2015 IL App (4th) 131046-U

NO. 4-13-1046

FILED
November 23, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ANTONIO McCLENDON,	)	No. 12CF464
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and vacated in part, concluding (1) the evidence adduced at defendant's trial was sufficient to sustain the jury's verdict beyond a reasonable doubt, but (2) his second conviction for home invasion must be vacated under the one-act, one-crime rule.

¶ 2 Following a June 2013 jury trial, defendant, Antonio McClendon, was found guilty of two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and two counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)). In October 2013, the trial court sentenced defendant to four concurrent terms of 25 years' imprisonment. Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) in the alternative, this court should vacate one of his home-invasion convictions under the one-act, one-crime rule. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In September 2012, the State charged defendant by information with two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) (counts I and II) and two counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)) (counts III and IV). In June 2013, the trial court held a jury trial. The following is a summary of the evidence adduced at trial.

¶ 5 A. State's Case in Chief

¶ 6 1. *Ernest Cox-Knight*

¶ 7 Ernest Cox-Knight testified that on September 11, 2012, he began his day at Patricia Taylor's home in Danville, Illinois. Around 10 a.m., Cox-Knight and Taylor went across the street to Tonya Miller's home, where Taylor was dog-sitting for Miller. Around 5 p.m., Cox-Knight heard a knock at Miller's door. Cox-Knight answered the door, discovering a young man who appeared lost. Cox-Knight asked the man whether he needed help, to which the man responded he did not. The man asked Cox-Knight and Taylor whether they sold cigarettes, to which Cox-Knight responded they did not. Cox-Knight offered the man a cigarette of his own, which the man accepted. Cox-Knight testified by this point Taylor was also standing by the door. When Cox-Knight turned around to grab a cigarette, the man pushed the door open, pulled a gun out of his backpack, and, standing approximately three to five feet from Cox-Knight, told Cox-Knight and Taylor to get to the ground and give him everything they had. Cox-Knight testified he continued to look at the man while crouched down.

¶ 8 Cox-Knight testified the man did not have anything covering his face. Cox-Knight described the man as a black male with long hair in a ponytail and his teeth were "kinda jagged or crooked, broke, chipped, or whatever in the front up top." On cross-examination, Cox-

Knight further described the man's teeth as if they "looked like a 'v' in his mouth up top." He also indicated he did not recall any marks on the man's face. Cox-Knight testified the man was wearing a white T-shirt, dark pants, and carrying a book bag on his chest. As to the gun, Cox-Knight testified it was a revolver, approximately 12 inches long.

¶ 9 Cox-Knight gave the man his money, two packages of cigarettes, his shoulder bag, three cell phones, and three chargers. Cox-Knight testified the man also took Miller's money, which was inside an envelope in a console on the couch. Cox-Knight did not know money was in the console until the man opened it.

¶ 10 Cox-Knight testified Taylor asked the man whether he was going to kill them, to which the man responded, " 'Yes, I want to.' " Taylor pleaded for the man not to kill her as she had grandchildren. Cox-Knight testified the man told them, if he heard anything on the streets about the incident, he was going to come back and "air it out." Cox-Knight believed this meant he would come back and "shoot it up." The man then left. Cox-Knight believed the incident lasted approximately two to three minutes.

¶ 11 After the man left, Taylor was hysterical; she was crying and screaming. Cox-Knight ran across the street to Taylor's home, where Taylor's son and daughter-in-law also resided, and advised them of what had occurred. They then went back to Miller's house to help Taylor. Approximately 5 to 10 minutes after the incident, the police were called from Taylor's home. (Miller's home did not have a telephone.) Cox-Knight could not remember who made the call. They requested the police not come to their location because they were afraid the man was still in the area. Later that evening, they went to the public safety building and reported the incident to the police.

¶ 12 Several days later, Cox-Knight reviewed a series of photographs at the public safety building. Cox-Knight identified defendant in a photograph as the offender. On the day of trial, Cox-Knight made an in-court identification of defendant as the person he picked out in the lineup as the offender.

¶ 13 2. *Officer Phillip Wilson*

¶ 14 Phillip Wilson, a police officer with the City of Danville, testified that on September 21, 2012, at approximately 9:30 a.m., he spoke with Cox-Knight at the public safety building and gave him a photographic lineup of six individuals. Prior to giving the lineup, Officer Wilson gave Cox-Knight a written advisory, informing him he was not required to make an identification. Cox-Knight identified defendant as the offender. That same day, at approximately 9 a.m., Officer Wilson gave the same photographic lineup and written advisory to Taylor. Taylor was unable to identify anyone from the lineup. The photographic lineups and advisories were admitted into evidence and published to the jury.

¶ 15 3. *Patricia Taylor*

¶ 16 Taylor testified that on September 11, 2012, she was dog-sitting at Miller's home. Around 10 a.m., Cox-Knight arrived at Miller's home. During the afternoon, a young man knocked on the door. Taylor testified she had a conversation with the man for a few minutes, during which he asked to buy a cigarette. Taylor told the man they did not sell cigarettes. The man asked to buy a package of cigarettes he observed sitting on the coffee table inside the house. Cox-Knight offered to give the man a cigarette, which the man accepted. After Taylor grabbed the cigarette and turned around, the man entered the house, pulled a gun from his backpack, and told them to sit down and give him everything they had.

¶ 17 Taylor testified she looked at the man's face when she first opened the door and they had a conversation; the man's face was unconcealed. She described him as thin, with a goatee, sideburns, and having "a thing wrapped around his head like a little pony tail." She noticed he had a broken or chipped front tooth, which looked like a triangle. The man was wearing a black jacket and a backpack on his chest. As to the gun, Taylor testified it was approximately one foot long.

¶ 18 Taylor testified the man took (1) Miller's $300, which was sitting on top of an envelope next to a power bill on the table; (2) Cox-Knight's money and his bag containing two packages of cigarettes and two or three cell phones; and (3) her cell phone. Taylor asked the man if he was going to kill them, to which the man responded, " 'I want to.' " Taylor pleaded for the man not to kill her as she had grandchildren. The man told them not to follow him; otherwise, he would come back and "spray" the house. The man then left. Taylor testified the incident lasted about 10 minutes.

¶ 19 After the incident, Taylor went outside and called for her son. Taylor did not want to call the police because she was afraid the man would come back and "spray" the house. They eventually called the police and stated they would go to the police station rather than have an officer come by the house. Taylor went to the police station and spoke with a police officer.

¶ 20 Several days later, Taylor viewed a series of photographs. She was unable to identify the offender in the photographs. Taylor testified, "If I had to follow my first mind, I'd have had him; I'd have had it right. I didn't. I told the officer it's hard for me to say because the picture that was next to him was a little bit fuller face. But then I didn't know." Taylor made an in-court identification of defendant as the offender.

¶ 21 On cross-examination, Taylor indicated Cox-Knight did not go to the door. She also indicated she and Cox-Knight left Miller's home together. Taylor acknowledged, prior to testifying, she had spoken with Cox-Knight about the incident.

¶ 22 Following this testimony, by agreement of the parties, defendant stood in front of the jury box and displayed his teeth to the jury. On this evidence, the State rested. Defendant moved for a directed verdict, which the trial court denied.

¶ 23 B. Defendant's Case in Chief

¶ 24 1. *Derricka Crum*

¶ 25 Derricka Crum testified she had been in a relationship with defendant for the previous nine months. Crum recalled September 11, 2012, because defendant's mother, Maria Vasquez, was in a car accident. Crum had class from 10 a.m. to 12:50 p.m. After class, around 1:15 p.m., she went to defendant's house, where defendant was cleaning and cooking. Around 3:30 p.m., defendant's sister, Lexus McClendon, arrived at home from school. Later, Vasquez arrived at home and Vasquez, Lexus, Crum, and defendant had dinner and watched a movie. After the movie, Lexus went to her room and Crum talked with Vasquez. Eventually, Vasquez went to her bedroom. Defendant and Crum stayed in the living room. Crum stayed overnight and left at 6 a.m. the following day. Crum testified defendant never left his home.

¶ 26 On cross-examination, Crum testified she was contacted by the public defender's office to see if she was with defendant on September 12, 2012. Crum stated she did not recall. A few months prior to trial, Crum realized the crime for which defendant was charged occurred on September 11, 2012. Crum testified she contacted defendant's lawyer to inform him she was with defendant on that date. She did not contact the police.

¶ 27 2. *Lexus McClendon*

¶ 28 Lexus testified that on September 11, 2012, she received a phone call from her mother (Vasquez) while on her way home from school. Around 3:30 p.m., Lexus arrived at home, where defendant and Crum were present. Lexus told defendant their mother was in a car accident. Defendant called his mother. Defendant then cooked in the kitchen with Crum, while Lexus lounged in the living room. When Vasquez arrived home, she told defendant, Crum, and Lexus about the car accident. The four then ate dinner and watched a movie. Vasquez was the first one to go to sleep. Around 1 a.m., Lexus went to sleep. Lexus did not see defendant leave the house. The police did not talk with Lexus. Lexus indicated she learned the robbery took place on the same day as her mother's accident because her mother told her it was the same day.

¶ 29 3. *Maria Vasquez*

¶ 30 Vasquez testified that on September 11, 2012, at approximately 1 p.m., she was in a car accident and received a traffic ticket. On her way home after the accident, she called Lexus, who was on the school bus. When she arrived at home, defendant, Crum, and Lexus were present. Defendant was in the kitchen cooking and cleaning. The four had dinner and watched television. Vasquez went to sleep around 8 p.m. Vasquez testified defendant did not leave the house.

¶ 31 Vasquez indicated she did not inform the police she was at home with defendant on September 11, 2012, because she disclosed such information to someone in the public defender's office.

¶ 32 Following Vasquez's testimony, defendant introduced a certified copy of Vasquez's traffic ticket, which was published to the jury.

¶ 33 4. *Defendant*

¶ 34 Defendant testified he did not commit the robbery. He recalled September 11, 2012, because his mother was in a car accident. On that day, he was at home with Crum and Lexus, cooking and cleaning. He spoke to his mother on the telephone. Around 4 p.m., Vasquez returned home and described the car accident. The four had dinner and watched a movie. After the movie, defendant and Crum fell asleep on the couch. Defendant testified he never left the house.

¶ 35 Defendant showed the jury tattoos located on the back of his hands and testified they had been there for approximately two years. He also had a tattoo above his eyes, which he had in September 2012.

¶ 36 On cross-examination, defendant testified, when questioned by detectives about September 11, 2012, he did not indicate that was the day of Vasquez's accident or that he was at home cooking and watching a movie. On redirect and re-cross-examination, defendant testified he told the police he was at home.

¶ 37 On this evidence, defendant rested.

¶ 38 C. State's Rebuttal

¶ 39 On rebuttal, the State recalled Officer Wilson. Officer Wilson testified defendant did not tell him he was at his house on September 11, 2012.

¶ 40 D. Jury's Verdict, Posttrial Motions, and Sentencing

¶ 41 On June 4, 2013, the jury returned a verdict of guilty on all counts. Following the appointment of new counsel, on October 18, 2013, defendant filed a motion for judgment notwithstanding the finding of guilty or, in the alternative, a new trial. Defendant alleged, in

relevant part, the State failed to prove him guilty beyond a reasonable doubt. That same month, the trial court held a hearing on defendant's motion and sentencing. The court denied defendant's motion and sentenced him to four concurrent terms of 25 years' imprisonment.

¶ 42 On October 30, 2013, defendant filed a motion to reconsider his sentence. Following a November 2013 hearing, the trial court ordered the sentencing judgment be corrected to reflect day-for-day credit but otherwise denied defendant's motion.

¶ 43 This appeal followed.

¶ 44 II. ANALYSIS

¶ 45 On appeal, defendant argues the State failed to prove him guilty beyond a reasonable doubt. In the alternative, defendant argues this court should vacate one of his convictions for home invasion under the one-act, one-crime rule. We address these arguments in turn.

¶ 46 A. Sufficiency of the Evidence

¶ 47 Defendant argues the State failed to prove him guilty beyond a reasonable doubt where its evidence hinged on unreliable witness identifications. Defendant further asserts the State failed to meet its burden where its evidence consisted of differing witness accounts of the event, while his evidence consisted of consistent alibi witness testimonies. We disagree.

¶ 48 1. *Standard of Review*

¶ 49 In reviewing the sufficiency of the evidence to sustain a conviction, this court, in viewing the evidence in the light most favorable to the State, considers whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007); *People v. Tomei*, 2013 IL App (1st)

112632, ¶ 34, 986 N.E.2d 158. The function of a reviewing court is not to retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). Instead, it is "to carefully examine the evidence while giving due consideration to the fact that the [trial] court and jury saw and heard the witnesses." *Smith*, 185 Ill. 2d at 541, 708 N.E.2d at 369. Thus, a jury's findings regarding witness credibility and resolving conflicts in evidence will be given great weight. *Wheeler*, 226 Ill. 2d at 115, 871 N.E.2d at 740. We will not reverse a conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 276 (1985).

¶ 50 2. *Witness Identifications*

¶ 51 Defendant asserts the State failed to meet its burden where its evidence hinged on unreliable witness identifications. The State must prove the offender's identity beyond a reasonable doubt. *People v. Stanley*, 397 Ill. App. 3d 598, 610, 921 N.E.2d 445, 455 (2009). Vague or doubtful identification testimony is insufficient to meet the quantum of proof. *Stanley*, 397 Ill. App. 3d at 610-11, 921 N.E.2d at 455. However, "positive testimony from a single, credible witness is sufficient to support a conviction." *Stanley*, 397 Ill. App. 3d at 611, 921 N.E.2d at 455. "This is true even in the presence of contradicting alibi testimony, provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 319 (1989).

¶ 52 Our courts have generally applied the factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), in assessing witness identifications. *Slim*, 127 Ill. 2d at 307-08, 537 N.E.2d at 319; *Stanley*, 397 Ill. App. 3d at 611, 921 N.E.2d at 455. Those factors, which have now been embodied in our pattern jury instruction on

identification and were given to the jury in the present case, include the following: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Lewis*, 165 Ill. 2d 305, 356, 651 N.E.2d 72, 96 (1995); see also Illinois Pattern Jury Instruction, Criminal, No. 3.15 (4th ed. 2000).

¶ 53 "When considering whether a witness had an opportunity to view the offender at the time of the offense, courts look at 'whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation.' " *Tomei*, 2013 IL App (1st) 112632, ¶ 40, 986 N.E.2d 158 (quoting *People v. Carlton*, 78 Ill. App. 3d 1098, 1105, 398 N.E.2d 107, 112 (1979)). Cox-Knight and Taylor testified they had a conversation with defendant. Cox-Knight estimated the incident lasted approximately two to three minutes. Taylor estimated the incident lasted about 10 minutes. Based on this testimony, a rational trier of fact could find the witnesses had an ample opportunity to view defendant during the commission of the crime.

¶ 54 As to the degree of attention, Cox-Knight and Taylor gave a detailed description at trial of defendant's physical appearance and the clothing he was wearing on the day of the incident. They also described the condition of defendant's front teeth, which the jury had the opportunity to observe and determine whether the witnesses' descriptions comported with defendant's actual appearance. Although neither Cox-Knight nor Taylor stated defendant had tattoos on his hands or above his eyes, "discrepancies and omissions as to facial and other

physical characteristics are not fatal, but merely affect the weight to be given the identification testimony." *Lewis*, 165 Ill. 2d at 357, 651 N.E.2d at 96. "Such discrepancies and omissions do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *Lewis*, 165 Ill. 2d at 357, 651 N.E.2d at 96. A rational trier of fact could have found the witnesses' degree of attention was sufficient as to make a positive identification of defendant.

¶ 55 The third *Biggers* factor is inapplicable as there was no testimony at trial of a prior description of defendant.

¶ 56 With respect to the fourth *Biggers* factor, the witnesses' level of certainty, Cox-Knight identified defendant both in a photographic lineup and in court as the offender. Taylor identified defendant in court as the offender but was unable to make an identification in the photographic lineup. At trial, Taylor indicated her uncertainty was due to the particular photographs in the lineup. The jury had the opportunity to observe the photographic lineup and determine the weight to be given to Taylor's reasoning for being unable to identify defendant in the photograph. A rational trier of fact could have found the witnesses' level of certainty sufficient to support a positive identification of defendant.

¶ 57 Finally, with respect to the fifth *Biggers* factor, the length of time between the crime and the identification confrontation, Cox-Knight identified defendant as the offender 10 days after the incident and Taylor identified defendant as the offender 9 months after the incident. Our courts have upheld identifications after considerable time has passed. See, *e.g.*, *People v. Rodgers*, 53 Ill. 2d 207, 213-14, 290 N.E.2d 251, 255 (1972) (finding an identification made more than two years after the crime sufficient to indicate a positive identification to support a conviction). A rational trier of fact could have found the length of time between the

crime and the identification confrontations sufficient to make a positive identification of defendant.

¶ 58 Our review of the *Biggers* factors convinces us of the reliability of Cox-Knight's and Taylor's identifications of defendant as the offender, and we find those identifications are sufficient to support the convictions.

¶ 59 3. *Differing Accounts of the Event*

¶ 60 Defendant further asserts the State failed to meet its burden where its evidence consisted of differing witness accounts of the event, while his evidence consisted of consistent alibi witness testimonies. Specifically, defendant highlights the following inconsistencies in the State's evidence: (1) Cox-Knight testified he answered the door, while Taylor testified she answered the door; (2) Cox-Knight testified defendant was wearing a white T-shirt, while Taylor testified defendant was wearing a black jacket; (3) Cox-Knight testified defendant took $300 in an envelope inside a closed console in the couch, while Taylor testified he took $300 lying on the coffee table on top of an envelope; (4) the timeline of events differed between Cox-Knight's and Taylor's testimonies; and (5) Cox-Knight testified Taylor stayed at Miller's house when he went across the street to Taylor's home, while Taylor testified she went across the street to her home. Defendant further highlights the consistent alibi witness testimonies from his mother, sister, and paramour.

¶ 61 As to the State's evidence, the jury had the opportunity to observe the State's witnesses and hear their testimony. It was the jury's role as trier of fact to resolve any inconsistencies in that testimony and determine the weight to be given. *Tomei*, 2013 IL App (1st) 112632, ¶ 59, 986 N.E.2d 158. Based on its verdict, the jury found, regardless of the

inconsistencies in their testimony, the State's witnesses credible and gave great weight to their testimony. We will not substitute our judgment on questions involving the credibility of the witnesses or the weight of the evidence. The inconsistencies of which defendant complains do not render the witnesses' testimony so improbable as to raise a reasonable doubt of defendant's guilt.

¶ 62 The jury likewise had the opportunity to hear and evaluate defendant's alibi witnesses and determine the weight to accord their testimony. Based on its verdict, the jury did not find defendant's mother's, sister's, or paramour's testimony credible. "[T]he trier of fact is not required to accept alibi testimony over positive identification of an accused, particularly where the alibi testimony is provided by biased witnesses." *People v. Mullen*, 313 Ill. App. 3d 718, 729, 730 N.E.2d 545, 554-55 (2000). After viewing the evidence in the light most favorable to the State, it cannot be said the evidence here was so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt.

¶ 63 B. One-Act, One-Crime Rule

¶ 64 Defendant asserts this court should vacate one of his home-invasion convictions under the one-act, one-crime rule. Defendant acknowledges he failed to properly preserve this issue for appeal but requests we consider his claim under the substantial-rights prong of the plain-error rule. In response, the State agrees vacatur is appropriate. We accept the State's concession.

¶ 65 Forfeited claims of a violation of the one-act, one-crime rule may be considered under the substantial-rights prong of the plain-error rule. *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). Under the one-act, one-crime rule, "[a] defendant may be

convicted of only one count of home invasion where the defendant made but one entry into one dwelling, regardless of the number of occupants inside the dwelling." *People v. Braboy*, 393 Ill. App. 3d 100, 113, 911 N.E.2d 1189, 1201 (2009) (citing *People v. Cole*, 172 Ill. 2d 85, 102, 665 N.E.2d 1275, 1283 (1996)). Here, defendant was found guilty of two counts of home invasion based upon a single entry into a dwelling. We vacate one of defendant's two home-invasion convictions (count IV) (*Braboy*, 393 Ill. App. 3d at 113, 911 N.E.2d at 1200) and order the sentencing judgment be corrected to reflect only one conviction (count III) and sentence for home invasion (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967); *People v. Harper*, 387 Ill. App. 3d 240, 244, 900 N.E.2d 381, 384 (2008)).

¶ 66 III. CONCLUSION

¶ 67 We affirm defendant's convictions and sentences on counts I, II, and III but vacate defendant's conviction and sentence on count IV. We remand for the issuance of an amended written sentencing judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 68 Affirmed in part and vacated in part; cause remanded with directions.