

NOTICE

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2015 IL App (4th) 130742-U

NO. 4-13-0742

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 26, 2015

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JORDAN CROSBY,)	No. 12CF568
Defendant-Appellant.)	
)	Honorable
)	Craig H. DeArmond,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part and reversed in part, concluding (1) defendant did not adequately waive defense counsel's *per se* conflict of interest, thus requiring automatic reversal; (2) sufficient evidence existed to allow for retrial; and (3) the automatic-transfer provision of the Juvenile Court Act was not unconstitutional.

¶ 2 In December 2012, the State charged defendant, Jordan Crosby, by information with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). Though defendant was a juvenile at the time of the offense, the nature of the charge required the State to prosecute him in adult court. See 705 ILCS 405/5-130(1)(a) (West 2010).

¶ 3 Prior to the start of defendant's jury trial, defense counsel disclosed she had previously represented the alleged victim in a minimal capacity in an unrelated matter. After speaking with defense counsel off the record, defendant stated he wished defense counsel to continue her representation of him. Following the presentation of evidence, the jury found

defendant guilty. The trial court subsequently sentenced him to a total of 21 years in the Illinois Department of Corrections (DOC).

¶ 4 Defendant appeals, asserting (1) the trial court failed to obtain a valid waiver of defense counsel's *per se* conflict of interest, (2) the State failed to prove him guilty beyond a reasonable doubt, and (3) the automatic-transfer provision was unconstitutional. For the following reasons, we affirm in part, reverse in part, and remand for a new trial.

¶ 5 I. BACKGROUND

¶ 6 A. Information

¶ 7 In December 2012, the State charged defendant by information with armed robbery, alleging, on November 19, 2012, while armed with a firearm, he took pizza and United States currency from the person of Denise Spencer by the use or threat of force. 720 ILCS 5/18-2(a)(2) (West 2010). At the time, defendant was 16 years old. Though defendant was a juvenile when the offense was committed, his case was automatically transferred to adult court due to the nature of the charge. See 705 ILCS 405/5-130(1)(a) (West 2010).

¶ 8 B. Defense Counsel's Conflict of Interest

¶ 9 Defendant's trial commenced in May 2013. After selecting the jury but prior to opening arguments, defense counsel disclosed to the trial court she had previously represented Spencer, the alleged victim in defendant's case. According to the court, defense counsel's representation of Spencer consisted of a postsentencing proceeding unrelated to the present case. The court asked defense counsel to consult with defendant to ensure he "understands the circumstances and whether he has any objection to your continued representation of him in light of your former minimal representation of the victim in an unrelated matter." Following a recess in which defense counsel conferred with defendant, defense counsel informed the court, "I

indicated to him basically what Your Honor reiterated on the record. I asked him if he had any disagreement or any issues with me continuing to represent him. So I think he would be waiving any issue with regard to my prior limited representation of [Spencer], and he has no objection to me continuing to represent him now." Defendant then indicated to the court that he agreed with defense counsel's statement. The case thereafter proceeded to trial.

¶ 10 C. Trial Proceedings

¶ 11 Spencer testified, on November 19, 2012, she was working as a pizza-delivery driver for Papa John's Pizza. Shortly after 7:00 p.m., she received a delivery order for 930 Blue Ridge Drive in Danville. Spencer indicated she was familiar with the area because she regularly delivered to that neighborhood. However, she had never before delivered to 930 Blue Ridge Drive.

¶ 12 When Spencer arrived, it was dark outside. She observed three black males leaned against the back of a vehicle that was parked in the driveway at 930 Blue Ridge Drive. Spencer stepped out of her vehicle and approached the males to see if they had purchased a pizza. The male standing to Spencer's right took the pizzas from her. One of the males indicated, "I gotta go get my money," then reached into his pocket and started walking toward the house. He asked if Spencer could break a \$50 bill for the \$43 order, and she indicated she could. According to Spencer, the male on her left then shoved a gun in her face and said, "Give me all the money you got." Spencer gave him approximately \$27. He stood there for "a minute," pointing the gun at Spencer's face, then took off running past the house toward Timberline Drive. The other males followed him, with one of them still carrying the pizzas. The male carrying the gun fired one shot in the air as they ran away.

¶ 13 Spencer described the male with the gun as wearing a yellow hooded sweatshirt that said "U.S. Polo Association" on the front. She further described him as "dark" with a "kinda big" nose. She testified she could not see his hair because his hood was pulled up; however, during an interview shortly after the offense, she told Detective Dawn Hartshorn of the Danville police department that the male had short hair. The male appeared to be around five feet seven inches tall. Spencer believed all of the males to be "young," perhaps 17 or 18 years old. She indicated it was difficult to see because it was dark outside. Spencer described the gun as a silver revolver, which she could identify as a revolver because she could see the barrel. Spencer estimated the entire encounter lasted 5 to 10 minutes.

¶ 14 The following day, Spencer met with Detective Hartshorn to review a photo lineup. The lineup contained a photograph of defendant with short hair and wearing a yellow hooded sweatshirt. Spencer was unable to identify defendant from the lineup. One week later, following a search of defendant's residence, Detective Hartshorn presented Spencer with a second photo lineup wherein Spencer identified defendant as the male who held the gun during the robbery. In his photograph in the second lineup, defendant's hair was "longer and bushier" than it was in his photograph in the first lineup. When asked why she chose defendant's picture in the second lineup, Spencer stated defendant's face "just looked more familiar" in the second lineup. Defendant was the only subject depicted in both the first and second photo lineups. Spencer then identified defendant in open court as the young male who wielded the gun during the robbery. She next identified a yellow hooded sweatshirt recovered from defendant's home as the one worn by the male carrying the gun.

¶ 15 While meeting with Detective Hartshorn to review the second photo lineup, Spencer stated she believed she could identify a second individual involved in the robbery—

Darius Bland—because she knew him personally. However, Spencer later changed her mind and indicted Bland had not been involved in the robbery. Prior to leaving the witness stand, Spencer acknowledged she had a 2010 theft conviction and a 2008 conviction for financial exploitation of the elderly.

¶ 16 Officer Kent O'Brien testified he responded to the scene where Spencer had been robbed. Spencer described the person who wielded the weapon as being a black male, approximately five feet seven inches tall, 145 pounds, and wearing a yellow sweatshirt. She also indicated the male appeared to be 17 years old. Officer O'Brien followed the path along which Spencer saw the males run and discovered a trail of pizza. The trail continued through Timberline Street and ended on Sunset Ridge, at which time Officer O'Brien could no longer gauge the direction the males took.

¶ 17 Detective Hartshorn testified, after showing Spencer the initial photo lineup, she obtained consent to search defendant's house. In one of the bedrooms, Detective Hartshorn discovered a yellow hooded sweatshirt that defendant's mother identified as belonging to defendant. She also found a nylon gun holster and a black speed loader for a revolver that had two unspent .38-special bullets inside of it. She further discovered one spent bullet casing. Detective Hartshorn then interviewed defendant who denied any knowledge of a robbery, instead, representing he was at a friend's house that evening.

¶ 18 After the State rested, defendant moved for a directed verdict, which the trial court denied. Following deliberations, the jury found defendant guilty of armed robbery.

¶ 19 In May 2013, defendant filed a motion for a new trial, asserting, in part, the State failed to prove him guilty beyond a reasonable doubt. The following month, the trial court denied defendant's motion for a new trial and sentenced him to 15 years in DOC. However, in

August 2013, following a motion to reconsider by the State, the court amended its sentence and ordered defendant to serve 21 years in DOC—a 6 year sentence with a 15-year sentencing enhancement due to defendant being armed with a firearm during the commission of the offense. See 730 ILCS 5/5-8-1(d)(i) (West 2010).

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues (1) the trial court failed to obtain a valid waiver of defense counsel's *per se* conflict of interest, (2) the State failed to prove him guilty beyond a reasonable doubt, and (3) the automatic-transfer provision is unconstitutional. We address these arguments in turn.

¶ 23 A. *Per Se* Conflict of Interest

¶ 24 Defendant asserts the trial court erred by failing to obtain a valid waiver of defense counsel's *per se* conflict of interest. The State denies defense counsel had a *per se* conflict and, further asserts that, even if a conflict existed, defendant waived it. We first address whether a *per se* conflict of interest existed.

¶ 25 1. *Whether a Per Se Conflict of Interest Existed*

¶ 26 A criminal defendant has the right to effective assistance of counsel, which includes the right to conflict-free representation from his attorney. *People v. Washington*, 101 Ill. 2d 104, 109-10, 461 N.E.2d 393, 395-96 (1984). Whether an attorney has a *per se* conflict of interest is subject to *de novo* review. *People v. Fields*, 2012 IL 112438, ¶ 19, 980 N.E.2d 35.

¶ 27 The supreme court has identified three situations in which a *per se* conflict of interest exists:

"(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [Citations.]; (2) when defense counsel contemporaneously represents a prosecution witness [Citations.]; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant [Citation.]." *People v. Hernandez*, 231 Ill. 2d 134, 143-44, 896 N.E.2d 297, 303-04 (2008).

¶ 28 Defendant relies on *Hernandez* in support of his contention that defense counsel labored under a *per se* conflict of interest, as defense counsel had previously represented the victim, Spencer. We agree. *Hernandez* clearly outlines a *per se* conflict of interest exists where defense counsel has a *prior* or contemporaneous association with the victim. *Id.* at 143, 896 N.E.2d at 303. Because the record demonstrates defense counsel previously represented Spencer, the victim, a *per se* conflict exists.

¶ 29 The State asserts the present case is distinguishable from *Hernandez*, as the present record affirmatively demonstrates the nature and extent of defense counsel's prior representation of Spencer. The State's argument is unpersuasive. The *Hernandez* court held, "the *per se* conflict rule applies whenever an attorney represents a defendant and the alleged victim of the defendant's crime, regardless of whether the attorney's relationship with the alleged victim is active or not, and *without inquiring into the specific facts concerning the nature and extent of counsel's representation of the victim.*" (Emphasis added.) *Id.* at 151-52, 896 N.E.2d at 308. Though the State notes, "a case-by-case analysis would create more diversity than uniformity" (*id.* at 147, 896 N.E.2d at 305), it argues "there must be some minimal threshold for

counsel's past representation to be determined a *per se* conflict." However, the supreme court specifically ruled out such an approach: "A case-by-case determination of the facts, as the State urges, would extinguish the *per se* conflict rule entirely." *Id.* at 151, 896 N.E.2d at 308.

¶ 30 The State also cites *People v. Lewis*, 88 Ill. 2d 429, 430 N.E.2d 994 (1981), in support of its argument that we should examine the extent of the prior representation to determine if a minimum threshold has been met to create a *per se* conflict of interest. In *Lewis*, the supreme court declined to find defense counsel labored under a *per se* conflict of interest where his relationship with the deceased victim consisted of a " 'working relationship,' " not legal representation that would trigger professional obligations or a friendship that would create strong emotional ties. *Id.* at 439, 430 N.E.2d at 999. The State contends "*Lewis* demonstrates that the supreme court can look into the extent of the relationship at least so far as to determine if a minimum threshold has been met to determine a *per se* conflict." *Lewis* is distinguishable from the present case. Here, unlike in *Lewis*, defense counsel's prior representation of Spencer specifically falls within one of the categories of *per se* conflict of interest as outlined in *Hernandez*. Under such circumstances, it is not the court's role to examine the nature and extent of the prior attorney-client relationship between the alleged victim and counsel for the defendant. Thus, we find the State's arguments unpersuasive.

¶ 31 Accordingly, we conclude defense counsel labored under a *per se* conflict of interest. "Unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal." *Hernandez*, 231 Ill. 2d at 143, 896 N.E.2d at 303. We therefore examine whether defendant waived defense counsel's conflict.

¶ 32 *2. Whether Defendant Waived the Conflict of Interest*

¶ 33 To be valid, defendant's waiver of a conflict must be knowingly and intelligently made. *People v. Johnson*, 322 Ill. App. 3d 117, 123, 749 N.E.2d 402, 408 (2001). The trial court "must adequately inform defendants of a conflict's *significance* before any waiver of such a conflict can be accepted." (Emphasis in original.) *People v. Coleman*, 301 Ill. App. 3d 290, 301, 703 N.E.2d 137, 145 (1998). Although there are no required admonishments defendant must be given, "[the] defendant must actually understand how the conflict could affect his attorney's representation, before his right to a conflict-free attorney can be knowingly waived." *Id.* In determining whether the defendant knowingly and intelligently waived a conflict, the court "should look to the circumstances surrounding the claimed waiver and consider the background, experience and conduct of the accused." *Washington*, 101 Ill. 2d at 114, 461 N.E.2d at 398.

¶ 34 In this case, defense counsel disclosed her prior representation of Spencer prior to opening arguments. The trial court noted defense counsel "had some minor involvement" representing Spencer in a postsentencing matter. The court further stated, "It is not related to this case. There's no confidential information which [defense counsel] would have obtained from the victim in that minimal representation that is adverse to the victim. Would that be fair, [defense counsel]?" When defense counsel agreed, the court went on to say, "we need to get an indication from [defendant] as to whether he understands the circumstances and whether he has any objection to your continued representation of him in light of your former minimal representation of the victim in an unrelated matter." Defense counsel then spoke to defendant off the record. After a brief recess, defense counsel stated, "I indicated to him basically what Your Honor reiterated on the record. I asked him if he had any disagreement or issues with me continuing to represent him. So I think he would be waiving any issue with regard to my prior limited representation of [Spencer], and he has no objection to me continuing to represent him now."

The court then asked defendant if defense counsel's statement was correct, to which defendant responded, "Yes, sir."

¶ 35 Defendant argues this waiver of the conflict was insufficient due to his youth and low mental acuity. He asserts the record does not reflect that the trial court or defense counsel made him fully aware of the potential ramifications of allowing defense counsel to proceed despite a *per se* conflict of interest. We agree.

¶ 36 When we look to the circumstances surrounding defendant's waiver, and consider the background, experience, and conduct of the defendant, we are persuaded as to the insufficiency of defendant's waiver. Here, the trial court was dealing with a 16 year old charged with his first adult felony and facing his first jury trial. The court emphasized defense counsel's prior representation of Spencer was minimal, unrelated to defendant's case, and did not lead to defense counsel obtaining any "confidential information" from the victim. In his comments, which, according to defense counsel, she repeated to the defendant, the court gave the impression that defense counsel's prior representation of the victim was insignificant. In focusing on the nature and extent of counsel's prior representation of the victim, the court neglected to ensure defendant understood why an objection to defense counsel's continued representation might be appropriate. No mention was made of the significance of the conflict—*i.e.*, that defense counsel may have had divided loyalties due to her prior representation of Spencer. Nothing in the record demonstrates defendant was told of the risks associated with the conflict or how those risks could impede his right to a fair trial. The court made no effort to gauge the extent of defendant's understanding other than to ask whether he agreed with defense counsel's statement that he would be waiving the conflict. The court should "indulge in every reasonable presumption against waiver of a constitutional right." *Washington*, 101 Ill. 2d at 114, 461 N.E.2d at 398.

Thus, in examining the circumstances surrounding the waiver, including the background, experience, and conduct of defendant, we conclude defendant's waiver of the conflict was not knowingly and intelligently made.

¶ 37 Because defendant did not waive defense counsel's *per se* conflict of interest, automatic reversal is required. See *Hernandez*, 231 Ill. 2d at 143, 896 N.E.2d at 303. We next turn to whether the evidence was sufficient to remand for a new trial. See *People v. Lopez*, 229 Ill. 2d 322, 367, 892 N.E.2d 1047, 1073 (2008) (a retrial raises double-jeopardy concerns requiring us to consider the sufficiency of the evidence).

¶ 38 B. Sufficiency of the Evidence

¶ 39 Defendant next contends the State presented insufficient evidence for the jury to find him guilty beyond a reasonable doubt.

¶ 40 "The double jeopardy clause prohibits retrial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to present in the first proceeding." *Id.* at 367, 892 N.E.2d at 1073. Thus, the State cannot retry defendant if the evidence presented at the first trial was insufficient to sustain the conviction. *Id.* Insufficient evidence exists where the proof is "so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Maggette*, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001). Where a witness's credibility is at issue, it should be resolved by the trier of fact. See *People v. Singleton*, 367 Ill. App. 3d 182, 189, 854 N.E.2d 326, 333 (2006).

¶ 41 In this case, though Spencer's inability to identify defendant from the first photo lineup and her criminal history raised issues regarding her credibility, it is the role of the jury to determine what weight to be given to her testimony. Moreover, Spencer's problematic eyewitness testimony was not the sole evidence against defendant; police recovered from

defendant's home a yellow hooded sweatshirt consistent with what the robber was wearing, a holster for a revolver, a speed loader for loading a revolver, and two .38-caliber bullets. We conclude the evidence was sufficient to obtain a conviction in the initial trial; thus, a retrial would not subject defendant to double jeopardy.

¶ 42 C. Automatic-Transfer Provision

¶ 43 Because defendant's case has been remanded for a new trial, we address defendant's assertion that the automatic-transfer provision of the Juvenile Court Act of 1987 (Juvenile Act) (705 ILCS 405/5-130 (West 2010)) is unconstitutional. Specifically, defendant asserts the automatic-transfer provision of the Juvenile Act violates his constitutional rights under the (1) eighth amendment of the United States Constitution (U.S. Const., amend. VIII), (2) proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), and (3) due-process clauses of the United States and Illinois Constitutions (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2). We review the constitutionality of a statute under a *de novo* standard of review. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 200, 909 N.E.2d 783, 795 (2009). We begin by presuming the statute is constitutional. *Id.* "To overcome that presumption, the party challenging the statute must clearly establish a constitutional violation." *Id.*

¶ 44 Defendant concedes this court has already ruled the automatic-transfer provision constitutional on these grounds in *People v. Patterson*, 2014 IL 115102, 25 N.E.3d 526, but seeks to preserve the issue for further review.

¶ 45 In *Patterson*, the State charged the 15-year-old defendant with aggravated criminal sexual assault, an offense subject to the automatic-transfer provision. *Id.* ¶¶ 4-5, 25 N.E.3d 526; 705 ILCS 405/5-130 (West 2008). After his transfer to adult court, a jury found the defendant guilty of three counts of aggravated criminal sexual assault. *Id.* ¶ 26, 25 N.E.3d 526.

On appeal, the defendant raised several of the same challenges to the automatic-transfer provision at issue here. The supreme court rejected the defendant's eighth-amendment and proportionate-penalties arguments, holding the automatic-transfer provision was not punitive in nature, but rather served as a procedural mechanism for determining where the defendant's case should be tried. *Id.* ¶ 105. The *Patterson* court similarly rejected the defendant's due-process challenge, relying upon United States Supreme Court cases such as *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). *Patterson*, 2014 IL 115102, ¶ 98, 25 N.E.3d 526. The *Patterson* court found no persuasive basis to reconsider its decision in *People v. J.S.*, 103 Ill. 2d 395, 469 N.E.2d 1090 (1984), which upheld the automatic-transfer provision on due-process grounds. *Patterson*, 2014 IL 115102, ¶ 98, 25 N.E.3d 526.

¶ 46 Defendant asserts the supreme court's reasoning in *Patterson* was flawed, as the result of the automatic-transfer provision is solely to increase a juvenile's sentence. Therefore, defendant contends the statute is punitive in nature and should be found unconstitutional. We decline defendant's invitation to challenge the supreme court's ruling in *Patterson*.

¶ 47 Accordingly, we conclude defendant failed to demonstrate the automatic-transfer provision violated his constitutional rights.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 619-20, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 50

Affirmed in part and reversed in part; cause remanded.