist. Cabrera took defendant to a Burger King at the corner of 64th and Kedzie, dropping him off there at 9:35. He went directly back to work, arriving at 9:50, so that he was about half an hour late returning from his break. Cabrera admitted that he did not punch out to give defendant the ride, stating that he had told his supervisor he would be quick. Cabrera denied that defendant had lines shaved into his eyebrows that day.

Defendant contends that there was insufficient evidence to prove him guilty beyond a reasonable doubt. In reviewing such a claim on appeal, we must look at the evidence in the light most favorable to the prosecution and determine whether any rational finder of fact, in this case the trial court, could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *People v. Smith*, 185 Ill. 2d 532, 542 (1999). The evidence in this case satisfies that burden.

Jacqueline Ortiz viewed the man who robbed her from a distance of three or four feet as she passed him. She also heard him speaking on his cell phone in what was apparently a distinctive voice because two weeks later when she identified defendant in a lineup, her identification included his voice, when all the lineup participants were made to speak a certain phrase which she recalled the robber saying. Contrary to defendant's claim, Ortiz indicated that defendant's voice was one factor in her identification. She never said it was the only basis of her identification. She also identified defendant in court. Defendant suggests that the lineup identification made by Ortiz was tainted because she stated that the police told her to see if "she could identify that person" when she was called to come in and view the lineup. But Ortiz also testified that the police did not tell her that "that person" was the one whose license plate number she gave them. She also signed a lineup

advisory form indicating she knew that the robber might not be in the lineup.

Ortiz was not only able to describe defendant's white van with a black stripe, she was able to record the number of his temporary plates and give it to the police, with the aid of a passerby who wrote it down when Ortiz recited it to her. The police used the number to trace the van to the defendant and arrest him. It was stipulated that the Secretary of State's records established that the temporary plates had been registered to defendant's van, which was found on his property when he was arrested,

Defendant was also incriminated by the testimony of Gloria Galeana, who saw him driving a white van from a distance of two or three steps on the morning of the robbery. She noticed distinctive marks, perhaps cuts or scars, on one of defendant's eyebrows. According to Galeana these marks were also visible when she identified defendant in a photo array that same day and in a lineup on the day of his arrest, September 17. Galeana also identified defendant in court as the man she saw on the day of the robbery.

The defense asserts that Galeana's identification of defendant in a photo array was tainted because his neck tattoos were apparently covered up by pieces of paper on his photograph. But defendant has failed to include those photographs in the

record on appeal, so we are unable to determine the overall context of the photographs. The only reference to such covering of any of the photographs comes in final argument and thus is not evidence. Even there, the trial court found the photo array "exceptional" in the manner in which the participants looked similar. In any event, the failure of the defense to include this photo array in the record on appeal supports a finding against the defendant on this issue. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

As the defense notes, Galeana was positive in her testimony that she saw defendant at 8:35 that morning. This was a time when the records of defendant's plant showed he was still at work. But those records were shown to be unreliable in a number of respects. They contradicted each other as to the time defendant began work that day. The testimony of defendant's fellow worker and alleged driver, Jose Cabrera, if true, revealed a laxity about those records. According to his account of leaving the plant with defendant around 9:17, he was permitted to leave work for 30 minutes without checking out or in, merely by telling a supervisor he would be "quick." The trial court, as the trier of fact, was justified in failing to believe Cabrera's testimony about defendant leaving the plant at 9:17 a.m. and instead finding that he left at 9 a.m. It was within the court's discretion to accept the eyewitness testimony of Ortiz and reject

the testimony of defendant's alibi witnesses. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). As the court noted in its findings, two of the alibi witnesses did not even testify that defendant left the plant any later than 9 a.m. Michael Litro, the plant manager did not see defendant at all that day and defendant's supervisor, John Acosta, did not see defendant after 9 a.m. The defense does not contradict the court's finding that leaving at this time would have permitted the defendant to commit the robbery at the time indicated by Ortiz. The court also found that Galeana could have been mistaken about the time or defendant could have left the plant and returned before leaving again at 9 a.m. We find that this criminal conviction is supported by the evidence, which is not "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

Alternatively, defendant asserts that the prosecution failed to prove that he used the necessary force in taking the chain so as to render this crime robbery and not merely theft. The question is whether in taking the chain the defendant used force or threatened the imminent use of force. 720 ILCS 5/18-1(a) (West 2008). The act of snatching a necklace off a victim's neck has been held to constitute robbery. *People v. Taylor*, 129 Ill. 2d 80, 82-84 (1989). Here, Ortiz testified that when defendant took her chain and medallion from her neck she "felt that he

attacked me from behind like me [sic] attacked my chain." In other words, defendant's action in removing the chain was so forceful that the victim felt she and the necklace were being "attacked." This language does not comport with the defense supposition that defendant may have slipped the chain over the victim's head, although even that action could constitute force if the chain encountered resistance as it came off. In any event, we find no basis for challenging the trial court's implicit determination that defendant used force in taking the chain from the victim's neck so that he committed a robbery.

Finally, defendant claims that his trial attorney was ineffective for failing to request a continuance to obtain the testimony of Diana Perez, who was on vacation in Mexico during trial. To prove ineffective assistance of counsel, a defendant must prove both of two elements: that his attorney's advice was not within the range of competence expected of criminal attorneys and that but for that advice there is a reasonable probability that there would have been a different result at trial. *People v. Flores*, 128 Ill. 2d 66, 80-81 (1989); citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Defendant included her affidavit in his motion for a new trial. According to her affidavit, on September 3 or September 4, Perez found a white van blocking her garage exit. The van was "open", with the windows down and papers and objects thrown all over. In the van she

found a currency exchange receipt with a name, address, and phone number. She called that number and reached defendant, who told her his vehicle was stolen "earlier in the week." Defendant came over but could not start the van until he went to buy gas. Defense counsel told that court that he was aware of Perez even before trial but did not seek a continuance to obtain her testimony because his investigators reported that she was in Mexico.

A second affidavit filed in support of the motion for a new trial was that of FBI special agent Michael Moreland, who stated that in "approximately August 2008 or September 2008" defendant telephoned him and told him that his van was stolen. Then several days later, defendant again telephoned him and said he "now possessed his van" but someone was asking him for money in return for his personal property. On both occasions, Agent Moreland advised defendant to contact the local police.

In a police report dated September 9, 2008, defendant was quoted as saying that an individual was constantly calling him and demanding money to return his car keys. The man also threatened to beat up defendant. There was no mention of a stolen van.

Defendant's motion for a new trial suggests that he would have also testified to these matters, as well as that his van was stolen two days before the crime, on August 31, 2008. Defendant

would testify that he attempted to report this theft but was told that "the computers were down." But defendant's claim that he would have chosen to testify if his attorney had presented Perez' testimony is flawed. There was nothing to prevent defendant from choosing to testify regardless of whether Perez also testified. Moreover, as the trial court found, Perez' testimony that defendant told her his car had been stolen would have been inadmissible hearsay. See *People v. Tenney*, 205 Ill. 2d 411, 432-433 (2002). This would also be true of the testimony of FBI agent Moreland that defendant reported the car theft to him. Furthermore, neither the testimony of Perez nor that of Moreland, even if admissible, would have established that defendant's van was stolen before the robbery. Moreland recalled that defendant reported the theft in "approximately" August or September 2008. Perez stated that she spoke to defendant on September 3 or 4 and he stated that the van was stolen "earlier in the week." Thus to the extent defendant is claiming that corroboration of his account of his van being stolen on August 31, 2008, would have motivated him to testify, the affidavits he presented in his motion for a new trial did not support this claim. We find, as the trial court did, that this evidence, even if admissible, would not have affected the outcome of the trial, and accordingly defendant has failed to show that he was denied the effective assistance of counsel.

1-09-3514

For all of these reasons we affirm defendant's robbery conviction and his four-year prison term.

The judgment of the circuit court is affirmed.

Affirmed.