2015 IL App (1st) 130501-U

FOURTH DIVISION
March 31, 2015

No. 1-13-0501

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.	)	No. 10 CR 5005
	)	
JAMES MORGAN,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence was sufficient to convict defendant of aggravated kidnapping, home invasion, and possession of stolen vehicle. Victim's identification of defendant was reliable. Other evidence strongly corroborated defendant's involvement in the initial robbery and second, related robbery. Affirmed.

¶ 2 Following a bench trial in 2012, defendant James Morgan was convicted of aggravated kidnapping while armed with a firearm, home invasion while armed with a firearm, and possession of a stolen motor vehicle. Defendant was sentenced to a total of 21 years in prison. On appeal, defendant asserts the State did not establish his guilt beyond a reasonable doubt

because the victim's identification of defendant was unreliable. We affirm defendant's convictions.

¶ 3 During his direct examination at trial, Roderick Ethridge testified that he was 50 years old and managed several properties as part of a family business. On February 12, 2010, Ethridge lived in the first floor unit of a two-flat property he was rehabbing at 8000 South Kingston in Chicago and drove a Chevrolet Silverado truck with an Illinois license plate of a specific number (a number that we will not publish in this Order).

¶ 4 That evening, Ethridge received a phone call from John Walters, one of his employees whom Ethridge had known for about six months. Walters asked to meet with Ethridge to talk about Walters working additional hours, and Ethridge agreed to talk that night. Walters arrived at 8000 South Kingston at about 11 p.m. About two minutes later, Walters answered a call on his cell phone, walked to the back door of Ethridge's unit and admitted a man wearing a black mask and carrying a .380 automatic handgun. Ethridge testified the man had a receding hairline, stood about 5 feet 10 inches tall, and weighed about 200 pounds. Along with the mask, the man wore a black shirt, blue jeans and black shoes.

¶ 5 The masked man and Walters led Ethridge to a bedroom that contained a futon and demanded Ethridge's wallet and ATM card. After binding Ethridge's hands in front of his body with duct tape, the masked man removed his mask. Ethridge identified him in court as defendant. Ethridge said the room contained "plenty of light." He also identified the mask, which was an exhibit at trial.

¶ 6 Defendant and Walters said they would kill Ethridge if they did not receive $100,000, and Ethridge thought they were aware he had recently inherited money from his grandmother.

Walters took Ethridge's ATM card, got the PIN number from Ethridge, and called Ethridge's bank; he discovered that there was no money in Ethridge's account. Walters likewise confirmed by phone that the ATM card belonging to Ethridge's deceased grandmother—a card Ethridge had kept for purely sentimental value—had been cancelled. Defendant then said he "didn't do all of this for nothing," struck Ethridge in the face with the gun, and said they should "just kill [Ethridge] right now."

¶ 7 Wanting to rid himself of the intruders, Ethridge told the men they could take his construction tools that he kept at another property on South Vernon Avenue and sell them for several thousand dollars. The men removed the duct tape from Ethridge's hands and "hog-tied" his hands, legs and feet behind him with an extension cord and taped his mouth shut. Ethridge testified that after being bound, he was placed on the futon, which was "turned toward the wall like a crib so I couldn't get out."

¶ 8 The men asked Ethridge for money, and when Ethridge replied he had none, defendant struck him on the right side of the jaw with the gun. Before leaving the apartment, Walters and defendant took Ethridge's jacket, cell phone, debit card and keys. Ethridge also testified that a suede jacket was taken. Ethridge heard the men go to the basement where he kept tools. After about ten minutes, Ethridge freed himself and went upstairs to a neighbor's apartment, where he called the police, his brother and his mother. He warned his brother that the intruders might be heading toward the other rehab property on South Vernon and that they were armed.

¶ 9 Ethridge then accompanied officers to the police station. When his Chevrolet truck was returned to Ethridge at the police station in the early morning hours of February 13, he found a mask and a college identification card of Walters inside the truck and gave those items to police.

¶ 10 Ethridge remained at the police station for over half a day until police were able to put together a line-up. Ethridge identified defendant in the lineup at about 6:50 p.m. Ethridge testified that, while viewing the lineup, it took him "a second" to select defendant.

¶ 11 On cross-examination, Ethridge said that at the time of these offenses, he had been prescribed pain medication for his legs and asked Walters to give him a pain pill after being struck with the gun. Ethridge said defendant wore a vest on top of the clothing described earlier. In contrast to his direct testimony, Ethridge stated the men did not bind his hands with duct tape until after Walters called the bank to check on Ethridge's funds. He also said he was only struck with the gun once, not twice as he earlier testified. Ethridge also described his position on the futon, stating that he was facing the wall but was able to see the men enter and leave the bedroom. He also described his position as being very close to the bedroom closet.

¶ 12 On re-direct examination, Ethridge said he was in the bedroom with defendant and Walters for 20 minutes and that defendant had the mask off for three or four minutes. The room was lit with a three-bulb light fixture. Ethridge also testified that his pain medication did not affect his observation or memory. On re-cross, Ethridge said defendant removed his mask "right after he hog-tied me." Ethridge continued, "And I think he forgot he took it off because he was looking around for items" in the bedroom. Ethridge said he could see defendant's face when he was lying on the futon facing the wall. On the State's final re-direct, Ethridge estimated that he got a clear look at defendant's face for about one minute, while defendant was searching through the closet that was very close to defendant's position on the futon. He also stated that during the two weeks he had been taking his pain medication, he'd been able to work, including the use of power tools, without any problem.

¶ 13 Anthony Ethridge, Roderick's brother, testified that, after his brother and mother called him on the night in question, warning him that armed robbers were heading to the other property at 11029 South Vernon, Anthony travelled to that location. Police vehicles were already present. He spoke to officers and saw his brother's truck in a nearby alley. The parties stipulated that Margaret Ethridge would testify that she purchased a 2003 Chevrolet truck for her son, Roderick, with an Illinois license plate of a specific number and that no one else had permission to use that vehicle.

¶ 14 Chicago police officers John Foertsch and Kenneth Wojtan testified that they received a flash message at about midnight on February 12, 2010, that two black males, travelling in a white pickup truck with the specific Illinois license plate at issue, were headed to 11029 South Vernon to commit a burglary. At that address, the officers observed two men carrying tools to the truck; both officers identified the men in court as defendant and John Walters. Walters ran and was caught. Defendant surrendered immediately.

¶ 15 Chicago police officer Tracy Drew testified that when he arrived at the Vernon address, defendant was in handcuffs and wearing a coat. Drew patted defendant down and recovered a set of keys from one of defendant's pockets. Drew gave the keys to another officer who used them to open the door to the white truck. The key chain also held a key to the South Vernon property.

¶ 16 Chicago police detective Wade Golab testified that none of the evidence was dusted for fingerprints or tested for DNA. Golab did not recall Ethridge describing his assailant as having a tattoo near his eye. Golab's notes did not indicate that Ethridge reported a jacket missing. No gun was recovered in the police investigation.

¶ 17 After hearing that evidence, the trial court found defendant guilty on all counts, describing the evidence as "overwhelming." The court noted that defendant was "caught with the proceeds" of the crime and was collecting additional proceeds when he was arrested. The court recalled that Ethridge recovered the mask and Walters' identification from his truck and said that the fact that no weapon was recovered did not discount the testimony of Ethridge as a "very, very credible witness." The court noted that Ethridge was able to describe the type of gun used in the offense.

¶ 18 When considering a challenge to the sufficiency of the evidence in a criminal case, it is not the task of the reviewing court to retry the defendant. *People v. Lloyd*, 2013 IL 113510, ¶ 42. Instead, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found each element of the offense beyond a reasonable doubt. *Id*.; see also *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (noting that all reasonable inferences from record in favor of State are allowed). We will not substitute our judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given their testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). "We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 19 Defendant bases his challenge almost exclusively on the victim's identification of defendant as the second intruder, along with John Walters. He claims that his identification was not sufficiently reliable to overcome reasonable doubt. He argues that where a single witnesses' identification is the basis for a defendant's conviction, the witness must have viewed the accused

under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *People v. Slim*, 127 Ill.2d 302, 307 (1989).

¶ 20 Defendant has correctly stated a principle of law, but he is incorrect in applying it to this case. We are not bound or persuaded by defendant's characterization that his convictions rise or fall solely on the positive identification by the victim. The trial court was presented with considerable evidence, independent of Ethridge's identification of defendant, that pointed to defendant as the second robber inside the South Kingston apartment. In the trial court's words, "This is not … what we sometimes call a single finger identification case. This is a case where there's overwhelming evidence."

¶ 21 Independent of Ethridge's positive identification of defendant, there is no question that one of the two men in the South Kingston apartment was John Walters, who made no attempt to conceal his identity and whom Ethridge had known for the previous six months. It is likewise undisputed that defendant was found with Walters at Ethridge's second property on South Vernon, in Ethridge's Silverado, with items stolen from Ethridge's property on South Kingston and clearly in the process of stealing items from the South Vernon property—just as Ethridge had predicted to police. Even without the victim's positive identification of defendant from the South Kingston apartment, defendant was caught with the undeniable co-offender from South Kingston, with the proceeds from that robbery, and in the process of stealing additional tools and equipment from the second property.

¶ 22 The defense's explanation for this evidence is implausible. The defense did not put on a case, but in closing argument, defense counsel argued (as does defendant on appeal) that, during the approximate one hour of lag time between the home invasion and the discovery of Walters

and defendant at the South Vernon property, Walters could have parted ways with the second intruder and recruited defendant to help him rob South Vernon. Suffice it to say, the notion that the second offender simply called it a night after the South Kingston robbery, when he knew there was more loot at South Vernon, and that Walters had the time and opportunity to recruit a willing new partner for the South Vernon robbery, is difficult to believe. But the more important point is that the trial court is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). And a reviewing court, in viewing the evidence in the light most favorable to the State, is not required to substitute the far more plausible version of events put forward by the State—that defendant had been Walter's accomplice all along—in favor of a version advanced by defendant that is, at best, difficult to credit. See *Jackson*, 232 Ill. 2d at 281.

¶ 23 Though we find that the evidence was sufficient to convict defendant independent of the victim's identification of defendant, and we do not believe that the *Lewis* test related to a single-witness identification case is even applicable, see *Lewis*, 165 Ill. 2d at 356, we also agree with the trial court that the victim's identification of defendant in this case was reliable.

¶ 24 Under *Lewis*, in assessing the identification testimony of a witness, five factors are relevant: (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 descriptions provided; (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.* These factors were first set out by the U.S. Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199 (1972). These criteria, known as the *Biggers* factors, are viewed in the light most favorable to the prosecution. *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007).

¶ 25 In this case, defendant focuses on the first three factors, conceding that the fourth and fifth factors favor the State. He contends that the first factor, the opportunity of the witness to view the suspect during the offense, is the "most important factor." However, this court has held that no single factor is dispositive and that the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87.

¶ 26 In any event, we find that the first factor favors the State and reject defendant's argument that Ethridge lacked a sufficient opportunity to view the masked assailant during the robbery at South Kingston. Ethridge testified that he was able to view the man's face clearly for approximately one minute, in a well-lit room, while the intruder removed his mask and rooted through Ethridge's nearby bedroom closet. Defendant points to conflicting accounts in Ethridge's testimony, at one time claiming the mask came off while Ethridge was sitting up with his hands tied in front of him, and later testifying that he was lying down, hog-tied, on the futon when defendant removed his mask. The trial court, which had the opportunity to listen to the testimony, observe Ethridge's demeanor, and judge his credibility, did not consider him untruthful or evasive—to the contrary, the court found Ethridge "very, very credible." Reviewing the transcript, we have no basis to second-guess the trial court's superior view of the evidence, this minor discrepancy notwithstanding. See *Jackson*, 232 Ill. 2d at 281. The evidence shows that Ethridge had a clear view of the closet and entrance of the bedroom while on that futon. Viewing the evidence in the light most favorable to the State, we find that Ethridge had a sufficient opportunity to view defendant's face.

¶ 27 Turning to the second factor, the eyewitness' degree of attention, defendant contends that point is "of little consequence," principally because in his view, it pales in comparison to the fact that Ethridge did not have the opportunity to view the unmasked man sufficiently under the first *Biggers* factor. But we have already found that the first factor favors the State. We also disagree with defendant that the evidence showed that Ethridge's attentiveness was affected by taking pain medication and being struck in the head with a gun. Ethridge testified that the prescription pain medication did not adversely impair him; in fact, he said, he performed carpentry work, including operating power tools, while on that medication over the previous two weeks. See *People v. Denton*, 329 Ill. App. 3d 246, 251 (2002) (fact that witness took pain medication before viewing photo array did not support suppressing identification, where there was no indication that medication affected witness's observations). We do not doubt the possibility that a blow to the head could have impaired Ethridge somewhat, but he said it did not—he testified that he was able to clearly see defendant's face, and taking that evidence in the light most favorable to the State, we are in no position to disagree with the trial court that Ethridge's testimony was credible. We find that the second factor likewise favors the State.

¶ 28 As to the third factor, the accuracy of the witnesses' prior description of the offender, defendant contends that Ethridge did not testify about two of his facial features, including a beard and a "teardrop tattoo" near his eye. Defendant also argues that Ethridge inaccurately described his clothes, pointing to Ethridge's testimony that defendant wore a vest when entering the apartment, though defendant was wearing a coat when he was arrested. "The presence of discrepancies or omissions in a witness' 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. We do not find the inconsistent description of defendant's clothing to be fatal. See *id*. at 310 ("[t]hat the victim was unable to identify the type or color of clothing the subject was wearing has been held not to make an identification vague or uncertain where the identification is otherwise positive"). The supreme court in *Slim* also noted that the failure of a witness to notice facial hair is not fatal to an otherwise credible identification. *Id*.

¶ 29 Similarly, as to the defendant's tattoo, the failure of Ethridge to include a distinctive physical characteristic affects the credibility of the description, which is an issue to be evaluated by the trier of fact, but does not automatically raise a reasonable doubt as to the defendant's guilt. See *People v. Thomas*, 121 Ill. App. 3d 883, 888 (1984) (the key concern is the overall ability of the witness to positively identify the offender after having had an adequate opportunity to view the person at the time of the crime). We do not find those omissions and discrepancies in Ethridge's testimony sufficiently glaring to render his identification of defendant unreliable.

¶ 30 As noted earlier, defendant acknowledges that the fourth and fifth factors, Ethridge's level of certainty at the time of the identification procedure and the length of time between the crime and the identification, weigh in the State's favor. Defendant asserts, though, that the approximate 14-hour time period that preceded Ethridge's viewing of the lineup may have caused Ethridge to be fatigued and affected the reliability of his identification. We decline to engage in such speculation, given Ethridge's decisive identification of defendant and a finding that the first three *Biggers* factors also weigh in favor of the identification. In conclusion, an analysis of the *Biggers* factors supports the reliability of Ethridge's identification of defendant as the masked man who entered his apartment.

¶ 31 Defendant also points to the fact that the gun used in the robbery was never recovered, nor was the suede jacket taken from Ethridge's South Kingston apartment. In light of the other evidence, however, the absence of physical evidence such as fingerprints, the weapon used in the offense, and the jacket does not create a reasonable doubt of defendant's guilt. See *People v. Walker*, 77 Ill. App. 3d 227, 232-33 (1979) (failure of police to recover money or gun used in burglary and armed robbery did not lead to reasonable doubt finding).

¶ 32 Viewing the evidence in the light most favorable to the prosecution, the trial court could have found the offenses proven beyond a reasonable doubt. The evidence of defendant's guilt, independent of his positive identification by the victim, was sufficient to support his convictions. The positive identification served as additional corroborating evidence. Accordingly, the judgment of the trial court is affirmed.

¶ 33 Affirmed.