

2013 IL App (1st) 13-2034-U

No. 1-13-2034

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SIXTH DIVISION
November 8, 2013

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF D.J., a MINOR)	
(The People of the State of Illinois,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County
)	
v.)	No. 12 JD 4673
)	
D.J., a Minor,)	
)	Honorable
Respondent-Appellant.))	Carol A. Kelly,
)	Judge Presiding.
)	

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

ORDER

¶ 1 *HELD:* The State proved beyond a reasonable doubt that Respondent was delinquent of attempted aggravated robbery.

¶ 2 Following an adjudicatory hearing, respondent D.J., a minor ("Respondent"), was found delinquent of attempted aggravated robbery and sentenced to three years' probation and ordered

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to perform 50 hours of community service. Respondent appeals from his adjudication of delinquency and from the dispositional order of probation.

¶ 3 On appeal, Respondent concedes that the State's key witness was the victim of a mugging but contends that the victim's identification of him was not reliable because, during the mugging, the victim was so focused on the gun used by the offenders that he did not sufficiently note their appearance and his identification of Respondent can be explained only by suggestiveness of the showup.

¶ 4 For the reasons that follow, we affirm the circuit court's finding of delinquency and sentence.

¶ 5 I. BACKGROUND

¶ 6 On the evening of November 21, 2012, a young white man was walking on a street on the south side of Chicago when he was approached by a group of three young black men who used a weapon to try to rob him. While the incident was taking place, they heard police cars approaching, and the three men ran away. Within minutes after the incident, the victim identified Respondent and two other individuals as the offenders.

¶ 7 Shortly thereafter, the State filed a petition for the adjudication of wardship against Respondent for committing aggravated robbery, robbery, and theft from the person.

¶ 8 At the adjudicatory hearing, William Zender testified that at approximately 8:45 p.m. on the date of the offense, he was walking on Pulaski, having crossed from the west to the east side of the street after he crossed Ogden. Although it was dark out, Zender stated that the street lights were "just so-so" but he could "see well enough *** to feel safe." There, three young men

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approached him, forming a "half circle" around him and, when they were about three or four feet from him, they pulled out a gun. One of the offenders pointed the gun at Zender and held it about one foot away from his rib cage.

¶ 9 Zender identified the three men as African-Americans between the ages of 15-20. They were wearing hoods, hats, and dark clothing, and one had shorter hair. Zender was frightened because of the gun and he could not "give an exact [sic] what everybody was wearing." However, he believed one of the three was not wearing a hat.

¶ 10 As the incident progressed, the three got closer to Zender, "uncomfortably close, like a foot away" and they demanded that Zender give them his money. Zender took out his wallet and told them that he did not have any money. He had only an ID that he said was "irreplaceable" and about five or six dollars. One of the three men had his hands on the wallet and tried to yank it away. As the incident was taking place, Zender kept his eyes on the offenders' gun which he described as blackish gray metal. After no more than 10 seconds, they heard sirens and saw lights, and saw one police officer approach. In the struggle over his wallet, Zender managed to "rip" it back from the offenders when they heard the sirens.

¶ 11 The sirens that Zender heard were coming from both the northbound and southbound directions on Pulaski. At that point, the offenders ran away. They ran along a junkyard wall to a strip mall. Zender described the area on Pulaski as a "tunnel" with "businesses on one side and metal gates preventing you from going to the back;" it was an area where "you can't go anywhere with all the fences and walls."

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¶ 12 As police cars approached, Zender pointed to the direction behind one of the stores in the strip mall where the offenders fled, "right there behind [the store], not 200 feet from" him. The three offenders were still within Zender's line of sight when they started running away. Zender followed the offenders far enough to see where they ran but not "to get close enough to have anymore confrontations." Zender did not see anyone else run at that time in the same direction. The parking lot and the street were "pretty deserted by then."

¶ 13 The officers told Zender to wait where he was. Another officer arrived within about five seconds and drove Zender to the other side of the store to identify the offenders. Zender never lost sight of the offenders until he was put in the police car. The three offenders had been handcuffed, and the police had Zender and another witness identify them individually. Zender heard the officers state that the gun was a BB gun.

¶ 14 When the individuals were "pulled out" for identification, Zender recognized them immediately as the three men who tried to rob him in the incident that had "just happened five minutes before." Zender stated that two of the three men had hoods that obstructed part of their faces "around the edge of the face" but that nothing obstructed Respondent's face. He "remember[ed] seeing [Respondent's] face. Because he kept his eyes on the gun, Zender did not differentiate "one guy saying something" or whose arm was holding the gun but he thought that Respondent was to his left during the altercation. Zender identified Respondent in court as one of the offenders.

¶ 15 On cross-examination, Zender was asked if the store parking lot where the identification occurred was .2 miles from the scene of the robbery. He responded that the building that houses

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that particular store is "one massive building," and that "the only reason you get that .2 miles is because businesses [are] in the same building as the [store]" but that there is "only one alleyway" and "nowhere to get lost." There was no viaduct between where the incident occurred and the store.

¶ 16 Zender further stated that he was never shown a photo array, nor was he asked to do a lineup identification. He was not sure if he dropped the five or six dollars that were in his wallet or whether the money fell out during the struggle. He was not allowed to return to the site of the altercation and the money was never returned to him.

¶ 17 Chicago Police Sergeant John Lucid testified that on the date in question, he was working as a field sergeant and was eating at a restaurant at 24th and Pulaski at approximately 8:45 p.m. He was in uniform and was driving a marked police vehicle. As he was finishing his meal, an older Hispanic man entered the restaurant and approached him. The man was distraught because he had just been robbed.

¶ 18 Sergeant Lucid exited the restaurant with the man who then directed him toward Pulaski as the location of the robbery. He pointed to three male blacks dressed in dark clothing who were running down Pulaski. The three men were about a quarter of a block away, so Sergeant Lucid decided to pursue them in his vehicle. The sergeant put a flash message of the offenders' description on the radio, and he drove north on Pulaski where he saw the three men turn towards a strip mall. He continued in that direction and when the three were no longer in his view, he saw a young white male with whom he briefly spoke. After their conversation, Sergeant Lucid went behind the strip mall where he saw Respondent with two other young men, and two police

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officers. Respondent and the two others behind the strip mall matched the appearance of the individuals Sergeant Lucid originally saw when he exited the restaurant.

¶ 19 After Respondent was detained, the police conducted a showup of him and the two other suspects. The victim who approached Sergeant Lucid in the restaurant participated in the showup. A search of the immediate area was conducted by officers on the scene. After returning to the police station, Sergeant Lucid saw, in relation to Respondent's arrest, a small black BB gun that looked like "an automatic."

¶ 20 Chicago Police Officer Jonathan Kitching testified that he was on duty on the date in question and he saw Respondent in the alley behind the store in the strip mall with two other juveniles. Officer Kitching eventually placed all three individuals under arrest. Officer Kitching was present while other officers conducted a search of the immediate area and recovered a weapon from a dumpster. The weapon was a blue steel-looking semi-automatic BB gun that was later found to be "a replica." The dumpster where the weapon was recovered was about five feet away from Respondent.

¶ 21 The officer was one of the first officers to arrive at the store parking lot. Other officers arrived within about 10 seconds. Officer Kitching's emergency lights and sirens had been activated.

¶ 22 After the State rested, the defense moved for a directed finding, which was denied. The defense rested without presenting any witnesses.

¶ 23 The trial court found Respondent delinquent of the lesser included offense of attempted aggravated robbery. In its ruling, the trial court specifically found Zender to be a credible

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witness, and stated that, although Zender testified that he kept his eyes on the gun during the altercation, he had the opportunity to observe Respondent before he saw the weapon, and during the incident and as the offenders were leaving. The court found Zender's testimony was corroborated by the testimony of the police officers. Further, in concluding that the State proved its case beyond a reasonable doubt, the court noted that Respondent and the two other offenders were the only three people behind the store who fit the description, and that no one else was in the alley and that Zender identified Respondent within minutes after the incident occurred.

¶ 24 Respondent was sentenced to three years' probation. Respondent timely appealed his finding of delinquency and sentence.

¶ 25

II. ANALYSIS

¶ 26 Respondent contends the State failed to prove beyond a reasonable doubt that he was guilty of attempted aggravated robbery because the only evidence of his guilt came from an unreliable witness whose identification of him could only be explained by suggestiveness of the showup. Respondent concedes that Zender was the victim of an attempted aggravated robbery, but challenges as unreliable the identification that Zender made of him as one of the offenders just minutes after the offense occurred. He contends that Zender did not have sufficient opportunity to see his attackers because it was dark outside and Zender was too distracted by the weapon used against him. Respondent argues that eyewitness identifications are notoriously unreliable, and cross-racial identifications, as in this case where the victim was white and the offenders were African American, are even more likely to be unreliable. He claims that Zender's description of the offenders was generic and his identification was made because the showup was

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suggestive. At the showup, Respondent and the other two suspects were handcuffed and the victim heard that the police had recovered a BB gun, which, Respondent asserts, was especially suggestive to someone as "impressionable" as Zender.

¶ 27 When the sufficiency of the evidence is challenged, a criminal conviction will not be set aside unless the evidence, when viewed in the light most favorable to the prosecution, is so improbable or unsatisfactory that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (2013). A person commits the offense of aggravated robbery when he or she knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force, and while doing so, is armed with a firearm or other dangerous weapon. 720 ILCS 5/18-1(a); (b)(1) (2013).

¶ 28 The reasonable doubt standard applies in all criminal cases, whether the evidence is direct or circumstantial. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 47. The reviewing court may not retry the defendant, nor substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to the witnesses' testimony. *People v. Rivera*, 166 Ill. 2d 279, 287 (1995); *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 34. The trier of fact determines reasonable inferences drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 29 Identification by a single witness can sustain a conviction if the witness viewed the accused under circumstances sufficient to permit a positive identification and the witness is

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credible. *People v. Smith*, 185 Ill. 2d 532, 541 (1999); *Tomei*, 2013 IL App (1st) 112632, ¶ 36.

"This is true *** provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). A reviewing court "will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Id.*

¶ 30 Showups have been justified where, *inter alia*, "a witness had an excellent opportunity to observe the defendant during the commission of the crime, *** or prompt identification was necessary for the police to determine whether or not to continue their search." *People v. Manion*, 67 Ill. 2d 564, 569-70 (1977). To determine the admissibility of suggestive out-of-court identification evidence, courts look at the totality of the circumstances. *Id.* at 571. "[E]vidence of an unnecessarily suggestive identification may nevertheless be admitted at trial if reliability of the identification, under the totality of circumstances, is shown." *Id.* In assessing the reliability of an identification, courts look at: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior description given; (4) the witness's level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification. *Id.*; *Slim*, 127 Ill. 2d at 307. "The presence of discrepancies or omissions in a witness's description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *Slim*, 127 Ill. 2d at 309.

¶ 31 In the instant case, the evidence presented at the adjudication hearing, taken in the light most favorable to the prosecution establishes Respondent's guilt beyond a reasonable doubt.

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Identification of Respondent was made by Zender, who, as is undisputed, was the victim of an attempted aggravated robbery. The court specifically found Zender to be a credible witness and nothing in the record before us suggests the contrary.

¶ 32 Zender testified honestly that he was frightened during the incident and that he kept his eyes on the gun. He did, however, have ample time to observe Respondent and the other offenders as the incident took place. He saw Respondent approach with the other two offenders and form a semi-circle around him. During that time, Zender observed the approximate age and the race of the offenders, as well as items of their clothing. He testified that two of the three wore hoods that partially obscured their face around the edge of their face, and he observed that one of them was not wearing a hat and one had shorter hair. This opportunity to view Respondent and the accuracy of the description belie Respondent's claim that Zender had a "very poor" opportunity to see his attackers due to the evening hour and the short duration of the incident. Rather, the identification was reliable as to the witness's opportunity to view the offender. See *Manion*, 67 Ill. 2d at 569-70; *Slim*, 127 Ill. 2d at 307. See also *Tomei*, 2013 IL App (1st) 112632, ¶¶ 41, 45 (witness's opportunity to view was sufficient where the witness viewed the defendant on video feed during the offense).

¶ 33 The record does not support Respondent's assertion that Zender's fear and attention to the weapon rendered his identification unreliable. Despite his fear, Zender observed the approximate distance the offenders stood from him, and that they got closer to him as the incident progressed. Although Zender testified that he could not state exactly what each of the three offenders was wearing, such degree of detail is not required. See *Slim*, 127 Ill. 2d at 309 (omissions in a

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witness's description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made); *Tomei*, 2013 IL App (1st) 112632, ¶ 51-2 (description of the suspects by their race and clothing did not undermine accuracy of witness's identification). Respondent dismisses Zender's description of the offenders as "generic." This assertion is unfounded. Although Zender's description of Respondent was not detailed, it showed sufficient degree of attention and accuracy to be reliable.

¶ 34 Furthermore, the sole case Respondent cites in support of his claim that the presence of the weapon was distracting, and increased the likelihood of a mistaken identification is inapposite. See *People v. Allen*, 376 Ill. App. 3d 511 (2007). In *Allen*, the issue involved exclusion of the defendant's expert witness psychologist who had prepared a report concerning eyewitness identification. No such issue was raised in the instant case.

¶ 35 Similarly unavailing is Respondent's reliance on secondary sources as support for his assertion that eyewitness identification, especially in cross-racial identifications, is notoriously unreliable. Not only did Zender have sufficient opportunity to observe the offenders, and a sufficient degree of attention to identify Respondent, his description was sufficiently accurate. Additionally, Zender's certainty at the time of identification and the extremely short amount of time that had passed between the incident and his identification make his identification reliable. Zender immediately identified Respondent, who had barely been out of Zender's sight after the attempted robbery. Respondent and the other offenders ran away in an area where there was "nowhere to get lost." As they fled, they were in Zender's line of sight and the parking lot and street were almost deserted. The identification was certain and occurred within minutes of the

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offense. Despite Respondent's claim that the showup was suggestive and that Zender was "impressionable," Respondent concedes that the showup occurred "close in time to the altercation." The identification made by Zender at the showup was reliable as to the witness level of certainty and the length of time between the crime and the identification. See *Manion*, 67 Ill. 2d at 569-70; *Slim*, 127 Ill. 2d at 307.

¶ 36 Considering the totality of the circumstances, the identification of Respondent by Zender was reliable as to all the factors. Furthermore, portions of Zender's testimony was corroborated by the testimony of the two Chicago police officers. The record supports the trial court's finding that Zender was a credible witness and the adjudication that Respondent was delinquent of attempted aggravated robbery.

¶ 37

III. CONCLUSION

¶ 38 For the foregoing reasons, we affirm Respondent's adjudication of delinquency for attempted aggravated robbery and his sentence.

¶ 39 Affirmed.