

No. 1-12-1619

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2318
	)	
GREGORY SHELL,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Harris and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's aggravated battery conviction affirmed over his contention that the eyewitness identifications were unreliable.

¶ 2 Following a bench trial, defendant Gregory Shell was convicted of aggravated battery and sentenced to four years' imprisonment. On appeal, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt because the eyewitness identifications were unreliable.

¶ 3 The incident giving rise to the charges against defendant occurred on August 15, 2010, on the southeast side of Chicago. At trial, Marcus Jackson testified that at 12:45 a.m. he and his girlfriend, Jonica Hudson, went to the area of 1572 East 79th Street where people were gathered and showing off their cars. There were about 50 cars on display and 250 people present. Jackson described the car "show" as "[c]ontrolled chaos."

¶ 4 While he was driving slowly by the cars on display, Jackson saw defendant leaning against a white Dodge Charger with white 26-inch rims and a tail. He had never seen defendant before, and defendant said to him, "I'm a boss. I will wet this car up," which, he explained, was street language for shooting his car. Jackson laughed and kept driving. He then made a U-turn, and as he drove by defendant again, defendant said to him, "I'm a boss, man." Jackson stopped his car, and asked defendant, who was standing a couple of feet away, why he was talking to him and if he knew him. Defendant then told him to leave. Jackson became upset because defendant was talking "down" to him in front of his girlfriend. Defendant swung at Jackson, but missed, and Jackson, who was 6'1" tall and weighed 280 pounds, exited his car. After that, defendant, who was about 5'7" tall and weighed 140 pounds, started to back up after seeing his size.

¶ 5 Jackson further testified that a couple of defendant's friends, including Marcus Shell, arrived and began to fight with him, and were followed by about six more men who converged on him. While he was fighting, he was hit in the back of his head with a hard object, and when he turned around, he saw defendant with a steel baseball bat in his hands. Defendant swung the bat at Jackson's face and hit him in the right eye. At that point, he was unable to see out of his right eye, but could see defendant with his left eye, and observed defendant strike the windshield

of his car. Jackson told his girlfriend to drive away and, as he staggered down the street, defendant approached him again and hit him in the face with the baseball bat. Jackson fell to the ground, but remained conscious, and observed defendant enter the Charger and drive off. Jackson was hospitalized with a fractured orbital, and underwent surgery on his right eye, in which he is now blind.

¶ 6 Jackson testified that he told his attending physician, Dr. Galvez, that several people with baseball bats attacked him, but acknowledged that there was only one person with a baseball bat. Jackson explained that he was just concerned with having his eye repaired at the time and did not know that what he said to the doctor would be used in court. Jackson also testified that he gave Detective Docherty a description of defendant, including his dreadlocks, skin complexion, and his height and size.

¶ 7 Jackson further testified that on September 15, 2010, he went to the police station where he observed a four-person photo array and identified defendant as the person who struck him with the baseball bat. Several men in the photo array had dreadlocks and facial hair like defendant. On January 26, 2011, he returned to the police station and identified defendant in a lineup as the person who struck him with the bat. Jackson also identified defendant in court.

¶ 8 Jonica Hudson testified that she was at the car show with Jackson, and that defendant, who was standing against a White Charger, yelled at them. They initially drove on, but when they returned, defendant walked up to the car, swung at Jackson through the open window, but missed. Jackson then exited the car, and a number of people approached and began to fight with him. Defendant pulled out a metal baseball bat from the trunk of the Charger, and hit Jackson in

the back of the head. When Jackson turned around, defendant hit him in the eye, and Jackson yelled at her to drive away. Another person then tried to pull her out of the car, and at that time, defendant hit the windshield of the car she was in with the baseball bat. Hudson drove away, but returned for Jackson, and the police arrived on the scene.

¶ 9 Hudson explained that she got a good look at defendant during the incident, and described him to police to the best of her ability, "after [the] traumatic experience." She also told police that defendant had dreadlocks.

¶ 10 Hudson testified that she did not know the identity of the person who hit Jackson with the baseball bat, and always looked for the white Charger after the incident. About a month later, she saw the "[v]ery distinctive" white Charger, being driven down the street, followed it and saw that defendant was a passenger in the car. She took down the license plate, then called Detective Docherty with the plate information. On September 15, 2010, she identified defendant in a photo array, and on January 26, 2011, she identified him in a lineup. She also identified defendant in court as the person who struck Jackson with the baseball bat.

¶ 11 Daniah Thomas testified that she is defendant's girlfriend and have one child together. At the time in question, she observed defendant leaning against his car while there was a verbal altercation between some other men. She then observed Jackson drive up and exchange words with Marcus Shell, defendant's cousin. Jackson then exited his car and he and Marcus began to fight. This turned into a brawl, during which defendant remained leaning up against his car. Thomas further testified that she saw Jackson possibly bite Marcus on the chest, and called

defendant over. As he was approaching her, she saw Jackson staggering down the street, then saw Marcus hit Jackson with a bat; defendant, however, did not hit anyone with a bat.

¶ 12 Donna Shell testified that she is defendant's aunt, and that he lives with her. About 1 a.m. on August 15, 2010, Marcus, who does not share that residence, arrived at her home, nervous and crying. She observed that his clothes were dirty and torn, and Marcus showed her human teeth marks in his chest. Donna noted that Marcus did not have dreadlocks or a goatee.

¶ 13 Chicago police detective Kevin Docherty testified that when he initially spoke with Jackson and Hudson, he had no leads as to who attacked Jackson. He later received the license plate information for the Charger from Hudson, and his search indicated that defendant was the owner of the car.

¶ 14 Chicago police officer Patrick Lorde testified that he responded to the incident on August 15, 2010. Hudson and Jackson were unable to provide him with a description of the offender, including whether he had dreadlocks. Officer Lorde testified that they only described the offender as a black male, and that the scene was chaotic with Hudson visibly distraught and attending to Jackson.

¶ 15 At the close of evidence, the court found defendant guilty of aggravated battery. In doing so, the court reviewed the evidence and concluded that defendant was the person who struck Jackson with the baseball bat. The court noted the chaos surrounding Jackson being struck with the bat, and the preoccupation of Jackson and Hudson in getting medical attention for him rather than providing details to police about what had occurred. The court also noted that Hudson was confident that if she were to drive around the neighborhood, she would find the unusual car and

help police identify the offender, and when she found the car, she immediately called police with the license plate number. The court further noted that Hudson and Jackson identified defendant in a photo array and lineup, and found that the identification of defendant was "true and accurate." The court also found that the identification was "corroborated by the car, the very unusual car, [and defendant's] relationship with it."

¶ 16 Defendant filed a motion for a new trial questioning the identification of him as the offender when neither Jackson nor Hudson were able to provide police with a description of the man. Defendant maintained that this was a case of misidentification, and that Marcus Shell was the real offender. The trial court denied the motion.

¶ 17 On appeal, defendant contests the sufficiency of the evidence to prove him guilty beyond a reasonable doubt where the identifications made of him by Jackson and Hudson were unreliable. He maintains this is so because the witnesses only viewed the offender for a fleeting moment during a violent, chaotic encounter, and were unable to describe the assailant until defendant was seen a month later in a distinctive car that was present at the scene of the assault.

¶ 18 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the proper standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375

(1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Campbell*, 146 Ill. 2d at 375.

¶ 19 Defendant claims that the identifications of him as the offender were unreliable as evidenced by the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the witnesses' opportunity to view the offender at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of the witnesses' prior description of the criminal; (4) level of certainty of the witnesses at the identification confrontation; and (5) length of time between the crime and identification. When applied to the evidence in this case, we find that these factors weigh in favor of the reliability of the eyewitnesses' identification of defendant as the offender.

¶ 20 The evidence presented at trial shows that Jackson and Hudson had a good opportunity to view the offender, and that their attention was focused on him as he targeted them. The witnesses testified that defendant initially yelled at them as they drove slowly by his car, telling them he was the "boss" and was going to shoot up their car. When Jackson asked defendant why he was talking to him and if he knew him, defendant yelled at them to leave, then walked up to their car and attempted to strike Jackson through the car window. Jackson exited his car and approached defendant, who then backed up, as a number of other men converged on him. In the ensuing brawl, Hudson observed defendant remove a baseball bat from his car, and use it to strike Jackson on the back of the head. After being hit, Jackson turned around and also saw defendant with the bat. Defendant struck Jackson in the right eye, and then hit the windshield of Jackson's car, in which Hudson was sitting. As Jackson was staggering down the street, defendant approached him again and hit him in the face with the baseball bat. When he fell

down, Jackson observed defendant get into his Charger and drive away. This evidence clearly shows that Jackson and Hudson had ample time and opportunity to view defendant during the incident, and were clearly focused on him throughout, thus establishing the first and second *Neil* factors.

¶ 21 The record further shows that these witnesses identified defendant about a month after the incident; however, given the circumstances of this case, this time period did not adversely affect their ability to identify the attacker. When Hudson observed defendant as a passenger in the distinctive Charger, she recognized him as the offender with the baseball bat (*People v. Malone*, 2012 IL App (1st) 110517, ¶36, citing *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (identifications found reliable under longer periods of time between incident and identification)), and both witnesses identified him as that person in a photo array and later, in a lineup. Thus, the period of time between the crime and identification falls within the acceptable limits of the fifth *Neil* factor.

¶ 22 Although neither witness was able to give Officer Lorde a description of defendant on the scene, Jackson later provided Detective Docherty an accurate description of defendant, thus satisfying the third *Neil* factor. Moreover, Jackson and Hudson were both confident and certain in their later identifications of defendant as the offender in the photo array, lineup and in-court, thereby satisfying the fourth *Neil* factor; and given the strong positive and consistent identifications, any discrepancies or omissions in their description of defendant merely went to the weight of the identification testimony, to be decided by the trier of fact. *People v. Slim*, 127 Ill. 2d 302, 308-10 (1989).



¶ 23 We further observe, contrary to defendant's contention, that Hudson and Jackson did not identify him as the assailant solely because they associated him with the Charger. Both witnesses testified that they recognized him as the person who struck Jackson with the baseball bat, and were certain in their identification of him. In addition, Jackson did not observe defendant in the Charger when Hudson did, and thus his identification of defendant in a photo array, which included photos of other men with facial hair and dreadlocks similar to defendant, was solely based on his observations of him during the incident.

¶ 24 Defendant, however, maintains that there is significant potential for eyewitness error. He explains that there is a low correlation between a witness's confidence and the accuracy in his identification, and thus the certainty factor is manifestly worthless as a guide to the reliability of an identification, particularly where an encounter is stressful and violent or the offender has a weapon. In support of his assertion, defendant cites *People v. Allen*, 376 Ill. App. 3d 511, 524 (2007), federal and foreign jurisdictions, and articles from different fields, as well as law review articles. Defendant's citation to federal and foreign jurisdictions in support of his contention is unpersuasive (*People v. Reatherford*, 345 Ill. App. 3d 327, 340 (2003)), and we find defendant's reliance on *Allen* misplaced.

¶ 25 In *Allen*, the issue was whether testimony of defendant's expert witness regarding the reliability of eyewitness identification testimony was improperly excluded without careful scrutiny into the probative value of the proposed testimony against its prejudicial effect. This court concluded, without expressing any opinion on whether the court should allow any of the expert's testimony to be heard by the jury, that the trial court failed to conduct a meaningful

inquiry into the proffered expert testimony. *Allen*, 376 Ill. App. 3d at 524, 526. The expert's proffered testimony, included, in relevant part, that a witness's focus on a weapon indicates less attention is paid to encoding the perpetrator's characteristics, and there are low correlations between a witness's confidence and the accuracy of their identification. *Allen*, 376 Ill. App. 3d at 524.

¶ 26 In this case, it appears that defendant is attempting to interject expert opinion from the above cited material to undermine the reliability of the identifications made by the eyewitnesses. None of this evidence, however, was presented at trial, nor subject to cross-examination, and we remind that, on review, a reviewing court must determine the issues before it on the record made in the trial court. *People v. Mehlberg*, 249 Ill. App. 3d 499, 532 (1993). Thus, as in *Mehlberg*, we will not consider these secondary materials on appeal. *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994).

¶ 27 We also find this case factually distinguishable from *Allen*. In *Allen*, 376 Ill. App. 3d at 524, the sole eyewitness was immediately shot in the back by the offender who was robbing her store with little or no corroboration of her testimony, and she was not asked to identify defendant in person until she saw him at counsel's table in a jail uniform in court, 44 months after the incident. Here, the two eyewitnesses observed defendant over a period of time during which they exchanged words, renewed contact, saw him during the various assaults, and identified him in a photo array only a month after the incident, and five months later in a lineup. *Malone*, ¶36. There was no showing that the fact that a weapon was involved decreased the likelihood of the accuracy of their identifications, where they had two facial encounters with defendant before the

brawl and then watched him back up to his car. Under these circumstances, defendant's decision to get the bat from his trunk and use it did not distract from the ability of the eyewitnesses to identify him as the offender. We thus conclude that the evidence was sufficient for the trier of fact to find that defendant was proved guilty of aggravated battery beyond a reasonable doubt. ¶

28 Defendant, nonetheless, contends that the trial court ignored the evidence identifying his cousin, Marcus Shell, as the real assailant. Jackson testified that when he exited his car, defendant backed up and Marcus came up to him and hit him. While he was fighting with several of defendant's friends, including Marcus, Hudson observed defendant strike Jackson in the back of the head with the baseball bat, and Jackson turned around and also saw defendant with the baseball bat in his hand. Defendant then struck Jackson twice more with the bat, and Jackson identified defendant as the assailant. The trial court found the identifications of defendant "true and accurate," and thus rejected the testimony of defendant's girlfriend that defendant was leaning against his car during the entire fight. We have no reason to disturb the credibility determination made by the court (*People v. Hernandez*, 278 Ill. App. 3d 545, 552-53 (1996)), and, accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.