

FIRST DIVISION
May 14, 2012

No. 1-10-2309

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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.)	08 CR 21260
)	
JUAN SEPULVEDA,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: We affirm defendant Juan Sepulveda's convictions and sentence, but we vacate the \$200 DNA analysis fee.

¶ 1 Following a jury trial, defendant Sepulveda was found guilty of two counts of robbery

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arising from the robbery of two brothers, Alvaro and Sergio Romero. Defendant Sepulveda was sentenced as a Class X felon to two concurrent 15-year terms of imprisonment along with a three-year term of mandatory supervised release (MSR). The trial court also imposed certain court costs and fees, including a \$200 deoxyribonucleic-acid (DNA) analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5-4-3(j) (West 2008)). For the reasons that follow, we affirm defendant Sepulveda's convictions and sentence, but we vacate the \$200 DNA analysis fee.

¶ 2 The evidence at trial showed that on October 28, 2008, at approximately 7:30 p.m., Alvaro Romero and his brother Sergio Romero, went to a Walgreens store where Alvaro withdrew \$20.00 from an ATM. After purchasing items for dinner, the brothers were walking along the street when they were approached by a Hispanic male wearing a brown jacket, black pants, and a covering over his mouth. The Hispanic man, whom Alvaro later identified as defendant Sepulveda, told the brothers that he had a gun and lifted his jacket to reveal what Alvaro believed to be the handle of a firearm. Defendant Sepulveda demanded money and then took money from both men and a gold chain from Alvaro.

¶ 3 While defendant Sepulveda was robbing the two brothers, an accomplice stood nearby about seven or eight steps away acting as a lookout. After robbing the brothers, defendant Sepulveda told them to get away fast and threatened to shoot them if they turned around. Defendant Sepulveda and his accomplice walked to a gray van, which defendant Sepulveda drove away.

¶ 4 Alvaro testified that after the van drove away, he gave his cell phone to Sergio to call the police. When Alvaro began to testify about what Sergio told the police, defense counsel objected

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on hearsay grounds. Sergio was living in Mexico at the time of trial and would not be testifying.

The objection was overruled.

¶ 5 Alvaro testified that Sergio called 911 and shortly thereafter the police arrived on the scene. The arriving officers did not speak Spanish, so Alvaro and Sergio were taken to the police station where their statements were taken and translated by a Spanish-speaking officer.

¶ 6 Several days later, Alvaro and Sergio traveled to the police station where they separately viewed a physical lineup. Alvaro identified defendant Sepulveda in the lineup as the man who had robbed him and his brother.

¶ 7 Following Alvaro's testimony, defense counsel moved for a mistrial, or in the alternative for a directed finding, claiming that defendant Sepulveda was denied his sixth amendment right to confront and cross-examine witnesses against him because Sergio was not present at trial and would not be testifying. The motion was denied.

¶ 8 Chicago police officer Rhonda Hawkins testified that she and her partner were the first officers to respond to the dispatch about the robbery. The officers could not converse with the brothers because the officers did not speak Spanish and the brothers did not speak English. The brothers were transported to the police station where they met with a Spanish-speaking officer who translated their statements. Officer Hawkins testified that the brothers stated that they were robbed and they provided a license plate number of the getaway vehicle along with descriptions of the offenders.

¶ 9 During cross-examination of Officer Hawkins, defense counsel attempted to use the officer's testimony to impeach Alvaro's prior testimony as to the amount of money taken from his brother

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during the robbery and his description of the getaway vehicle as a gray van. Alvaro had testified that his brother Sergio was robbed of \$20.00. Officer Hawkins testified that Sergio told police he was robbed of \$35.00.

¶ 10 In regard to the getaway vehicle, Officer Hawkins testified that she ran the license plate number the brothers gave police and matched the numbers to a gray Saturn. Alvaro had described the getaway vehicle as being a gray van.

¶ 11 Chicago police officer Omar Rivera was assigned to investigate the robbery. He contacted Sergio by telephone and spoke to him in Spanish. Sergio gave Officer Rivera a description of the suspects as well as information regarding the getaway vehicle. Officer Rivera also reviewed a "general offense case report" containing the license plate number the brothers had given police.

¶ 12 Officer Rivera ran the license plate number through LEADS, a national law enforcement database, and learned the name and address of the registered owner of the Saturn. Officer Rivera also learned that defendant Sepulveda lived at the identified address and that he matched the description of the robber.

¶ 13 Officer Rivera assembled a five-man photographic array that included a photograph of defendant Sepulveda. The officer took the photo array and a standard photo advisory form to the brothers' home. Alvaro was not home at the time. Sergio viewed the photo array and identified defendant Sepulveda.

¶ 14 Officer Rivera and his partner went to the identified address but did not locate defendant Sepulveda. Officers returned to the address the following morning at which time Officer Rivera observed a gray van with a license plate number matching the number the brothers had given police.

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Officers located defendant Sepulveda at the residence and placed him in custody.

¶ 15 Detective Ralph Benavides conducted a physical lineup that included defendant Sepulveda. The lineup was viewed separately by Alvaro and Sergio. Alvaro immediately identified defendant Sepulveda as the man who robbed him.

¶ 16 Prior to the State resting, defense counsel objected to the admission of State exhibits Nos. 8, 9, and 11, which consisted of standard police forms and documents (photo array, physical lineup advisory form, and photo advisory form) that were signed by Sergio during the course of the police investigation. Defense counsel argued that defendant Sepulveda's confrontation rights in regard to Sergio would be violated by the admission of the challenged exhibits.

¶ 17 The trial court ruled that based on defense counsels' opening statement and on their cross-examination of the police officers, all of the challenged exhibits were admissible except for the physical lineup advisory form since there was no testimony that Sergio identified defendant Sepulveda in the physical lineup. Defense counsel then renewed his motion for a mistrial and directed verdict, again arguing that defendant Sepulveda was denied his sixth amendment right to confront witnesses against him because Sergio was not present at trial and did not testify. The motion was denied.

¶ 18 The defense rested without presenting any evidence. The jury found defendant Sepulveda guilty of two counts of robbery. Defense counsel filed several post-trial motions, all of which were denied.

¶ 19 Defendant Sepulveda was sentenced as a Class X felon to two concurrent 15-year terms of imprisonment along with a three-year term of MSR. The trial court also imposed a \$200 DNA

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analysis fee pursuant to section 5-4-3(j) of the Code of Corrections. This timely appeal followed.

¶ 20

ANALYSIS

¶ 21 Defendant Sepulveda first contends, as he did at trial, that his sixth amendment right to confront witnesses against him was violated when the trial court admitted alleged hearsay testimony from police officers regarding out-of-court statements made by Sergio relating to the license plate number of the vehicle involved in the offense and his description and identification of defendant Sepulveda . We must disagree.

¶ 22 The admission of evidence is within the sound discretion of the trial court whose ruling will not be disturbed absent an abuse of that discretion. *People v. Evans*, 373 Ill. App. 3d 948, 959 (2007). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein and dependent for its value on the credibility of the out-of-court declarant. *People v. Crowe*, 327 Ill. App. 3d 930, 937 (2002). The fundamental basis for excluding a hearsay statement is the lack of an opportunity to test the credibility of the statement through cross-examination. *Crowe*, 327 Ill. App. 3d at 937; *People v. Rodriguez*, 312 Ill. App. 3d 920, 928 (2000).

¶ 23 Testimony by a witness that a nontestifying party identified the accused as the perpetrator of a crime is inadmissible hearsay. *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994). Officer Rivera's testimony relating that Sergio identified defendant Sepulveda in the photo array constituted inadmissible hearsay.

¶ 24 Nevertheless, the admission of hearsay identification testimony amounts to reversible error only where it is used as a substitute for courtroom identification or is introduced to strengthen and corroborate a weak identification. *Smith*, 256 Ill. App. 3d at 615. If the testimony is merely

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cumulative or is supported by a positive identification and by other corroborative circumstances, then its admission amounts to harmless error. *Id.*

¶ 25 A review of the record shows that the admission of the hearsay identification testimony amounted to harmless error because Sergio was not the only witness who identified defendant Sepulveda as the perpetrator. Sergio's brother, Alvaro, positively identified defendant Sepulveda in a physical lineup as the man who robbed him.

¶ 26 Moreover, the hearsay identification testimony was corroborated by evidence gathered during the police investigation. After the brothers were transported to the police station, they met with a Spanish-speaking officer who translated their statements. The brothers told officers that they were robbed and they provided a license plate number of the getaway vehicle along with descriptions of the offenders. Officer Hawkins produced a general offense case report from the information Sergio and Alvaro provided.

¶ 27 Officer Rivera reviewed the general offense case report, which contained the license plate number the brothers had given police. The officer ran the license plate number through LEADS and learned the name and address of the registered owner of a Saturn. Officer Rivera also learned that defendant Sepulveda lived at the identified address and that he matched the description of the robber.

¶ 28 Officer Rivera and his partner went to the identified address, at which time Officer Rivera observed a gray van with a license plate number matching the number the brothers had given police. Officers located defendant Sepulveda at the residence and placed him in custody.

¶ 29 The police officers' testimony was admissible as non-hearsay to show the course of the police investigation. Our courts have held that testimony recounting the course of a police investigation

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is admissible, even if the jury would conclude that the police began looking for a defendant as a result of what the nontestifying witness told them, as long as the testimony does not gratuitously reveal the substance of the statements. *People v. Smith*, 177 Ill. 2d 53, 77-78 (1997); *People v. Flores*, 256 Ill. App. 3d 484, 492 (1993); *People v. Peoples*, 377 Ill. App. 3d 978, 984 (2007).

¶ 30 In this case, the officers recounted the steps taken during their investigation of the robbery and their testimony was based on personal knowledge. As a result, the testimony did not constitute inadmissible hearsay. In addition, the admission of their testimony did not violate defendant Sepulveda's rights under the confrontation clause of the sixth amendment. See *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004) ("The [Confrontation] Clause [] does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

¶ 31 In sum, the hearsay identification testimony and related exhibits were supported by other corroborative circumstances as well as a positive identification by Alvaro. The admission of this hearsay evidence amounted to harmless error.

¶ 32 Defendant Sepulveda next contends, and the State concedes, that the trial court improperly assessed a \$200 DNA analysis fee pursuant to section 5-4-3(j) of the Code of Corrections. Our supreme court has held that trial courts are authorized to take a defendant's DNA and assess a DNA analysis fee only where the defendant's DNA is not already in the State's DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Since defendant Sepulveda's DNA is currently registered in the DNA database, the trial court's order imposing the DNA analysis fee must be vacated.

¶ 33 Defendant Sepulveda finally contends that the trial court erred in sentencing him to a three-year term of MSR. Defendant Sepulveda argues that the MSR term should be reduced from three

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years to two years because a defendant subject to mandatory Class X sentencing is subject to the MSR term for the underlying felony. Again, we must disagree. This court has rejected similar arguments and we see no reason to depart from these well-reasoned decisions. See *People v. Rutledge*, 409 Ill. App. 3d 22, 26- 27 (2011) (and cases cited therein).

¶ 34 For the foregoing reasons, we affirm defendant Sepulveda's convictions and sentence, and we vacate the \$200 DNA analysis fee.

¶ 35 Affirmed; fee vacated.