2016 IL App (1st) 153564-U
No. 1-15-3564

THIRD DIVISION
May 4, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the Circuit Court
	)	of Cook County.
IN THE INTEREST OF,	)	
	)	
	)	No. 15 JD 2412
	)	
DEMARLON J., a minor,	)	
	)	The Honorable
Respondent-Appellant	)	Kristal Royce Rivers,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* circuit court order adjudicating minor respondent delinquent of robbery and aggravated battery affirmed where the State proved beyond a reasonable doubt that respondent committed the offenses; circuit court order adjudicating respondent delinquent of the offenses of theft and theft from a person vacated where the adjudications violated the one-act, one-crime doctrine.

¶ 2 Minor respondent was adjudicated delinquent of the offenses of robbery, theft, theft from a person, and aggravated battery in juvenile proceedings governed by the Juvenile Court Act of 1987 (705 ILCS 405/5-101 *et seq*. (West 2012)) and was sentenced to two years' probation. On

appeal, respondent challenges his delinquency adjudications, arguing that the State failed to prove him guilty of the offenses beyond a reasonable doubt. He also raises a one-act, one-crime violation argument. For the reasons explained herein, the judgment of the circuit court is affirmed in part and vacated in part.

¶ 3 BACKGROUND

¶ 4 On July 23, 2015, 24-year old Jonathan Todd was attacked by a group of eight young men who punched and kicked him and stole his cellular phone. Fifteen-year old respondent was subsequently arrested in connection with the incident and the State filed a petition for adjudication of wardship alleging that respondent had committed multiple offenses including: robbery (720 ILCS 5/18-1 (West 2012), theft from a person (720 ILCS 5/16-1(a)(1) (West 2012), theft (720 ILCS 5/16-1(a)(1) (West 2012) and aggravated battery (720 ILCS 5/12-3 (West 2012).

¶ 5 At respondent's adjudication hearing, Todd testified that at approximately 9 p.m. on July 23, 2015, he was walking home. Although it was dark outside, street lights illuminated the area. As he neared the area of 2500 West Madison Street, Todd recalled that he was having a conversation with his cousin on his cellular phone. He was using his headset and his phone was in his back pocket. During his conversation, he was approached by a group of "like eight guys." Todd testified that he had recently passed the same group of guys on his walk home. He had been within "very close" proximity to the group and had been able to see their faces clearly. He confirmed that respondent was a member of the group that he observed. This time, one of the members of the group approached him and asked Todd for the time. When he replied that he "d[id]n't have it," the young men "started punching" him. Initially, Todd's assailants began "punching [him] in the face." After Todd fell to the ground, they began to kick him "in [his] stomach about five times." Someone then reached into his pocket, took his cell phone and told

the rest of the group, "I got it now." The group then "ran off real fast." Todd confirmed that respondent was a member of the group and further confirmed that all of the members of the group ran off "together."

¶ 6 Once his assailants left the scene, Todd testified that he got up off the ground, ran across the street and asked "two young ladies to call the police for [him]." When police officers arrived on scene, Todd relayed that he had been the victim of a robbery. He was then directed to take a seat in the officers' squad car and was driven around the block where respondent and another individual had been detained. Although it was dark out, the lights on the squad car illuminated the suspects' faces and Todd identified respondent as one of the members of the group that punched him, kicked him and stole his cellular phone. Todd testified that he made his identification from the backseat of the squad car and acknowledged that he did not recall exactly how far away the squad car was from the suspects when he made his positive identification.

¶ 7 On cross-examination, Todd testified that when he had seen the group the first time, the young men had been walking in front of him and that he had passed them from behind. He acknowledged that he could not describe the clothing of the individual who had asked him for the time, explaining that he had been punched within "seconds" of the request. Todd confirmed that he was wearing glasses at the time of the attack and that they were knocked off of his face. Accordingly, he was not wearing his glasses for most of the attack. He also confirmed that when he fell to the ground, he curled up into a ball and was not able to see the faces of the specific individuals who were attacking him. He was similarly unable to see the face of the person who removed his cell phone from his pocket. Todd testified that he only recovered his glasses after his assailants ran away. The frame was broken, but the lenses were intact. Todd confirmed that

when he was taken by the police to view the two suspects that police had apprehended, respondent and the other suspect were already handcuffed.

¶ 8 Chicago Police Officer Sehner testified that at approximately 9:30 p.m., he and his partners overheard a "flash message" about a robbery that had recently occurred near the area of 3500 West Madison Street. As he approached the area of 115 South St. Louis, he observed two individuals matching the descriptions provided in the flash message and detained them. Todd was subsequently brought to their location by other officers responding to the call. Todd remained seated in a squad car approximately 10 feet away and Officer Sehner used a flashlight to illuminate the faces and the two suspects. Todd identified respondent as one of the individuals who had robbed him earlier that evening. On cross-examination, Officer Sehner confirmed that respondent was in handcuffs and standing near a marked squad car at the time that Todd made his positive identification.

¶ 9 After presenting the aforementioned witnesses, the State rested its case and respondent moved for a directed finding, which the circuit court denied. Respondent elected not to testify and his attorney called no witnesses. Thereafter, the parties delivered closing arguments. The circuit court, after hearing the evidence and the arguments advanced by the parties, adjudicated respondent delinquent of robbery, theft, theft of a person, and aggravated battery. The court explained its rationale as follows:

> "I think the most important thing that was said during the testimony was that the witness, who I did find to be very credible, identified the defendant or the minor, excuse me, as the—being a part of the group. He called them they, he called them the boys and the prosecution specifically asked in almost all of the questions, they or the boys, the group included the minor respondent.

Although the prosecution did not ask specifically at what point did you see the respondent—I'm sorry, the minor, I believe that the witness' repeated testimony or repeated response to the testimonies or response to questions that were asked did this include the minor respondent and then the ability of the witness to be able to later identify the minor respondent, means that at some point he did see him.

It is true that the witness was very honest in the fact that he's not sure who was hitting him or who was punching him, but he was sure that the minor respondent was a part of the group. On that he was adamant.

So I do find that minor respondent aided in the commission of all four of the alleged offenses. And I do find the minor to be delinquent or guilty."

¶ 10 Respondent was subsequently sentenced to 2 years' probation and this appeal followed.

¶ 11 ANALYSIS

¶ 12 Sufficiency of the Evidence

¶ 13 On appeal, respondent challenges the sufficiency of the evidence. Specifically, he challenges the reliability of Todd's identification testimony, arguing that he had a limited opportunity to view the offenders. Alternatively, respondent argues that the State failed to present sufficient evidence that he was accountable for the actions of the group that attacked Todd given that Todd did not specifically see respondent punch and kick him.

¶ 14 The State responds that that "minor-respondent was proven guilty beyond a reasonable doubt where his identity was established, the identification procedure was proper, and the evidence supported his guilt based upon a theory of accountability."

¶ 15 Due process requires proof beyond a reasonable doubt to convict a defendant of a criminal offense. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This standard is applicable to

juvenile delinquency proceedings. *In re Jonathan C.B.*, 2011 IL107750, ¶ 47. In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *In re Jonathan C.B.*, 2011 IL107750, ¶ 47; *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 16 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed a crime. 720 ILCS 5/3-1 (West 2008); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d 332, 341 (2010). 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). In assessing a witness's identification testimony, courts employ the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and adopted by

our supreme court in *People v. Slim*, which include: (1) the opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the certainty of the witness's identification; and (5) the length of time between the offense and the witness's identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08. No one single factor is dispositive; rather, the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87. Ultimately, where, as here, a defendant's guilt and identity as the offender are dependent upon eyewitness testimony, the relevant inquiry on appeal is whether the circuit court could reasonably accept the eyewitness identification testimony as true beyond a reasonable doubt. *People v. Williams*, 2015 IL App (1st) 131103, ¶ 69.

¶ 17 Applying these factors to the instant case, we find that the State presented sufficient evidence to establish respondent's identity beyond a reasonable doubt. Although the crime occurred sometime around 9 p.m., Todd testified that the area was illuminated by street lights, which allowed him to observe the individual members of the group who attacked him and stole his cell phone. Todd further testified that he actually had two opportunities to view respondent. He first viewed respondent and the other members of the group when they were walking ahead of him and he passed them from behind. At that time, he was "very close" to the group and was able to see their faces clearly. Shortly thereafter, the group approached him, one member of the group asked the time, and members of the group then struck him and stole his cell phone. Respondent suggests that the brevity of the encounter as well as the problems associated with "nighttime viewing," undermine the reliability of Todd's identification. We acknowledge that the conditions may not have been ideal and that Todd's interactions with the group were brief; however, these factors do not necessarily undermine a witnesses's identification testimony. See,

e.g., *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (finding that the witness had sufficient opportunity to view his assailant where the witness testified that he viewed the offender's face for a "few seconds" in a dimly lit store); *People v. Cox*, 377 Ill. App. 3d 690, 697 (2007) (recognizing that "testimony based on night observations illuminated only be artificial light may serve as proof of identification beyond a reasonable doubt").

¶ 18 Regarding the witness's degree of attention, there is no dispute that during the attack, Todd was trying to protect himself and therefore, he did not see the faces of the specific individuals who punched him in the face and kicked him in the stomach. He likewise did not see the face of the individual who removed his cell phone from his pocket. Todd, however, recognized that his assailants were the eight teenagers whom he had recently passed in the street. As previously stated, Todd testified that he had been "very close" to respondent and the other members of the group and had clearly seen their faces. Therefore, although respondent is correct that high levels of stress can, in certain circumstances, diminish an eyewitness's ability to recall, we note that Todd was not under high stress when he observed the group including respondent, the first time.

¶ 19 Turning to the third factor, we note that it does not appear that Todd provided police with detailed descriptions of the offenders; rather, he simply testified that the group had been comprised of eight young African American men. Therefore, as respondent concedes, this factor is "neutral." The record similarly contains no evidence as to the degree of certainty that Todd expressed when he identified respondent from the show-up that was conducted within minutes of the offense. Thus, this factor too, is neutral.

¶ 20 Respondent acknowledges that the final factor—the length of time between the offense and the witness's subsequent identification— weighs in favor of the State. See, *e.g.*, *People v.*

Hope, 22 Ill. App. 3d 721, 724-25 (1974) (recognizing that the short time that had elapsed between the crime and the identification enhanced the credibility of the witnesses identifications). Based on the record, only a short time had passed between the time that Todd was beaten and robbed and his subsequent positive identification of respondent as one of the offenders. Respondent, however, argues that the identification procedure utilized in his case was unduly suggestive. He emphasizes that during the show-up, he was handcuffed and flashlights were shined on his face. Initially, we note that respondent never filed a motion to suppress in which he challenged the show-up or Todd's identification in the circuit court. Moreover, it is well-established show-ups are not categorically improper; rather " 'show-up' identification procedures are appropriate in situations involving a fleeing offender." *People v. Johnson*, 262 Ill. App. 3d 781, 792 (1994); see also *People v. Thorne*, 352 Ill. App. 3d 1062, 1076 (2004) ("Illinois courts have long held that an immediate show[-]up identification near the scene of the crime is proper police procedure"). Additionally, neither the use of handcuffs nor flashlights during a show-up automatically weakens a witness's identification. See, *e.g.*, *People v. Howard*, 376 Ill. App. 3d 322, 331 (2007) (recognizing that "a show[-]up, even conducted with a suspect in handcuffs, does not automatically weaken the veracity of an identification."); *People v. Rodriguez*, 387 Ill. App. 3d 812, 832 (2008) (rejecting the defendant's argument that the use of flashlights rendered the show-up improper, reasoning: "[T]he lighting was a necessary part of the procedure to ensure that the eyewitnesses had adequate lighting to make a reliable identification at night").

¶ 21 After reviewing the relevant factors, we acknowledge that the evidence in this case was not overwhelming. We emphasize, however, that "[w]hen examining the sufficiency of the evidence, the issue is not whether the evidence was close but whether *any* rational trier of fact

could have found defendant guilty beyond a reasonable doubt." *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 90. Here, the court heard Todd's identification testimony and found him to be "very credible." We reiterate that the reliability of a witness's identification of a defendant is a matter for the trier of fact (*In re Keith C.*, 378 Ill. App. 3d at 258) and conclude that based on the record, a reasonable trier of fact could have found Todd's testimony sufficient to establish respondent's identity as one of the offenders beyond a reasonable doubt.

¶ 22 Respondent, however, argues that his delinquency adjudication should nonetheless be reversed because the State failed to present sufficient evidence that he was "accountable for the actions of the eight people who attacked Todd, as Todd did not see [respondent] himself punch him, kick him, or take his phone, and the encounter was over so quickly that there was no evidence [respondent] would have even known what was happening until it was over."

¶ 23 "Accountability focuses on the degree of culpability of the offender and seeks to deter persons from *intentionally* aiding or encouraging the commission of offenses." *People v. Perez*, 189 Ill. 2d 254, 268 (2000). In accordance with section 5-2(c) of the Criminal Code of 2012, a person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012); *People v. Cooper*, 194 Ill. 2d 419, 434 (2000). To prove that a defendant had the intent to promote of facilitate the commission of a crime, the State must establish beyond a reasonable doubt that the defendant either shared a criminal intent of the principal offender or that there was a common criminal design. *People v. Fernandez*, 2014 IL 115527, ¶ 13; *Perez*, 189 Ill. 2d at 266; *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009). The intention of a defendant may be inferred from the character of his acts as well as from the

circumstances surrounding the commission of the charged offense. *Perez*, 189 Ill. 2d at 266. Similarly, the existence of a common design or purpose may also be inferred based upon the surrounding circumstances. *Velez*, 388 Ill. App. 3d at 512 (recognizing that "words of agreement are not necessary to establish such purpose or design"). Where "2 or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts." 720 ILCS 5/5-2(c) (West 2012); *People v. Fernandez*, 2014 IL 115527, ¶ 13. Although a defendant's mere presence at the scene of a crime or his flight from a crime scene, alone, is insufficient to establish a defendant's accountability, the fact-finder may consider these factors in determining whether he is legally accountable. *Perez*, 189 Ill. 2d at 267; see also *People v. Phillips*, 2012 IL App (1st) 101923, ¶ 11.

¶ 24 Here, viewing the evidence in the light most favorable to the State, we find that the State presented sufficient evidence to prove respondent delinquent beyond a reasonable doubt pursuant to an accountability theory. The evidence adduced at trial, established that a group of eight young men observed Todd talking on a cell phone and approached him. One member of that group asked Todd for the time and the other members of the group began to immediately assault Todd, punching him in his face and kicking him in his stomach. After one of the group member's reached into Todd's pocket and removed his phone, the group ran from the scene together. Although Todd testified honestly that he did not know the identity of the individual who asked for the time or the identity of the person who removed his cell phone, he testified clearly that he was attacked by the group. Todd further testified that respondent was a member of that group. While Todd could not identify which of the boys inflicted which blow, the

evidence, viewed in the light most favorable to the State supports the circuit court's finding that "respondent aided in the commission of all four of the alleged offenses." In so finding we acknowledge respondent's argument that there was insufficient evidence to prove him guilty under a common design theory given that this case did not involve a "textbook application of the common design rule," where two or more people set out to commit one offense but ultimately commit an unplanned offense. See *Fernandez*, 2014 IL 115527, ¶ 14 (citing *People v. Kessler*, 57 Ill. 2d 493 (1974)). We agree those cases are inapposite. But we do conclude that the evidence was sufficient to find that eight individuals set out to rob Todd of his phone and respondent is accountable because he aided and abetted the group in committing that offense.

¶ 25 We are also unpersuaded by respondent's argument that reversal is warranted because the court's statements at his sentencing hearing indicate that the court "misunderstood and misapplied the law of accountability." Specifically, at respondent's sentencing hearing, the court stated:

> "My mother had a saying called everybody goes when the wagon comes. And what that meant was if you're standing around trouble and the police show up, everybody gets picked up.
>
> I read in the social investigation report that that's your defense. That you're saying that it wasn't you and you just happen[ed] to be in the wrong place at the wrong time and got picked up wrongly. I hope that's not the case because I certainly don't want to be wrong in finding you guilty. I don't believe that; however, I do know that [when] you are hanging out with friends that are in gangs things can happen and you could be picked up and it could not be you and you could easily go down for it.

> So one of the things that I'm going to do is I'm going to say as part of your probation you can't hang out with those people. You have to stay away from them, because I don't want you to go when the wagon comes. You got it."

¶ 26 Respondent argues that "in stating that [respondent] could 'easily go down' for something that his friends did, but that he did not do, the court indicated that [it] believed that [respondent] could be held accountable for his association with his friends, and his mere presence at the scene of the offense." We disagree. When the court's statement is read in context, it is apparent that the court was admonishing respondent that his continued friendship with acknowledged gang members was not advisable. It is evident from the court's statement that it did not adjudicate respondent delinquent merely because he was present at the scene of the crime; rather, the court clearly indicated that it did not believe respondent's account of the events that transpired. The record thus does not reveal that the circuit court misunderstood or misapplied the principle of accountability.

¶ 27 One-Act, One-Crime

¶ 28 Finally, respondent asserts, and the State agrees, that his delinquency adjudications for the offenses of theft and theft from a person should be vacated because they arose out of the same physical act that formed the basis for his robbery adjudication. He contends that his multiple adjudications violate the one-act, one-crime doctrine.

¶ 29 Pursuant to the one-act, one-crime rule, a defendant may not be convicted of more than one offense arising out of the same criminal act. *People v. King*, 66 Ill. 2d 551, 559-66 (1977). This rule applies to juvenile proceedings. *In re Samantha V.*, 234 Ill. 2d 359, 375 (2009); *In re Jessica M.*, 399 Ill. App. 3d 730, 741 (2010).

¶ 30 Here, the State's petition for delinquency alleged that respondent committed the offenses of robbery, theft, and theft from a person.[1] All of these offenses were based on respondent's act of taking Todd's cellular phone. Because each of the offenses stemmed from the same act, respondent's multiple delinquency adjudications cannot stand. *Samantha V.*, 234 Ill. 2d at 375; *Jessica M.*, 399 Ill. App. 3d at 741. The proper remedy for a one-act, one-crime rule violation is to vacate the less serious offenses and enter a single finding of delinquency on the most serious offense. *Samantha V.*, 234 Ill. 2d at 380. Because robbery is the more serious offense, we vacate his delinquency adjudications for theft and theft from a person.[2] We uphold his delinquency adjudication for the offenses of aggravated battery and robbery.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court is affirmed in part and vacated in part.

¶ 33 Affirmed in part; vacated in part.

[1] For the sake of clarity, we note that the State's petition for adjudication of wardship alleged, and the circuit court found, that respondent also committed the offense of aggravated battery. Respondent's one-act, one-crime argument, however, is solely limited to his theft and theft of a person delinquency adjudications.

[2] Robbery is a Class 2 felony. 720 ILCS 5/18-1(e) (West 2012). Theft of property not exceeding $500, in turn, is a Class A misdemeanor (720 ILCS 5/16-1(b)(1) (West 2012)), and theft of property not exceeding $500 from a person is a Class 3 felony (720 ILCS 5/16-1(b)(4) (West 2012)).