

No. 1-12-0283

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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<i>In re</i> KEVIN Z., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County
	)	
Petitioner-Appellee,	)	No. 11 JD 4055
	)	
v.	)	Honorable
	)	Patricia Mendoza,
Kevin Z.,	)	Judge Presiding.
	)	
Respondent-Appellant).	)	

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JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *HELD:* The evidence was sufficient to convict respondent of armed robbery where the single identification witness had the opportunity to view the offender and selected respondent's photograph from an array within 10 days of the crime. Respondent did not receive ineffective assistance of counsel where the police report that was not properly introduced was merely silent on the issue of whether the witness told police he could identify the male offender. The trial court did not improperly delegate sentencing power to the parole officer where there was nothing in the language of the contested preprinted

condition to suggest that the probation officer was entitled to impose additional probation conditions that fall outside of the court's order. Finally, respondent's equal protection argument fails where he did not establish that he is similarly situated to adults facing criminal prosecution for armed robbery.

¶ 2 Following a trial, respondent Kevin Z., who was charged in a petition for adjudication of wardship, was found guilty of aggravated robbery and sentenced to five years of probation. On appeal, respondent contends that (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt where his conviction rested on the testimony of a single eyewitness, the robbery occurred on a dark, unlit street, and there were other problems with the identification; (2) he received ineffective assistance of counsel where his trial counsel incorrectly believed she could impeach a witness with hearsay evidence; (3) the probation order improperly delegated sentencing power and was ambiguous; and (4) the mandatory minimum sentence violates the equal protection clause because it treats juveniles more harshly than adult offenders, or, alternatively, the sentence must be modified because the current sentence extends beyond respondent's twenty-first birthday. For the reasons that follow, we affirm the order of the circuit court of Cook County, but modify the terms of respondent's probation.

¶ 3 BACKGROUND

¶ 4 At trial, Sergio Martinez testified that at approximately 1:50 a.m. on August 7, 2011, he was walking on the 2800 block of South Kedvale in Chicago when a young girl approached him and asked for some money. It was dark outside and there were no streetlights. The girl very close to Martinez and he could see her face clearly.

¶ 5 As Martinez took out his wallet, he was immediately surrounded by approximately 14 people and pulled out toward the street. A young man, identified by Martinez as respondent,

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grabbed Martinez and put a knife to his throat. Martinez indicated that the knife was approximately eight inches long and respondent held it to his throat for approximately one-and-a-half minutes. Martinez testified that respondent's face was "right up to [his] face" and he could see respondent clearly. Although it was dark, Martinez could see because there was "moon light or a night light."

¶ 6 While respondent held the knife to Martinez's neck, some other people in the group went through Martinez's pockets. They took his wallet, cell phone, and \$300, and then said he could leave. Martinez walked down the street and found two police officers. He explained what had just happened and the police returned with him to the scene, but nobody was there. That night, the police did not find any of the people who robbed Martinez.

¶ 7 On August 17, two police officers came to Martinez's house and told him they wanted to show him some photographs to see if he could identify any of the people who robbed him. The officers showed Martinez approximately 20 photos, including several photos of young women from which he identified the female who approached him. He also identified several young men from the photos and identified a photo of respondent as the male who held the knife.

¶ 8 On cross-examination, Martinez testified that he told the police officers he could identify both the male who held a knife to his throat and the female who initially approached him. When asked again whether it was dark and there was moonlight, Martinez responded, "Well, I couldn't say it was moonlight."

¶ 9 Officer Sandoval testified that he and his partner followed up on the Martinez robbery investigation. He spoke with Martinez once or twice on the phone to get details of the robbery

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and physical descriptions of the offenders before showing Martinez the photos. When Officer Sandoval took the photos to Martinez's house, he explained that the offenders may or may not be in the photographs. Martinez identified one female and three males from the photos. Martinez identified respondent's photo as one of the men that robbed him, and was 100% certain of his identification.

¶ 10 On cross-examination, defense counsel asked if a report generated by another officer stated only that the victim said he could recognize a female offender. The trial court sustained an objection on hearsay grounds. Defense counsel then elicited testimony that Officer Sandoval indicated in his supplementary report that in assembling the photo array, he had identified a female offender in a different case and included her photo and photos of her known male associates in the photographs that were shown to Martinez.

¶ 11 Respondent's motion for a directed finding was denied. Respondent then testified that he did not remember the date and time of the robbery, because it was just like any other day. Respondent further testified that he had never seen Martinez before and that he never held a knife to Martinez's throat and did not take anything from Martinez.

¶ 12 The trial court found that Martinez was firm and credible in his testimony regarding what happened that night. The court noted that Martinez did not try to fabricate light where there was no light, and did not contend that there were streetlights, but was adamant in his position that there was enough "night light" and he was close enough to both the female and the person holding a knife to his throat to be able to make an identification. The trial court stated that Martinez could have tried to make his identification more believable by trying to enhance the

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lighting, but he did not do so and was extremely credible. The court found that respondent's testimony was self-serving. Therefore, the court found respondent guilty of aggravated robbery.

¶ 13 The court sentenced respondent to five years of probation and ordered him to (1) perform fifteen days of work with the Sheriff's Alternative Work Program, (2) attend school every day and be on time, (3) provide a TASC drop and perform all related recommendations, (4) provide a DNA sample, and (5) attend a community impact panel. Respondent timely filed this appeal.

¶ 14 ANALYSIS

¶ 15 A. Insufficiency of the Evidence

¶ 16 Respondent first contends that the State failed to prove him guilty beyond a reasonable doubt where the eyewitness testimony was vague and the trial court failed to consider the appropriate factors in assessing the credibility of that testimony. When reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine "whether, [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." (Internal quotation marks omitted.) *People v. Austin M.*, 2012 IL 111194, ¶ 106.

¶ 17 Under this standard, 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 the witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Id.* A criminal conviction will not be overturned on insufficient evidence grounds unless the proof is so improbable or unsatisfactory that a reasonable doubt as to the defendant's guilt exists. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002).

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¶ 18 Although a single witness's identification that is vague and doubtful is insufficient to support a conviction, such an identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). In assessing identification testimony, Illinois courts rely on the factors set out by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* Those factors are: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (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. *Id.*

¶ 19 Respondent contends that Martinez's identification was vague and doubtful because the lighting conditions were not conducive to a positive identification, there was no pretrial description of the offenders, there was no evidence of Martinez's certainty at the time of identification, and Martinez viewed the photo array a week after he was robbed. Respondent further argues that the risk of a suggestive identification must also be considered. Finally, respondent claims that the focus of the trial court was on Martinez's confidence in court rather than on the *Biggers* factors.

¶ 20 Viewing the evidence in the light most favorable to the prosecution, we cannot say that Martinez's identification was so improbable or unsatisfactory that a reasonable doubt as to respondent's guilt exists. Martinez testified that there was sufficient light, regardless of the source of that light, and the faces of both respondent and the female who initially approached

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him were close enough that he could clearly see their faces. He further testified that respondent held a knife to his throat for approximately 90 seconds with his face close to Martinez's face. Thus, the evidence establishes that the first two *Biggers* factors weighed in the State's favor, namely, that Martinez had adequate opportunity to view the offender and his attention was focused on the offender's face. The fifth *Biggers* factor is also in the State's favor where only 10 days elapsed between the time of the offense and the identification. Compare *Biggers*, 409 U.S. at 201 (noting that a lapse of seven months would be a negative factor in most cases), and *People v. Piatkowski*, 225 Ill. 2d 551, 570 (stating that a delay of six months did not favor the State), with *People v. Simpson*, 172 Ill. 2d 117, 141 (1996) (concluding that an identification less than six days after the crime occurred weighed in favor of the State).

¶ 21 With regard to the fourth factor, Officer Sandoval testified that Martinez was 100% certain of his identification of respondent's photo. The officer's testimony was not impeached and no evidence was presented to contradict Martinez's testimony that he identified a photo of respondent as the person who held the knife to his throat. As for the third factor, the record does not contain any information regarding a prior description Martinez may have given the police officers. Even if the lack of a prior description can be said to weigh in respondent's favor, considering all of the factors together, it is clear that they weigh in favor of the State and that Martinez's identification was sufficient to sustain respondent's conviction.

¶ 22 Respondent's argument that the photo array was suggestive is not based on evidence in the record but, rather, on speculation. The record is very sparse on the actual details of the way in which the photo array was presented. The evidence adduced at trial established that Martinez

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was shown approximately 20 photos, five of which were photos of young women while the remaining photos were all young men. On direct examination, Officer Sandoval identified an exhibit containing just five photos presented to Martinez and testified that he laid the photographs out on the table. There were no questions to indicate the exact procedure used to display the 20 photographs, and defense counsel only asked the officer whether it was true that he used photographs of a female offender in a different case and her known male associates to put together the array. There is nothing in the record to indicate that the array and the way in which it was presented was suggestive. Respondent was shown a total of 15 photos of young men, only five of which are included in the record. The mere fact that respondent appears to have a slimmer build than the young men in the other four photos in that group does not establish that the array was suggestive. Indeed, respondent speculates in his opening brief that the officer may have reduced the risk of misidentification by showing one array at a time, presumably for a total of three separate arrays each consisting of five photographs of young men, each of which may have only contained one suspect. But the record contains no evidence to support this argument. Therefore, we cannot conclude that there was anything suggestive about the identification process.

¶ 23 Respondent relies heavily on *State v. Henderson*, 208 N.J. 208 (2011), in his opening brief for various propositions relating to inherent problems with eyewitness identification. In response to the fact that the State distinguished *Henderson* in its brief, respondent clarifies in his reply brief that he is not offering *Henderson* as an analogy but for "its review of eyewitness-identification science." Respondent then invites this court to find *Henderson* persuasive and

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points to *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 53, noting that the *McGhee* court recognized *Henderson* as a landmark case.

¶ 24 In *McGhee*, this court recognized that the ruling in *Henderson* changed the framework for evaluating the reliability of eyewitness identification in the state of New Jersey. *Id.* However, while noting that the law in this area is evolving, this court declined to depart from established Illinois precedent. *Id.* ¶¶ 53-55. Specifically, this court concluded that it was not unreasonable for defense counsel to decline to present expert testimony regarding the reliability of eyewitness identification. *Id.* ¶ 55.

¶ 25 Here, respondent appears to be asking this court to dispense with any need for expert testimony on the reliability of eyewitness identification and simply adopt the scientific findings discussed in *Henderson*. We decline to do so. Our conclusion that the eyewitness identification was sufficient in light of the *Biggers* factors is consistent with Illinois precedent on this issue.

¶ 26 Moreover, we disagree with respondent's contention that the trial court focused on Martinez's confidence in court rather than on the *Biggers* factors. According to respondent, by focusing on Martinez's certainty at trial, the court improperly relied on what is common to most eyewitness identifications later shown to be mistaken, *i.e.*, that the eyewitness is certain that the identification of the offender is correct.

¶ 27 The trial court stated that Martinez's testimony regarding what happened that night was "extremely credible." The trial court noted that Martinez did not try to fabricate the source of the light, but testified that there was enough night light, whatever the source, and Martinez was close enough to the offenders that he was able to make an identification. The trial court's comments

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regarding the fact that Martinez could not be shaken from his testimony were made in the context of noting that Martinez did not try to make his case more favorable by trying to enhance the lighting, not, as respondent claims, in the context of determining that Martinez's identification was credible simply because he could not be shaken at trial. The trial court is presumed to know the law and consider only competent evidence. *People v. McCoy*, 207 Ill. 2d 352, 357 (2003). Although the trial court did not specifically refer to the *Biggers* factors, there is nothing in the trial court's comments that would rebut the presumption that the trial court correctly applied the law.

¶ 28

#### B. Ineffective Assistance

¶ 29 Respondent next contends that he received ineffective assistance of counsel because his trial counsel mistakenly believed she could impeach Martinez by introducing a police report through the testimony of an officer who was not the author of the report. The police report stated that Martinez could identify the female offender but did not mention that he could identify the primary male offender. Martinez testified that shortly after the robbery, he told the officers that he could identify both the female who approached him and the male who held a knife to his throat. On cross-examination, defense counsel asked Martinez if it would be fair to say that he only told the officers he could recognize the female offender and Martinez answered no. In an attempt to impeach Martinez, defense counsel attempted to introduce the police report through the testimony of Officer Sandoval, who was not the author of the report.

¶ 30 A minor charged with an offense is entitled to the effective assistance of counsel. *Austin M.*, 2012 IL 111194, ¶ 76. Ineffective assistance of counsel claims are measured against the

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standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88, 694; see also *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Because a defendant must establish both prongs for a successful ineffective assistance claim, a court considering such a claim need not determine the reasonableness of counsel's performance before considering whether respondent suffered prejudice as a result of the alleged deficiency. *Id.* at 697; *Edwards*, 195 Ill. 2d at 163.

¶ 31 Here, respondent has not satisfied the prejudice prong under *Strickland*. The report does not state that Martinez said he could only identify the female offender, or that he said he could not identify any of the male offenders; it is merely silent regarding his ability to identify the primary male offender. Thus, even if defense counsel had called the author of the police report, respondent has not shown that there is a reasonable probability that the outcome would have been different. The evidence at trial established that Martinez had the opportunity to observe the person who held a knife to his throat for at least 90 seconds and identified respondent as that person in a photo array 10 days after the crime occurred. Evidence of a police report in which the recording officer noted that Martinez said he could identify the female offender but was silent on the issue of the primary male offender does not constitute evidence sufficient to undermine confidence in respondent's adjudication.

¶ 32 C. Delegation of Sentencing Power

¶ 33 Respondent also contends that the trial court improperly delegated sentencing power to the probation officer by ordering respondent to fully cooperate with his probation officer, "obeying all reasonable requests and directions." This argument has no merit.

¶ 34 Respondent's probation order is a preprinted form routinely used by trial courts in imposing a sentence of probation. The form consists of 17 preprinted conditions with a place to the left for the court to enter a checkmark next to those conditions it is ordering for that particular individual. Item 18 consists of blank lines, allowing the court to enter any additional conditions that do not appear on the preprinted form.

¶ 35 The condition respondent is challenging is preprinted condition number seven, which provides:

"You are to fully cooperate with your assigned probation officer; obeying all reasonable requests and directions of the probation officer, including, but not limited to, all scheduled visits at his/her office, in your home, or elsewhere."

There is a checkmark in the space to the left of this condition. A total of seven other preprinted conditions also have checkmarks and include such things as prohibitions on possessing or discharging a firearm or leaving the state without permission. Although there is no checkmark next to condition 18, the space available for this item contains the following handwritten conditions: "TASC drop and evaluation and follow recommendations [*sic*], 15 days SWAP, mandatory school, DNA SWAB, CIP."

¶ 36 This probation order in no way constitutes improper delegation of sentencing power by

the trial court to the probation officer. The preprinted condition merely orders the respondent to obey all reasonable requests and directions of his probation officer and provides, as an example, the arrangement of scheduled visits with that officer. There is nothing in this language to suggest that the probation officer is entitled to impose additional probation conditions that fall outside of the court's order. Thus, we conclude that the trial court did not improperly delegate sentencing power.

¶ 37

#### D. Equal Protection

¶ 38 Respondent next contends that the length of his probation sentence gives rise to an equal protection violation because it is a longer sentence than the maximum period of probation authorized for an adult who commits the same crime. Respondent was sentenced to five years of probation pursuant to section 5-715 of the Juvenile Court Act (Act) (705 ILCS 405/5-715(1) (West 2010)), while the maximum for an adult who commits the same crime is four years of probation (see 730 ILCS 5/5-4.5-35(d) (West 2010)).

¶ 39 Citizens are guaranteed equal protection of the law under both the United States Constitution and the Illinois Constitution. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Under the equal protection clause, similarly situated individuals will be treated in a similar fashion, unless the government can demonstrate an appropriate reason to treat them differently. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 116. The legislature is not prohibited from drawing distinctions in legislation among different categories of people, but it is not allowed to do so on the basis of criteria wholly unrelated to the legislation's purpose. *Id.* Our review of a constitutional challenge to a statute is *de novo*. *Id.* ¶ 79. Where, as here, a fundamental right is

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not at issue, we consider whether the challenged classification bears a rational relationship to a legitimate government purpose. *Id.* ¶ 116.

¶ 40 Here, respondent has not met the threshold requirement for an equal protection claim because he cannot establish that he is similarly situated to adults convicted of armed robbery. Our supreme court has repeatedly held that a delinquency conviction is not the legal equivalent of a felony conviction. *Id.* ¶ 95. Respondent attempts to circumvent this conclusion by focusing on a specific aspect of the applicable sentence and argues that he is similarly situated to adults charged with armed robbery who are given a sentence of probation rather than prison time. Even if we were to accept this narrow focus, respondent's argument still fails because (1) an adult convicted of armed robbery, even if only sentenced to probation, still has a criminal conviction, and (2) if an adult sentenced to probation violates the conditions of that probation, that adult is subject to an adult prison sentence. See also *In re Vincent K.*, 2013 IL App (1st) 112915, ¶ 54 (holding that a juvenile who has been adjudicated delinquent, even if subject to an adult sentence, is not similarly situated to imprisoned adults where an adjudication of delinquency is not a criminal conviction).

¶ 41 Because respondent is not similarly situated to adults facing criminal prosecution for armed robbery, we need not consider whether there is a rational basis for setting a maximum probation period of five years for juveniles who are found guilty of armed robbery when there is a maximum probation period of four years for adults convicted of the same crime. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 120. Respondent has failed to establish that the Act violates the equal protection guarantees of the United States and Illinois Constitutions.

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¶ 42 Finally, respondent argues that, in the event this court does not find a constitutional violation, his probation order must be modified because the Act provides that a sentence of probation must be terminated when the minor reaches the age of 21 (705 ILCS 405/5-755(1) (West 2010)). The State concedes and acknowledges that, while respondent will turn 21 on March 21, 2016, the probation order does not terminate until January 10, 2017. We agree and modify the terms of respondent's probation to terminate on March 21, 2016. See *In re Jessica M.*, 385 Ill. App. 3d 894, 906 (2008), *rev'd on other grounds*, *In re Samantha V.*, 234 Ill. 2d 359, 375 (2009).

¶ 43 For the reasons stated herein, we affirm the judgment of the circuit court, with the exception of the modification of the term of respondent's probation.

¶ 44 Affirmed as modified.