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2013 IL App (4th) 111091-U  
NO. 4-11-1091  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
June 25, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
KENNE Y. DYE,	)	No. 10CF326
Defendant-Appellant.	)	
	)	Honorable
	)	Claudia S. Anderson,
	)	Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Holder White concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) The State's evidence was sufficient to prove defendant guilty of home invasion where ample evidence showed the victims' identification of defendant as the intruder were reasonably reliable and not improperly suggestive.
- (2) The police investigator did not present improper lay opinion testimony at trial. Rather, he testified as to his own factual observations.
- (3) One of defendant's two convictions for home invasion must be vacated because both were based upon only one entry into the home, and therefore, pursuant to the one-act, one-crime rule, defendant can only be convicted of one count.
- ¶ 2 A jury found defendant, Kenne Y. Dye, guilty of two counts of home invasion: one for being armed with a firearm and one for causing injury to one of the occupants in the home. Defendant filed this direct appeal, claiming (1) the victims' identification of him as the intruder were unreliable and based upon suggestive influence from others, (2) the police investigator gave improper lay opinion testimony without proper foundation as to how defendant "normally" appeared,

and (3) one of his two convictions for home invasion should be vacated because there was only one entry into the home. We agree with defendant's third contention of error and vacate one of his home-invasion convictions. Otherwise, we affirm the trial court's judgment.

¶ 3

### I. BACKGROUND

¶ 4 On June 22, 2010, the State charged defendant with two counts of home invasion, one while armed with a dangerous weapon (720 ILCS 5/12-11(a)(1) (West 2008)), and the other for intentionally causing an injury to a person within the dwelling place (720 ILCS 5/12-11(a)(2) (West 2008)). Both charges stem from an incident that occurred on June 17, 2010, at a residence in Danville. Defendant allegedly broke into the home while the victims were present, pistol-whipped the man, and ransacked the home. The State alleged defendant stole a cellular telephone, \$1,000 in cash, and a Visa card.

¶ 5 At defendant's jury trial, Terry L. Evans testified he, his now wife Lucy, and two-year-old daughter were in the home during the early morning hours of June 17, 2010. He was getting ready for bed when he heard a kick at the door and a person announcing the presence of the Danville Police Department. He saw the suspect come through the broken door and knew it was not the police. He told Lucy to call the police, but she did not have time. The suspect rushed into the bedroom, turned on the light, pointed a gun at Evans, and demanded money.

¶ 6 Evans described the suspect as a male dressed in all black with a bandana around his mouth and face. He was holding a "big rusty gun." Evans reached into his pants pocket and gave the suspect cash in the amount of \$345, but the suspect demanded more. Evans handed over his wife's purse and his wallet. The suspect demanded Evans crawl into the kitchen. The suspect ransacked drawers in the kitchen and then forced Evans to crawl back to the bedroom. Evans told

the suspect he had already given him all of the money in the house. The suspect yelled at Evans to stop looking at him and he struck Evans in the back of his head with the gun. The suspect backed out of the bedroom, turned around, and ran out of the house. Evans called the police.

¶ 7 When the police arrived, Evans described the suspect as follows:

"I noticed that the person had eyes that was real-messed-up eyes, like a lazy eye or sleepy eye, you know. And I noticed that the frame of—I had a good look at this person, you know, and I knew who the person was, but I just didn't know his name at that moment of time.

You know, I could have picked him out through a lineup. I could have picked him through anything. I just couldn't put a name. I knew who this person was, and I knew if I seen this person again I would know exactly who it was."

¶ 8 Evans said when he was explaining the incident to his family members the next day, his cousin said the description sounded like "such-and-such." Evans said he knew that was the name. He called his wife and asked her to search the name given on the Internet. An Illinois Department of Corrections (DOC) photograph appeared, and Lucy immediately confirmed the suspect's identity. (The DOC photograph of defendant was introduced as People's exhibit No. 6.) Evans testified he was "a hundred percent sure" defendant was the person who "ran in [his] house and robbed [him]." Evans did not know defendant but had "seen him around" previously. Finally, Evans admitted he had a 2006 conviction for possession of drugs as well as a conviction for obstruction of justice for giving a false name to the police.

¶ 9 Lucy Evans testified as to her version of the incident. Her testimony corroborated that

of her husband's. She said she had gone to bed earlier in the night, but when her husband came to bed, she awoke. It was around that time she heard someone kicking at their front door. She also described the suspect as wearing dark clothing with a bandana around his face.

¶ 10 Lucy described the suspect as having "lazy" or "low" eyes. Her husband had called her sometime after the incident and asked her to look up the name "Kenne Dye" on the Internet. His picture appeared and Lucy said her "stomach dropped." She said she "knew exactly who it was." This was the man who broke into their home. She said, "His facial features are very clear to my—you know—it's something that you don't really forget. I've had nightmares about that face. I'll never forget that face." She clarified her testimony, indicating that she meant "mostly, his eyes." She said she had never seen him before the night of the incident.

¶ 11 Phillip Wilson, a Danville police officer, testified he met with Terry and Lucy Evans on June 21, 2010. They delivered to him a photograph of defendant they had found on-line. Wilson acknowledged that defendant's "top eyelids are kind of drooped down." Wilson began trying to locate defendant, but he was not apprehended until July 1, 2010. The following exchange occurred regarding defendant's facial characteristics:

"Q. Now, even as we sit here today,—And I apologize if I asked this already—have you ever mentioned the distinction about his eyes or the distinctive features of his eyes; are you able to see them even as you sit here today?

A. It looks like he's got his eyes wide open right now. But, yes, normally.

Q. Normally?

A. Yes, they would be half—like he's almost asleep.

\* \* \*

Q. Now, you said that just now when you looked at him they appear different?

A. It appeared like he had his eyes wide open, paying attention to me."

Wilson testified he tried to match the shoes defendant was wearing at the time of his arrest to the photograph of the shoe print found at the scene, but they did not match.

¶ 12 Finally, the State called Travis Spain, another Danville police officer, who responded to the home-invasion call at the Evans' home. Each victim described the suspect as having something wrong with his eyes. The State rested.

¶ 13 Defendant moved for a directed verdict, which the trial court denied. Defendant testified on his own behalf. He said he was released from prison in April 2010. He denied committing the charged offense. He said he was at his mother's house on the night of the incident with his mother, his brother, and his fiancée. He had known Terry Evans since he was seven years old, as Evans was the same age as defendant's oldest sister. According to defendant, the two were also on the same recreational basketball team in 2007. In defendant's opinion, they seemed to get along with each other. Defendant said he was wearing the only pair of shoes he owned at the time of his arrest. Defendant rested.

¶ 14 In rebuttal, and for purposes of impeachment, the State presented certified copies of defendant's convictions of a 2008 residential burglary and a 2006 attempted burglary. After considering the closing arguments and jury instructions, the jury retired to deliberate.

¶ 15 Two hours into deliberations, defendant moved for a mistrial after the jury foreman submitted a note claiming the jury was unable to reach a unanimous verdict. The trial court denied defendant's motion and ordered the jury to continue deliberations. An hour later, the foreman submitted a second note claiming again the jury was deadlocked and it needed more evidence. Defendant again moved for a mistrial. The court denied defendant's motion and again ordered the jury to continue to deliberate. A short time later, the foreman submitted a third note asking that one juror be removed so the jury could come to a unanimous verdict. As the court was deciding how to address the third note, a fourth note was submitted claiming there was "no deliberating going on" and the jury could not reach a verdict. The court issued a *Prim* instruction (*People v. Prim*, 53 Ill.2d 62 (1972)). Later, the jury found defendant guilty of both counts.

¶ 16 Defendant filed a posttrial motion alleging, *inter alia*, (1) the evidence was insufficient to prove him guilty, (2) he suffered prejudice during the police officer's testimony about defendant's facial features, and (3) the prosecutor misstated the evidence during closing arguments. The court denied defendant's motion and sentenced him to 20 years in prison, merging the two counts. Defendant filed a motion to reconsider his sentence, claiming it was "harsh and excessive." The court denied his motion. This appeal followed.

¶ 17

## II. ANALYSIS

¶ 18

### A. Sufficiency of the Evidence

¶ 19 Defendant's first argument on appeal challenges the sufficiency of the evidence against him. Namely, defendant claims no physical evidence linked him to the crime, the victims lacked credibility, and the evidence identifying defendant was questionable. When presented with a challenge to the sufficiency of the evidence, a reviewing court will sustain a criminal conviction

if, " 'after 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.' " *People v. Collins*, 106 Ill.2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to witnesses' testimony. *People v. Jackson*, 232 Ill.2d 246, 280-81 (2009).

¶ 20 When a jury's guilty verdict depends on eyewitness testimony, this court will affirm if "a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill.2d 274, 279 (2004). The reviewing court must not retry the defendant. *Cunningham*, 212 Ill.2d at 279. The jury's determination that testimony is reliable is entitled to deference as "it was the fact finder who saw and heard the witness." *Cunningham*, 212 Ill. 2d at 280. Thus, the reviewing court, while not bound by the verdict, should reverse "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280.

¶ 21 A defendant has a right to ascertain whether his "identification by victims was based solely on the victims' observation of defendant's participation in the crime or whether it was improperly influenced by actions of investigative officers or other extraneous factors that may have unduly affected their judgments and conclusions." *People v. Seets*, 37 Ill. App. 3d 369, 370 (1976). "No reversible error is shown, however, where it is possible for a reviewing court, on the basis of an informed judgment, to perceive from the record the presence of an independent origin for the in-court identification which was free of any improper suggestions made prior to trial." *Seets*, 37 Ill. App. 3d at 371.

¶ 22 Terry Evans testified at trial that, when he described the incident and the suspect to family members, his cousin informed him that the description of the suspect sounded like "such and such." Using the name given, Lucy Evans conducted an on-line search and found a photograph of the individual. Terry and Lucy both identified the individual in the photograph as the man who had broken into their home—defendant. The police obtained an arrest warrant and attempted to locate defendant based on this identification. Defendant claims this "inconsistent and unreliable" identification evidence was the only evidence connecting defendant to the scene. The State presented no physical evidence proving defendant was inside the Evans' home.

¶ 23 "Initial identification by photograph has been approved by the United States Supreme Court" in *Simmons v. United States*, 390 U.S. 377, 384 (1968). *People v. Jackson*, 12 Ill. App. 3d 789, 792 (1973). The burden is on defendant to establish that the identification procedure was so suggestive as to give rise to a substantial likelihood of misidentification. *People v. Johnson*, 45 Ill.2d 38, 45 (1970). Courts look to the "totality of circumstances" to determine whether the identifications were reliable. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). The factors to be considered in evaluating the likelihood of misidentification include (1) the opportunity of the witness 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 confrontation, and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200.

¶ 24 Considering these factors, we do not believe the process of identifying defendant was so impermissibly suggestive or coercive to constitute a mistaken identification. First, with respect to the first *Biggers* factor, defendant does not dispute the witnesses had the opportunity to view the criminal at the time of the crime. However, he claims, because the intruder was wearing a bandana

partially covering his face, their opportunity to identify him would have been limited. The testimony though, suggested the bandana was covering the intruder's mouth and nose areas, while his eyes (the most distinguishing characteristic) were readily observable. Terry testified he had seen defendant around but he did not know his name. After his cousin mentioned a name, Terry asked Lucy to search for a photograph of the individual. Lucy testified when she saw the photograph, she knew immediately that was the intruder based on his "droopy eye." Terry testified there was "no doubt in [his] mind."

¶ 25 Both Terry and Lucy had described the intruder's eyes to the investigators before they knew his name. Thus, the second factor, the witnesses' degree of attention to detail regarding the intruder's description, not only matched each other's, but matched the characteristics depicted in the photograph of defendant obtained the next day. Each witness had used several different terms to describe defendant's eyes, as well as providing a detailed description of his clothing, his build, and his gun.

¶ 26 The fact that both witnesses described defendant consistently and in detail supports affirmation of the third factor as well. When considering the third factor, the accuracy of the witnesses' prior description of the offender, it is notable that Terry and Lucy both described the distinguishing characteristic of the intruder's eyes. Contrary to defendant's position, their description of the intruder did not change. They merely used different words to describe the same distinguishing facial feature—that the intruder's eyes looked like he was half asleep.

¶ 27 The fourth factor, the witnesses' level of certainty with regard to the description, also supports the identification of defendant as the intruder. Neither witness wavered on his or her description. Each was unequivocal in describing the suspect to the investigators. Again, they

described, in detail, his clothing, his facial features, the placement of the bandana on his face, his type, their conversation during the incident, and the gun the intruder was holding.

¶ 28 Likewise, the fifth factor also supports the accuracy of the witnesses' description in terms of the time frame between the incident and the identifying photograph. According to Terry's testimony, Lucy performed her on-line search the day after the incident. The image of the intruder was therefore fresh in their minds when they each viewed the photograph and immediately confirmed defendant's identity.

¶ 29 "Normally, the jury decides the weight that an identification deserves; and the less reliable the jury finds the identification to be, the less weight the jury will give it." *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008). The facts that (1) both witnesses described the "lazy eye" characteristic to the police immediately following the incident, (2) Terry's cousin mentioned a name after hearing of this characteristic, (3) the photograph of the individual mentioned by the cousin depicted this characteristic, and (4) both witnesses immediately identified the person in the photograph as the intruder, suggest a rational trier of fact could have found the Evans' identification was sufficiently reliable to make a positive identification of defendant, and we will not substitute our judgment for that of the trier of fact. *Jackson*, 232 Ill.2d at 280-81. We find the evidence identifying defendant as the intruder was sufficient to support his convictions.

¶ 30 B. Officer Wilson's Testimony

¶ 31 Defendant next contends the trial court erred or, in the alternative, his counsel was ineffective, for allowing the State to introduce evidence from Officer Wilson regarding the normal appearance of defendant's eyes. According to defendant, Wilson testified that the photograph of the defendant depicted the "normal" appearance of defendant's eyes, as opposed to the appearance of his

eyes in the courtroom. Upon questioning about whether he had seen this distinctive characteristic of defendant's eye, Wilson said: "It looks like he's got his eyes wide open right now. But yes, normally." Defendant claims this opinion testimony was "unnecessary and prejudicial" and was admitted without a proper foundation. He contends that, although Wilson testified he was familiar with defendant, he did not explain how he knew him, when he knew him, whether he had seen him in person, or if he was relying on a photograph in order to lay a proper foundation.

¶ 32 The trial court's exclusion or admission of evidence is reviewed under an abuse of discretion standard and will not be reversed absent an abuse of that discretion. *People v. Stechly*, 225 Ill. 2d 246, 312 (2007). We find the court did not abuse its discretion in allowing Wilson to testify he had seen defendant with "lazy eyes" as depicted in the photograph though, at that moment, when Wilson was testifying, defendant's eyes "appeared like he had his eyes wide open, paying attention to [him]." After defendant's counsel objected to this line of questioning because it "is an implication of [his] client." Counsel argued the question posed "essentially implies to the jury and is a means of sneaking in an argument to the jury that [defendant] is sitting here propping his eyes open so he doesn't have lazy eyes." The court asked the prosecutor to rephrase the question and the following exchange occurred:

"Q. Detective, I'm going to refer again to People's Exhibit No. 6, and I want you to take a look at that again. With regard to the face of [defendant] as depicted, have you—after you've looked at that, can you tell the jury if you've seen what are depicted in the eyes on the photograph—have you seen that posture of the eyes in the defendant, Kenne Dye, in your experience?"

A. Yes."

¶ 33 This testimony does not qualify as lay opinion testimony and does not require a proper foundation for opinion testimony. Wilson was merely confirming he had seen defendant's eyes appear as they did in the photograph, though his eyes looked different at that moment in the trial. He did not state an opinion, but merely an observation. He testified as to concrete facts which he personally observed, not abstract ideas or theories. See *People v. Jones*, 241 Ill. App. 3d 228, 233 (1993) (difference between opinion testimony and testimony resulting from personal observation). We find defendant's claim of error has no merit, as no error occurred and he suffered no prejudice. Thus, it is not necessary to address his ineffective-assistance-of-counsel claim.

¶ 34 C. One-Act, One-Crime

¶ 35 Finally, defendant asserts, the State concedes, and we agree that one of defendant's convictions for home invasion should be vacated because with two convictions there is a violation of the one-act, one-crime rule. See *People v. King*, 66 Ill. 2d 551, 566 (1977). Both counts were predicated on the same act of entry into the home. Because the two counts charged defendant with the same physical act, *i.e.*, breaking into the home, one must be vacated. In *People v. Cole*, 172 Ill.2d 85, 102 (1996), the supreme court held that "a single entry will support only a single conviction" of home invasion even though the defendant inflicted harm on two occupants of a dwelling. In the present case, defendant made only one entry, and the rule set forth in *Cole* bars multiple convictions even though separate harms occurred following that single entry. We therefore vacate defendant's conviction on count I. See *People v. Artis*, 232 Ill. 2d 156, 172 (2009) (where there are multiple convictions for the same offense based upon the same physical act, none of the offenses are more serious than any other for purposes of the one-act, one-crime rule).

¶ 36

### III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm defendant's conviction of home invasion on count II; however, we vacate his home-invasion conviction on count I. In all other respects, the judgment of the circuit court of Vermilion County is affirmed. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed in part and vacated in part.