2016 IL App (1st) 133322-U

FIFTH DIVISION
February 5, 2016

No. 1-13-3322

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. 09 C6 61176
	)	
PAUL JOHNSON,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Where the victim of armed robbery had ample ability to view offender during the crime and identified defendant in police photo array and lineup at first opportunity, the evidence was sufficient to convict defendant beyond a reasonable doubt despite his presentation of two alibi witnesses. Moreover, defendant's sentence, which was subject to a mandatory sentence enhancement of 15 years for use of a firearm, did not feature an impermissible second sentence enhancement.

¶ 2 Following a jury trial, defendant Paul Johnson was convicted of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). The trial court sentenced defendant to a term of 30 years in prison. On appeal, defendant contends the State did not prove his guilt beyond a reasonable

doubt because no physical evidence was presented and the State's only witness was the victim, who had a limited opportunity to view his assailant. He also asserts the State's evidence was undermined by the testimony of his two alibi witnesses. In addition, defendant contends the trial court applied an impermissible double enhancement to his sentence when the court applied a 15-year enhancement for using a firearm during the offense and also relied on the use of a firearm in the robbery as an aggravating factor in arriving at a 30-year sentence. For the reasons set out below, we affirm defendant's conviction and sentence.

¶ 3 At trial, Norell Polk testified that at about 6:45 p.m. on January 19, 2009, he was walking west on Sibley Boulevard in Calumet City on his way to a friend's house. Polk testified he had been a security guard for 28 years and had training and certification in weapons and was familiar with different types of guns. He noticed a man later identified as defendant and another man following him. When defendant ran toward him, Polk ran away from defendant.

¶ 4 Polk testified defendant "gave chase and caught up with me and pushed me down on the street, and got on top of me and put a firearm in my2 face." Defendant stated: "Well, where the money at? Where the money at? We know you got money. He saw you with money." Polk responded no, to which defendant replied, "shut the f— up" and put the gun in Polk's face. Defendant told Polk, "You look at me again, I will f—ing shoot you."

¶ 5 Polk testified he got a "very good look" at defendant's face because he looked at him until the offender told him to stop, at which point Polk closed his eyes. Polk said the attack occurred near a streetlight and a daycare center that was lit. The other man who approached Polk took his wallet, and he and defendant fled. Polk ran after the two men but did not catch them. Polk identified defendant in court.

¶ 6 Polk said defendant wore dark blue jeans and a dark nylon winter jacket with gold fur around the hood and pockets with gold zippers in the stomach area and on the arm. He also wore brown Timberland boots and a skull cap, which came off of defendant's head during the robbery. Polk also identified the gun as a semi-automatic nickel-plated handgun, possibly a .38-caliber.

¶ 7 Polk had a small cut on his lip because defendant held the gun to Polk's mouth for a "couple of minutes" while his wallet was taken. Polk said his wallet contained credit cards, cash, and several identification cards. Polk went to the police station that night and reported the crime.

¶ 8 Two days later, on January 21, Polk viewed a police lineup but did not identify anyone as his assailant. On January 28, Polk viewed a police photo array but did not identify anyone. Calumet City police detective Mitch Growe testified he showed Polk that photo array, which did not include defendant's picture.

¶ 9 Polk further testified that at about 8:15 p.m. on February 6, he was boarding a bus at the Harvey Transit Center; he recalled that day was a Friday. Polk said he recognized defendant because "he had the same [clothing] that he had on when he held me up" and defendant recognized him as well. Defendant sat behind Polk on the bus and told a person sitting nearby that he was "going to shoot that motherf—".

¶ 10 After Polk heard defendant's comment, he exited the bus at the next stop, boarded another bus going in the opposite direction and called the police. Polk said he told the investigator working on the case that he had just seen the man who robbed him. Polk drew a sketch of defendant and gave it to the police. A few days later, Polk met with the police sketch artist and worked with him to create a sketch that Polk said resembled his assailant. On February 11, Polk viewed a second photo array and identified defendant's picture. About four months later, on June

19, Polk identified defendant in a police lineup. Copies of Polk's sketch, the sketch drawn by the police sketch artist, and the January 28 and February 11 police photo arrays were admitted into evidence.

¶ 11 On cross-examination, defendant's counsel asked Polk if he recalled meeting with defense investigators and telling them the attack took place at 7:24 p.m. Polk responded he told the defense investigators the crime occurred at 6:45 p.m. Polk also denied telling investigators he saw defendant on the bus on February 5, reiterating that took place on Friday, February 6. Polk said that when defendant was on top of him, he looked both at the gun and at defendant's face.

¶ 12 Calumet City police sergeant Kevin Kolash testified defendant's photograph was included in the February 11 photo array based on its similarity to the sketch by the police sketch artist. Sergeant Kolash testified defendant did not live far away from where Polk was robbed. Defendant was apprehended in Omaha, Nebraska, on June 18.

¶ 13 For the defense, John Wilson testified he was a co-worker of defendant's counsel and he and defendant's counsel spoke with Polk in 2011 about the robbery. Wilson testified Polk told them the robbery occurred at 7:24 p.m. and that he saw defendant on the bus on February 5, not February 6. On cross-examination, Wilson said he could not recall if defense counsel asked Polk if the robbery occurred at 7:24 p.m. or if Polk specified that time.

¶ 14 Defendant also presented two alibi witnesses. Melissa Ali testified she and defendant communicated on-line in late 2008 and planned to meet in person in February 2009. Defendant rode the train to Omaha, where she lived. Defendant's train was due at 10:30 p.m. but was late, arriving in the early morning hours of February 5. Defendant stayed with her for two weeks. Their relationship ended in March 2010.

¶ 15 Lawrence Matthews, defendant's brother, testified he and defendant were at their mother's house on the night of the offense. He said he recalled the date because it was Martin Luther King Day and because they were cleaning and having dinner to celebrate their mother's birthday, which was January 17. After eating dinner at about 7 p.m., he and defendant watched the television show "24" which he testified began at 9 p.m. Matthews testified defendant did not leave the house that evening. He later stated "24" began at 8 p.m. and was a two-hour episode.

¶ 16 Matthews testified he took defendant to Union Station in Chicago at 2 p.m. on February 4, 2009, to catch an Amtrak train to Omaha to meet Ali. Matthews said he went into the station with defendant and saw him board the train. On cross-examination, Matthews acknowledged that when he learned defendant had been charged with this crime, he did not contact police to provide that alibi account.

¶ 17 The jury found defendant guilty of armed robbery. The trial court noted defendant was subject to a Class X sentence "with a minimum of 21 years as a potential sentence."

¶ 18 At defendant's sentencing hearing, the State presented evidence in aggravation. Calumet City police sergeant Kevin Rapacz testified another armed robbery occurred at about 10 p.m. on the same night and in the same area as the instant offense. Sergeant Rapacz testified the victim of that armed robbery described her attacker as wearing a black jacket and dark blue jeans. The victim identified defendant in a lineup on June 18, and defendant was arrested for that offense.

¶ 19 The State argued in aggravation of defendant's sentence that his conduct caused or threatened serious harm, in that defendant pointed a gun in Polk's face and demanded money. The State noted defendant had been identified by the victim of the 10 p.m. attack in the same area. In addition, the State reviewed defendant's criminal history, which included a 1992

conviction for possession of a controlled substance, a 1993 conviction for unlawful use of a weapon by a felon, convictions in 1995 and 1998 for delivery of a controlled substance, and a 2000 conviction for possession of a stolen motor vehicle. The State argued defendant was subject to a sentencing range of between 21 and 45 years in prison and asked the court to impose a sentence "on the higher end of the range." In mitigation, defense counsel emphasized defendant's status as a father of a newborn child, as well as his rehabilitative potential. Defendant also addressed the court.

¶ 20 In imposing sentence, the trial court noted defendant was subject to a minimum of 21 years. The court acknowledged defendant's statement in allocution and noted several factors in mitigation of his sentence, including the fact that no one was injured in the instant offense and that defendant was attending school. The court further stated several letters had been submitted in support of defendant's character.

¶ 21 The court then noted:

> "In aggravation, the court also has to look at what has occurred. Defendant was convicted of a crime of armed robbery, and this matter involved that – by doing the armed robbery with a firearm.
>
> Any time a firearm is used in any type of crime, the law looks at it with extreme scrutiny in possible sentences."

¶ 22 The court reviewed defendant's criminal background and noted that an aggravating factor was Sergeant Rapacz's testimony that defendant was identified as committing another armed robbery several hours after this offense. The court stated it "cannot overlook what occurred during this case here as well as the defendant's background as well as the aggravation testimony

of another similar type of offense on the same date," and the court sentenced defendant to 30 years in prison.

¶ 23 On appeal, defendant contends the State failed to prove his guilt of the armed robbery of Polk beyond a reasonable doubt. Specifically, he asserts no physical evidence supported his conviction and Polk's identification testimony was unreliable because he had a limited opportunity to view his assailant and was likely "distracted by the extreme stress" of a gun pointed at his face. Defendant also contends Polk's trial testimony differed from his account to investigators at the time of the robbery. In addition, he argues the unimpeached testimony of his two alibi witnesses contradicted Polk's identification.

¶ 24 Where, as here, a defendant has challenged the sufficiency of the evidence, a criminal conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant; rather, the relevant inquiry is 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. *Givens*, 237 Ill. 2d at 334; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 25 The eyewitness identification of an accused, even by a single witness, can sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995), citing *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Identification testimony is now evaluated under the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), and recognized in Illinois. *Slim*, 127 Ill. 2d at 307;

People v. Fields, 2014 IL App (1st) 110311, ¶ 31. Those factors are: (1) the opportunity that the victim had to view the offender 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. *Id*., citing *Lewis*, 165 Ill. 2d at 356. Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007).

¶ 26 As to the first and second factors, Polk had a considerable opportunity to view his attacker at the time of the offense and paid a high degree of attention. Although defendant contends on appeal that Polk's ability to view his attacker was limited, the facts indicate that Polk viewed defendant several times and at very close range. Polk first saw defendant as defendant ran towards him. Defendant then pushed Polk down and got on top of him, holding a weapon to Polk's face. Defendant's face was not covered. Polk testified he had a "very good look" at defendant's face and that he looked at defendant until defendant ordered him to stop. Polk said defendant uttered four sentences at him, to which Polk responded. Defendant then made three more remarks while putting the gun in Polk's face and telling him to close his eyes. Polk therefore had his eyes on defendant for the entire time defendant spoke to him. After the offense, Polk gave police a detailed description of defendant's clothing and the handgun.

¶ 27 Defendant contends as to those initial two factors that the fact that a gun was in Polk's face lessened his ability to notice his assailant's features and that Polk admitted his eyes were closed. However, as set out above, Polk did not close his eyes until after he and defendant exchanged multiple sentences and defendant ordered Polk to stop looking at him. Polk therefore

had an ample opportunity to view his attacker. Moreover, the mere presence of a weapon does not render a witness's testimony unreliable. See *Slim*, 127 Ill. 2d at 305-306.

¶ 28 As to the third factor, the accuracy of Polk's prior description, Polk was able to recall his attacker's facial features in such detail that police could retrieve defendant's photo based on the sketch Polk created with the police sketch artist. See *People v. Dizon*, 297 Ill. App. 3d 880, 888-89 (1998) (a witness is not expected or required to distinguish individual and separate features of a suspect, and a positive identification can be sufficient even though the witness gave only a general description based on the total impression of the accused's appearance).

¶ 29 As to the fourth and fifth factors, Polk displayed certainty as to his identifications of defendant and an undue amount of time did not pass between the crime and those identifications. Polk identified defendant's photo and identified defendant in a lineup at the first available opportunity as to each. Polk did not identify anyone in the first photo array, which did not contain defendant's picture. Polk selected defendant's photo on February 11, less than one month after the offense, when it was included in the second police photo array. That identification was made after Polk saw defendant on the bus and provided police with a sketch of his attacker's general visage. Polk also identified defendant the first time he was included in a lineup on June 19, which was exactly six months after the offense. The passage of one month between a crime and a photo identification of the accused has been deemed acceptable in numerous cases, and lapses of time as long as two years have been found to not adversely affect the identifications. See *People v. Wardell*, 230 Ill. App. 3d 1093, 1098 (1992) (and cases cited therein). Accordingly, all five factors support Polk's identification of defendant as his assailant.

¶ 30 Defendant next contends Polk's testimony was inconsistent with his statement to investigators as to the time of the offense and the day he saw defendant on the bus. Defendant points out the trial testimony that Polk told investigators that the robbery took place at 7:24 p.m. and that he saw defendant on the bus on February 5, in contrast to his trial testimony that the crime occurred at 6:45 p.m. and that he later saw defendant on February 6. Defendant further asserts Polk's testimony was undermined by the accounts of his alibi witnesses.

¶ 31 We do not find Polk's testimony unsound on the basis of those variations. Polk denied on cross-examination that he told an investigator that the crime occurred at 7:24 and that he saw defendant on the bus on February 5. Indeed, Polk specified that he saw defendant on February 6, 2009, which he recalled was a Friday. Determinations of the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *Fields*, 2014 IL App (1st) 110311, ¶ 30. It was the task of the jury here, as the trier of fact, to consider Polk's answers on cross-examination and resolve those alleged conflicts. See *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); see also, *e.g.*, *People v. Lee*, 173 Ill. App. 3d 181, 185 (1988) (victim's account was not improbable despite inconsistent testimony about time of certain events). We do not find the questions on cross-examination to weaken Polk's otherwise unwavering testimony.

¶ 32 As to defendant's two alibi witnesses, his brother testified he and defendant were together at the time the offense occurred. Defendant's former girlfriend testified he was with her in Nebraska on the day Polk attested he saw defendant on the bus. The weight to be given alibi evidence is a question of credibility for the trier of fact, which is not obligated to accept those accounts over a positive identification of the accused by the crime victim. *People v. Singleton*,

367 Ill. App. 3d 182, 189 (2006); *Slim*, 127 Ill. 2d at 315. This is particularly true where the alibi is provided by biased witnesses such as a member of the defendant's family. *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 63; *Singleton*, 367 Ill. App. 3d at 189. In conclusion on this point, a reasonable jury could have found the identification testimony of Polk to be credible and the overall testimony of Polk to be more believable than that of defendant's alibi witnesses. Viewed in the light most favorable to the prosecution, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

¶ 33 Defendant's remaining contention on appeal is that his sentence must be vacated and this case remanded for resentencing because the trial court applied an impermissible double enhancement in imposing his 30-year sentence. The State asserts defendant has forfeited this claim by failing to raise a contemporaneous objection or include that argument in a written post-sentencing motion.

¶ 34 In response, defendant contends a sentence representing a double enhancement is void because it is not authorized by statute and argues that a void sentence can be challenged at any time. During the pendency of this appeal, the Illinois Supreme Court abolished the void sentencing rule in *People v. Castleberry*, 2015 IL 116916, ¶ 19. Defendant alternatively relies on the application of either prong of the plain-error doctrine; however, we need not undertake that analysis because for the reasons set out below, we conclude no error took place in his sentencing. See *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 11 (the first step in plain-error review is to determine whether error occurred).

¶ 35 Defendant contends his use of a firearm during the offense triggered a statutory 15-year sentence enhancement, and that the trial court relied on that use of a firearm a second time in

arriving at a sentence, thus representing an impermissible double enhancement. Specifically, defendant points to the trial court's remark about his use of a gun when considering factors in aggravation of his sentence. The State responds that no improper double enhancement occurred because the statutory enhancements reflect the legislative intent to punish gun crimes more severely by increasing the sentencing range for those offenses and the court imposed a sentence within that enhanced range.

¶ 36 As a general rule of statutory construction regarding criminal sentencing schemes, a factor that is implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor at sentencing. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). An improper double enhancement can occur in one of two scenarios. The first type of double enhancement, on which defendant focuses his argument, is where a single factor is used both as an element of an offense and then used a second time as a basis for imposing a harsher sentence than might otherwise have been imposed. *Id*. The second type of double enhancement occurs when the same factor is used twice to elevate the severity of the offense itself. *Id*. The prohibition against double enhancements is a rule of statutory construction and is "premised on the assumption that the legislature considered the factors inherent in the offense in determining the appropriate range of penalties for that offense." *Id*.

¶ 37 Where the legislature clearly intends to enhance the penalty for a crime based on some aspect of that crime, and that intention has been clearly expressed, there is no prohibition. *Id*. at 545-46; *People v. Sharpe*, 216 Ill. 2d 481, 530 (2005) (noting the court "will not overrule the legislature" in this regard). In determining whether the legislature intended a double-

enhancement, the statute itself represents the best indication of the legislature's intent. *People v. Phelps*, 211 Ill. 2d 1, 14 (2004).

¶ 38 Defendant was convicted of armed robbery under subsection (a)(2) of the armed robbery statute, which involves the commission of that offense while the offender is carrying a firearm on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2008). By point of comparison, subsection (a)(1) of the statute involves the commission of that offense while "armed with a dangerous weapon other than a firearm." 720 ILCS 5/18-2(a)(1) (West 2008). Both of those offenses constitute Class X felonies; however, a violation of subsection (a)(2) "is a Class X felony for which 15 years *shall be added* to the term of imprisonment imposed by the court." (Emphasis added.) 720 ILCS 5/18-2(b) (West 2008). The statute also requires a 20-year sentence enhancement if the defendant "personally discharges a firearm" and a 25-year sentence enhancement if the defendant "personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person." 720 ILCS 5/18-2(a)(3), (a)(4), (b) (West 2008).

¶ 39 Therefore, defendant's commission of armed robbery while armed with a firearm subjected him to a Class X felony sentencing range to which a 15-year sentence was required to be added. 720 ILCS 5/18-2(a)(2), (b) (West 2008). A Class X felony is subject to a sentencing range of between 6 and 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2008) (now codified at 730 ILCS 5/5-4.5-25(a) (eff. June 12, 2012)). Therefore, defendant's effective sentencing range was between 21 and 45 years in prison. We note that the class of defendant's crime was not increased by the statutory sentence enhancement; all armed robberies are Class X felonies under the statute. 720 ILCS 5/18-2 (b) (West 2008).

¶ 40 An analysis of the statute indicates the statute itself does not contain a double enhancement. By enacting the 15-, 20- and 25-year statutory sentence enhancements based on the presence or use of a firearm, the legislature indicated a clear intent to punish gun crimes more harshly than those offenses not involving firearms. See *Sharpe*, 216 Ill. 2d at 511, citing 720 ILCS 5/33A-1(b)(1) (West 2000) (according to codified statement of legislative intent, the purpose of the sentence enhancements for armed robbery while in possession of a firearm is "to deter the use of firearms in the commission of a felony offense"). The sentence enhancements in the armed robbery statute are mandatory components of a defendant's sentence. *People v. Moss*, 206 Ill. 2d 503, 534 (2003) (reversed on other grounds by *Sharpe*); see also *People v. Thomas*, 171 Ill. 2d 207, 222 (1996) (requirement in 730 ILCS 5/5-5-3(c)(8) that offenders with applicable prior convictions "shall be sentenced as a Class X offender" did not preclude sentencing court from considering same convictions as aggravating factor). Therefore, a single enhancement occurred as to defendant's punishment when he was subjected to an increased sentencing range of 21 to 45 years.

¶ 41 Defendant claims the trial court applied a second, impermissible enhancement when, imposing a sentence within the range of 21 to 45 years, the court relied on the use of a firearm as an aggravating factor in arriving at a 30-year sentence. We conclude the trial court in this case did not apply a second enhancement in arriving at its sentence when it considered factors in aggravation. The supreme court noted in *Thomas* that "[t]he judicial exercise of this discretion, in fashioning an appropriate sentence within the framework provided by the legislature, is not properly understood as an 'enhancement.' " *Id*. at 225. In the context of considering prior convictions in aggravation, the supreme court stated in *Thomas*:

> "[W]hile the *fact* of a defendant's prior conviction determines his eligibility for a Class X sentence, it is the *nature and circumstances* of these prior convictions, which, along with other factors in aggravation and mitigation, determine the exact length of that sentence." (Emphasis in original.) *Id*. at 227-228.

¶ 42 A recent appellate court decision highlighted the permissibility of the defendant's sentencing in *Thomas* by contrasting it with a scenario in which an improper double enhancement was found. In *People v. Melvin*, 2014 IL App (2d) 131005, ¶ 2, the defendant was charged with attempted predatory criminal sexual assault of a child, a Class 1 felony. The parties agreed to a Class X, extended-term sentence of 60 years, with the State asserting that the defendant's offense could be increased from a Class 1 felony to a Class X felony due to a prior offense and then arguing the same prior offense could subject the defendant to the extended-term sentence. *Id*. The court in *Melvin* rejected the State's attempt to compare that sentencing with the facts of *Thomas*, noting that in *Thomas*, the sentencing range to which the defendant was subject increased only once based on the defendant's prior convictions. *Id*. ¶¶ 5-6. Here, as in *Thomas*, defendant's sentencing range was increased once, via the mandatory statutory sentencing enhancement. No additional enhancement occurred when the trial court imposed a sentence that was within the enhanced range of 21 to 45 years. Therefore, no impermissible double enhancement took place in this case.

¶ 43 Moreover, the record does not indicate the trial court focused on defendant's use of a firearm when arriving at defendant's 30-year sentence. Although the trial court noted firearm offenses are viewed "with extreme scrutiny," the court also reviewed defendant's criminal background, which included numerous convictions dating to 1992. In addition, the court heard

evidence that defendant was implicated in a second armed robbery that occurred hours after the instant crime on the same block. The court also noted several factors in mitigation of defendant's sentence. The court noted the minimum possible sentence of 21 years and imposed a 30-year sentence, which was in the lower end of the applicable range.

¶ 44 For all of those reasons, the sentence imposed by the trial court did not include a double enhancement. Thus, because we find that no error occurred in defendant's sentencing, his plain-error contentions do not warrant further discussion.

¶ 45 In conclusion, Polk's identification testimony was sufficient to support defendant's guilt of armed robbery beyond a reasonable doubt, despite defendant's presentation of two alibi witnesses. In addition, no error occurred when the court considered the facts of the crime in imposing a sentence within the enhanced range mandated by the armed robbery statute.

¶ 46 Accordingly, the judgment of the circuit court is affirmed.

¶ 47 Affirmed.