

No. 1-14-0308

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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. 12 CR 15664
)	
JASON HOLMAN,)	Honorable
)	Michael B. McHale,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Eyewitness evidence, corroborated by video, was sufficient to convict defendant of armed robbery with a firearm. A prison sentence of 70 years for armed robbery with a firearm was not excessive, where robbery was accompanied by violence and defendant had an extensive criminal history.

¶ 2 Following a 2013 bench trial, defendant Jason Holman was convicted of armed robbery and sentenced to 70 years' imprisonment, including a 15-year firearm enhancement. On appeal, he contends that there was insufficient evidence to convict him of armed robbery because his

identification by the victim was not sufficiently reliable and there was insufficient evidence that defendant was armed with a firearm. Holman also contends that his sentence is excessive. We affirm.

¶ 3 Holman was charged with the May 7, 2012 armed robbery of Anthony Lozano during which the State alleged Holman took money from Lozano by force or imminent threat of force while armed with a firearm. Holman was also charged with aggravated battery based on his conduct in striking Lozano on the head with a firearm. Another count alleged that Lozano was permanently disfigured as a result of the attack. Finally, Holman was charged with aggravated unlawful restraint of Lozano for detaining him while using a firearm.

¶ 4 Lozano is a convenience store clerk who was working alone on the night shift on May 7, 2012. There was a customer in the store when, at about 2:17 a.m., a man in a dark hooded sweatshirt entered the store repeatedly demanding "the money" and waving a gun in his hand. The gun was a silver revolver that Lozano believed to be "an older model gun, because it wasn't like the revolvers that are currently in production or that I've seen." Lozano dropped to the floor as soon as he saw the robber with a gun in hand, to avoid being shot, but heard the robber ordering the customer repeatedly to "get back," then repeating his demands for money. As the robber walked towards him, Lozano saw that he was wearing dark work pants and gray shoes, his hood was up, and a bandana or handkerchief was covering his lower face. The robber struck Lozano, dragged him to his feet, and told him to go to the cash register. As the robber was now closer to Lozano, his features became more apparent. Also, his hood and bandana began moving as he held Lozano, so Lozano could now see not only his eyes and eyebrows as before but his forehead "and things like that."

¶ 5 Holman repeatedly demanded that the customer stay back and that Lozano open the cash register, but Lozano replied that he did not know how. Holman then struck Lozano with his hand holding the gun, "and it cut me, and I felt *** the weight of the weapon, so I knew it was *** a real gun." Lozano fell to the ground from the blow, his head bleeding. Holman repeated his demand to open the cash register, adding "If I have to tell you again, I'm gonna shoot you." Holman pulled Lozano to his feet, and Lozano got another look at him at arm's-length. When Lozano repeated that he did not know how to open the cash register, Holman told him to process a sale and handed him a packet of cigarettes. Lozano scanned the packet, the cash register opened, and Holman grabbed the money in the drawer. He ordered Lozano to pick up the money he dropped and to put cigarette packets into a bag for him. With the money and cigarettes in a bag, Holman ordered Lozano to go to the back of the store. As Lozano walked to the back of the store, Holman left. Lozano called the police, who arrived a short time later. Lozano received treatment for his head injury.

¶ 6 In late July 2012, Lozano went to the police station and viewed a lineup of four men. Holman stood third from the left, as viewed by Lozano. Upon viewing the lineup, Lozano told an officer he thought Holman was the robber. The officer asked if anything could make Lozano certain as "we w[a]nt to know that we have the right person," and Lozano replied that hearing the men's voices would make him certain. Lozano told the officer that if he heard each man say "put it in the bag," he could distinguish the robber because the robber had been speaking almost continuously throughout the robbery. The officer had Lozano turn away from the lineup and he listened as each man said the phrase he suggested. The participants were asked to speak in the same order that they stood in the lineup, and Lozano became certain of his identification upon hearing the third man—Holman— speak.

¶ 7 At trial, Lozano identified Holman as the robber and identified photographs of the store taken after the robbery, including photographs depicting blood on the floor. He also identified the store's security video from the night in question as an accurate depiction of the robbery. Homan represented himself at trial and thus cross-examined Lozano and other witnesses. Lozano also recognized Holman's voice at trial as that of the robber.

¶ 8 Lozano reiterated that he could see the robber's eyes, eyebrows, and forehead. He could not see the robber's hairline because it was covered by the hood. In addition to describing the robber's clothing, Lozano told officers that the robber was about 29-35 years old, six feet tall, and 180 to 190 pounds. An officer showed Lozano a photographic array several days before the lineup but he did not recognize anyone and made no identification, though Holman's picture was in the array. In the photographic array where Lozano made no identification, Holman had long hair in a ponytail and facial hair, features that Lozano did not observe at the time of the robbery. Lozano attributed his positive identification at the lineup to Holman's "features *** from the nose up to the forehead," height, and voice. Lozano was "90 percent" sure of his identification before the lineup participants spoke.

¶ 9 The security video, with sound, depicts the robber entering the store, wearing a dark hooded sweatshirt, dark pants, grayish shoes, and a white handkerchief over his lower face, and holding in one hand an object appearing to be a gun. The robber brandished and pointed the gun during the robbery. The robber apparently kicked Lozano as he was on the floor in a fetal position after being struck on the head, before dragging him back to the cash register to open it. At one point during the robbery, the customer fled the store. While there was music playing in the store, the robber can be heard frequently barking commands (punctuated by vulgarities)

throughout the robbery, which took about five minutes from his entry to his exit. The robber can be heard saying "I'm gonna shoot you" as Lozano is on the floor.

¶ 10 Following closing arguments, the court found Holman guilty of all of the charged offenses, except for the count of aggravated battery involving permanent disfigurement. The court noted that it viewed and heard the security video and expressly found Lozano's testimony credible. The court found that Lozano's voice identification was strengthened by hearing Holman speak at length during trial, and "the voice that you gave in this courtroom corroborates the voice that was on" the recording.

¶ 11 Holman's post-trial motion¹ challenged (in relevant part) the sufficiency of the State's evidence and argued that Lozano's trial identification should not have been admitted because the pre-trial identification procedures were impermissibly suggestive. Following arguments, the court denied the post-trial motion, finding that Lozano's visual identification was corroborated by his voice identification, the voice identification was sufficient as Lozano had ample time to hear the robber speak, the photographic array was not unduly suggestive and Holman's photograph in the array was dissimilar to his appearance at the time of the robbery, and Lozano's stress during the robbery supported rather than detracted from his identifications as he would be focused and paying attention.

¶ 12 The pre-sentence investigation report (PSI) reflects that Holman was convicted of 10 armed robberies in 2004 and sentenced to 16 years' imprisonment. He was also convicted of possession of a stolen motor vehicle in 1991, possession of a firearm in 1992, robbery in 1992, and controlled substance offenses in 1994, 1995, 1996, and 1997. He was born in 1972, his

¹ A different judge presided over the post-trial and sentencing proceedings, and counsel was appointed for Holman at his behest.

parents divorced when he was two years old, and he grew up in "crime ridden" areas until he became a ward of the State at age 15. He denied being abused or neglected but admitted running away from home once or twice. With his girlfriend of three years, Holman has a daughter "who suffered from heart problems at birth." He also has two adult children from a prior long-term relationship. He completed elementary school with "average" grades but did not complete high school. While in prison, he received his GED in 1993, vocational training certificates in heating and air conditioning, custodial maintenance, and small business management, and his associates degree in 2005 or 2006. He was previously employed by a temporary agency "off and on since 2011," but the PSI preparer could not find a listing for the agency.

¶ 13 Holman described his physical and mental health as good. He admitted regularly drinking alcohol since age 14, smoking marijuana from age 12 or 13 until 2012, and using cocaine since age 15, and he "experimented with PCP." He completed outpatient substance abuse treatment in 2010 and received an alcohol evaluation in connection with an earlier case. Holman admitted to membership in the Conservative Vice Lords gang from age 9 until 1997. He volunteered at a "food pantry" once or twice a week.

¶ 14 At sentencing, the State added to the PSI a 1998 felony conviction for possession of contraband in a penal institution, with a two-year prison sentence. The State also added that Holman's 2004 sentence of 16 years for armed robbery was reduced in 2009 to eight years following a post-conviction petition. Holman clarified that he worked "odd jobs" rather than being unemployed as stated in the PSI.

¶ 15 The State stressed Holman's 17 prior felony convictions with another case pending as of sentencing. In particular, the State noted Holman's multiple convictions for the Class X offense

of armed robbery that rendered Holman eligible for an extended-term sentence. The State also requested the mandatory 15-year firearm enhancement.

¶ 16 The defense cited Holman's age—42—and noted that he was a special education student and has dyslexia. Defense counsel emphasized Holman's achievements in obtaining his GED and attending college classes in prison. The defense noted his "very difficult upbringing" in a "broken home" and crime-ridden neighborhoods. Counsel argued that Holman has drug addiction issues, but has worked odd jobs. As a mitigating factor, counsel noted that Lozano suffered no great bodily harm and received minimal treatment. Counsel requested "leniency." Holman spoke in allocution and apologized "that this matter turned out this way."

¶ 17 The court merged the aggravated unlawful restraint and aggravated battery counts into armed robbery and sentenced Holman to 70 years' imprisonment, including a 55-year extended term and a 15-year firearm enhancement. The court found Holman to be a "career criminal" who is "an extremely dangerous person to society." The court noted that Holman received the 2004 armed robbery convictions in a single proceeding with concurrent sentences, but nonetheless he committed multiple armed robberies. The court observed: "When you commit an armed robbery, you're half a step away from committing a murder," as borne out here where Holman threatened to shoot Lozano and struck him on the head with the gun.

¶ 18 The court denied Holman's motion to reduce his sentence, acknowledging that it "was on the high end, but I do rest on my rationale from the sentencing hearing." This appeal followed.

¶ 19 On appeal, Holman primary contention is that there was insufficient evidence to convict him because Lozano's identification of him as the robber was insufficiently reliable to prove his guilt beyond a reasonable doubt.

¶ 20 On a claim of insufficiency of the evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the defendant – we will not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Q.P.*, ¶ 24. As witness credibility is a matter for the trier of fact, it may accept or reject as much or little of a witness's testimony as it chooses. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Jonathon C.B.*, ¶ 60. A court in a bench trial is not required to (i) disregard inferences that flow normally from the evidence, (ii) seek all possible explanations consistent with innocence and elevate them to reasonable doubt, or (iii) find a witness incredible merely because the defendant says so. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Q.P.*, ¶ 24.

¶ 21 The testimony of a single witness may be sufficient to convict, and the fact that there are contradictions or conflicts between the accounts of State witnesses does not render their testimony incredible. *Peoples*, ¶¶ 65, 67. In assessing the reliability of a witness identification, we consider the (1) witness's opportunity to view the offender during the offense, (2) witness's degree of attention at the time of the offense, (3) accuracy of the witness's prior descriptions of

the offender, (4) witness's level of certainty at the subsequent identification, and (5) length of time between the offense and the identification. *People v. Moore*, 2015 IL App (1st) 141451, ¶ 22, citing *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). "It has consistently been held that a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness' positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made." *Slim* at 308-09. A witness may identify an offender by voice. *People v. Liner*, 356 Ill. App. 3d 284, 299 (2005); *People v. Hicks*, 134 Ill. App. 3d 1031, 1038 (1985); see also *People v. Booker*, 2015 IL App (1st) 131872, ¶ 74 (eyewitness identifications amply corroborated by voice identification).

¶ 22 Here, taking the evidence in the light most favorable to the State as we must, we conclude that a reasonable finder of fact could find defendant guilty of the armed robbery of Lozano. The robbery was several minutes long, and while Lozano was on the floor for part of that time, there were also times that he was close to Holman and had the opportunity to look at the portion of his face not covered by his hood and handkerchief. Moreover, Lozano had ample opportunity to hear Holman's voice as he barked commands throughout the robbery. Lozano also had ample reason to pay attention: Lozano was certain that the object Holman was brandishing and pointing during the robbery was a gun, and Holman both shouted commands and vulgarities at Lozano and reinforced those commands by striking him with the gun. Lozano's lineup identification of Holman was nearly certain based on visual factors alone and became certain upon hearing the participants' voices, after Lozano suggested that he listen to their voices.

¶ 23 Holman claims Lozano was impeached and thus the reliability of his identification was called into question. The fact that Holman's threatening actions, commands, and violence

intimidated Lozano (as shown by his initial inability to operate the cash register and by curling up on the floor after being struck) does not negate that they also focused his attention on Holman as a matter of imminent life or death. Lozano's failure to identify Holman in the photographic array preceding the lineup is reasonably explained by the facts that Holman's physical appearance in the array differed from his appearance at the time of the robbery and Lozano did not have the benefit of hearing voices at the time of the array. The record does not affirmatively establish that "Lozano omitted any reference to the offender's voice prior to the lineup" but merely that any such reference was not elicited from Lozano at trial. Moreover, as stated above, a witness's inability to give a detailed description of a person is not fatal to the witness's identification of that person. Lastly, the quality of the sound recording on the security video is not very good, but neither is Holman's voice "near[ly] unintelligible" as he argues, and the relative loudness of the store music on the video does not necessarily reflect Lozano's ability to hear and discern Holman's voice absent evidence of where the security microphones were located.

¶ 24 In sum, the court found Lozano's pre-trial and trial identifications of Holman as the robber were credible and reliable. That conclusion is not so improbable or unsatisfactory as to leave us with a reasonable doubt regarding Holman's guilt.

¶ 25 Holman alternatively contends that there was insufficient evidence that he was armed with a firearm so we should reduce his conviction to robbery and remand for resentencing.

¶ 26 A person commits armed robbery when he or she commits robbery – knowingly takes property from the person or presence of another by use of force or by threatening imminent use of force – while armed with a firearm or a dangerous weapon other than a firearm. 720 ILCS 5/18-1(a), 18-2(a)(1), (2) (West 2014). For purposes of this statute, a "firearm" is defined in

section 1.1 of the Firearm Owners Identification Card Act as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas" except for BB guns firing "a single globular projectile" of no more than 0.18 inches at less than 700 feet per second, paint-ball guns, flare guns, nail and rivet guns, and antique firearms designated as such by the State Police. 720 ILCS 5/2-7.5, citing 430 ILCS 65/1.1 (West 2014).

¶ 27 Illinois courts have repeatedly addressed the issue of the sufficiency of the evidence from which a trier of fact may infer that an object used in a crime was a firearm. In *People v. Ross*, 229 Ill. 2d 255, 273-76 (2008), our supreme court rejected a presumption that an object appearing to be a gun is a loaded and operable firearm, instead finding that a trier of fact may infer from trial evidence that an object was a firearm. In *People v. Washington*, 2012 IL 107993, the court likewise found that the victim's unimpeached testimony may be suffice to prove that a defendant was armed with a gun during his offense. Given the victim's "unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a *real* gun." (Emphasis added.) *Id.*, ¶ 36. The *Washington* court affirmed a conviction for armed robbery where the victim had a clear view of the object pointed at him and testified that it was a gun, when no gun or gun-like object was recovered and when the defense argued in its directed finding motion insufficient evidence of a firearm as charged, and argued to the jury reasonable doubt from the absence of a recovered weapon. *Id.*, ¶¶ 10-11, 15-16, 34-37.

¶ 28 Since *Ross*, and consistent with *Washington*, we have held that unequivocal and uncontroverted eyewitness testimony that a defendant held a gun is sufficient circumstantial evidence that he or she was armed with a firearm, and the State need not prove with direct or

physical evidence that a particular object is a firearm as defined by statute. *People v. Hunter*, 2016 IL App (1st) 141904, ¶¶ 16-20; *People v. Clark*, 2015 IL App (3d) 140036, ¶¶ 20-29; *People v. Wright*, 2015 IL App (1st) 123496, ¶¶ 74-79, appeal allowed, No. 119561; *People v. Fields*, 2014 IL App (1st) 110311, ¶¶ 34-37; *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 40-52; *People v. Toy*, 407 Ill. App. 3d 272, 286-93 (2011). In so holding, we noted that "unlike in *Ross*, no BB gun or other toy gun was recovered and linked to the crime which could potentially have precluded the jury from inferring that the gun used to commit the crime was not a toy gun." *Clark*, ¶ 28. In other words, the *Ross* court found the evidence insufficient to prove a firearm where the trier of fact credited "the subjective feelings of the victim" over the contradictory "objective nature of the gun" (*Ross*, 229 Ill. 2d at 277), whereas in *Hunter*, *Clark*, *Wright*, *Fields*, *Malone*, and *Toy*, there was no such superior objective evidence.²

¶ 29 Here, a rational trier of fact could have found that Holman was armed with a firearm during the robbery of Lozano. We note that Holman tries to conjure the specter that his gun was a toy, BB gun, or similar non-firearm object from various matters outside the trial evidence and thus beyond our proper consideration. See *Clark*, 2015 IL App (3d) 140036, ¶ 24 ("In support of his contention, defendant cites federal and [sister-State] cases in which police officers mistook fake guns for real guns and includes a photograph of an [object] that would not be considered a 'firearm' under the statutory definition. However, these things were not offered as evidence at trial."). Lozano testified that Holman used a silver revolver in the robbery, at one point threatening to shoot him. Lozano demonstrated some familiarity with guns by describing the

² We have distinguished *People v. Crowder*, 323 Ill. App. 3d 710 (2001), where the issue was not sufficiency of the evidence but a discovery sanction: "whether the trial court properly dismissed the indictment, which charged the defendant with unlawful possession of weapons by a felon and willful use of weapons, where the State destroyed the gun that formed the basis of the charges after the defendant requested to view it" (*Clark*, ¶ 29) thus "precluding the defendant from mounting a defense." *Hunter*, ¶ 19; *Fields*, ¶ 37.

weapon as an "older model" unlike modern firearms he had seen. The weight of the object that Holman used to strike Lozano supports the inference that the object was not a mere toy. The security video corroborates that Lozano saw Holman brandishing an object that he firmly and reasonably believed to be a gun. Lastly, as in *Hunter, Clark, Wright, Fields, Malone, and Toy*, and unlike *Ross*, there is nothing in the record to indicate that the object used in the robbery was recovered and found to be a non-firearm. Therefore, we reject this challenge to Holman's armed robbery conviction.

¶ 30 Finally, Holman contends that his 70-year prison sentence is excessive. Armed robbery is a Class X felony punishable by a prison term of 6 to 30 years, or an extended term up to 60 years, and an additional 15 years must be added when the offender was armed with a firearm. 720 ILCS 5/18-2(a)(2), (b); 730 ILCS 5/5-4.5-25(a) (West 2014). A defendant may receive an extended term for a felony if he has a prior conviction for a felony of the same or greater class, separate from the instant offense, within 10 years not including time in custody. 730 ILCS 5/5-5-3.2(b)(1) (West 2014).

¶ 31 A sentence within statutory limits is reviewed for an abuse of discretion, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. The court's broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). In imposing a sentence, the trial court balances the relevant factors including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *People v. Abrams*, 2015 IL App (1st) 133746, ¶¶ 32-33. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the

severity of the offense, nor does the presence of mitigating factors require a minimum sentence. *Alexander* at 214; *Abrams*, ¶ 34.

¶ 32 Here, Holman does not dispute that he was eligible for an extended term or the firearm enhancement nor that the applicable sentencing range was 21 to 75 years but argues that an extended-term sentence was inappropriate. While he notes that Lozano did not suffer great bodily harm, the court found him guilty of aggravated battery before merging that offense into armed robbery at sentencing. Also, it is clear from Lozano's testimony and the security video that Holman's crimes terrorized him and put him in fear for his life. While displaying a gun is virtually inherent in all armed robberies committed with a firearm, pointing it and striking a person with it so that blood is drawn are not. Neither is yelling commands and punctuating them liberally with vulgarities to instill in the victim the belief that the offender is dangerous and likely to kill him. Moreover, Holman's lengthy criminal history, culminating in 10 armed robberies, belies his argument for rehabilitative potential. We note particularly that his 16-year sentence for those armed robberies was reduced to 8 years in 2009 but, rather than take the opportunity to redirect his life, he committed yet another armed robbery. In sum, the crime itself and Holman's lengthy criminal record bear out the court's finding that Holman presents a danger to society meriting both an extended term and a sentence at the higher end of that range.

¶ 33 Against the weight of aggravating factors, Holman argues that his sentence is excessive because of his advanced age, difficult childhood, alcohol and substance abuse, education, and his young and ailing child. However, the trial court was apprised of these factors, and we see no evidence that it did not give them due consideration. Holman's argument that his sentence should be reduced because his "advanced age" of 42 years renders him "nearly elderly" for criminological purposes is without merit. We can see *no* basis to find that the trial court was

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required to label Holman as "Low-Risk" and unlikely to "inflict little harm," given his current offense. We conclude that the court did not abuse its considerable discretion in sentencing Holman to 70 years' imprisonment.

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

¶ 35 Affirmed.