

2017 IL App (1st) 152421-U

No. 1-15-2421

Order filed December 8, 2017

Fifth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 10368
)	
HELAREO HERNANDEZ,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for aggravated robbery affirmed where the trial court's denial of his motion to suppress his identification due to a suggestive lineup was not against the manifest weight of the evidence, and the evidence was sufficient to prove him guilty beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Helareo Hernandez¹ was convicted of aggravated robbery and unlawful restraint. The trial court merged the unlawful restraint conviction into the

¹ Defendant is also known as Fabian Valdez.

aggravated robbery conviction and sentenced defendant to a term of six years' imprisonment. On appeal, defendant contends that the trial court erred when it denied his motion to suppress his identification because the lineup was unduly suggestive, and the State was unable to prove that the victim's identification of him was based solely on her memory of the offense. Defendant also contends that the State failed to prove him guilty beyond a reasonable doubt because the victim's testimony was unconvincing and not credible. We affirm.

¶ 3 Defendant was charged with armed robbery and aggravated unlawful restraint. Immediately before the trial began, defendant submitted a motion to suppress identification testimony alleging that the State's witnesses viewed a lineup that improperly suggested that he was the offender. Defendant claimed that disparities in age, height, weight, dress, complexion, and other distinguishing characteristics, including the absence of pronounced facial hair on the other participants, made the lineup improperly conducive to misidentifying him. Defendant requested that the court suppress the witnesses' pretrial and in-court identifications of him.

¶ 4 At a hearing on the motion, defendant presented testimony from Chicago police detective Gorman who was present during the lineups. Gorman testified that a photograph of the lineup accurately reflected how the participants looked, and that four out of the five participants had facial hair. The first participant had hair above his lip, on both sides around his chin, and under his chin. The second participant had hair under his lip and on his chin. The third participant had a moustache, and the fourth participant, defendant, had hair above his lip and on his chin.

¶ 5 During cross-examination, Gorman testified that he assisted with the investigation of an armed robbery which occurred at approximately 4:50 p.m. on April 30, 2013, at Lopez Liquors. Gorman viewed video surveillance from the store. He also learned from other officers that three

witnesses gave a description of the offender, describing him as a male white Hispanic with a light brown complexion and tan brown hair, approximately 5 feet 10 inches tall, 145 to 170 pounds, and 30 to 39 years old. The offender wore a black hooded sweatshirt tied around his face and “rain green pants.” The description did not include any indication that the offender had facial hair or a full beard. After viewing the surveillance videos, Gorman and Officer Murtaugh had an idea of the individual they were looking for. Murtaugh told Gorman that two of the witnesses informed him that they recognized the offender as a customer from the store.

¶ 6 On May 11, 2013, Murtaugh notified Gorman that an individual was in custody on an unrelated charge who he believed matched the description of the offender in this case. That person was defendant. Gorman was unable to prepare a lineup that day because he could not locate enough individuals with the same physical characteristics. Gorman and Detective Anderson worked throughout that day and into the next day trying to find participants. The following day, they had enough people for the lineup. Defendant chose to stand in the fourth position. The clothing defendant wore during the lineup was the same clothing he wore when arrested.

¶ 7 Three witnesses from the store viewed the lineup on May 12, 2013. Store owner Rigoberto Lopez was not present during the robbery, but had viewed the store’s surveillance video several times. Lopez told police that he recognized the offender as a regular customer, and he was certain that the man had been in the store the day before the robbery. The lineup was also viewed by Tanina Rodriguez and Yolanda Garcia. Police explained the lineup advisory form to all three witnesses in both English and Spanish. The witnesses were informed that the suspect may or may not be in the lineup, and that they were not required to make an identification.

¶ 8 Lopez viewed the lineup at 9:45 p.m. and identified defendant as the robber. Rodriguez viewed the lineup at 9:47 p.m. and also identified defendant. Garcia viewed the lineup at 9:49 p.m. and identified defendant as the man who robbed her at gunpoint. When each witness viewed the lineup, the only other people in the room were Gorman and Officer Hernandez, and Detective Anderson was standing nearby.

¶ 9 Gorman identified two photographs of the lineup which depicted defendant standing in the fourth position. In one photo, the participants were facing forward, and in the other, they were turned to the side. The photos were taken several hours after the lineups were conducted. Gorman testified that the photos accurately depicted the way the lineup appeared to the three witnesses, except that the man standing in the fifth position was wearing a blue hooded sweatshirt in the photos, but during the actual lineup wore a white T-shirt without the sweatshirt.

¶ 10 On redirect examination, Gorman acknowledged that defendant was the only person wearing light-colored pants. The first three men were wearing black or navy shirts, the fifth man wore a white T-shirt, and defendant wore a tan shirt. On re-cross examination, Gorman confirmed that the witnesses did not describe the offender as wearing a white T-shirt or light-colored pants, and they did not mention any facial hair. The witnesses said the robber wore a black hooded sweatshirt, and in the lineup, the third man wore a black sweatshirt and the first two men wore dark-colored T-shirts.

¶ 11 The trial court found that defendant clearly had the heaviest beard out of the men in the lineup. The court noted that the first man had a slight moustache and goatee, the second man had hair under his lip and a partial goatee, and the third and fifth men in the lineup did not appear to have any facial hair. The court also noted that the clothing worn by defendant during the lineup

did not match the description. The court found that while looking at the photograph, each man looked different from the others in certain respects. Defendant stood out, but the second man also stood out due to his extensive tattoos, and the third man stood out because of his young age. The court pointed out that the description from the witnesses did not indicate that the offender had a beard. The court stated “if the fact that the Defendant was the only person with a beard, I would render this suggestive.” However, the court found that when “viewing the totality of the circumstances,” the lineup was not suggestive. Consequently, the court denied defendant’s motion to suppress.

¶ 12 The trial followed immediately thereafter. Both Lopez and Garcia testified with the assistance of an interpreter.

¶ 13 Lopez owned Lopez Liquors at 9700 South Commercial Avenue. The video recorded by the surveillance cameras in his store accurately captured the events of April 30, 2013. While the video was published to the court, Lopez pointed out a person entering his store. The video also depicted that person with money in his hand. Lopez testified that he did not give anyone permission to take money from his store.

¶ 14 Garcia was working as a cashier at the store on April 30 when a man entered the store, pointed a handgun at her, and instructed her to give him the money. He told her to remove the drawer, not to look at him, and not to follow him when he left, or he would shoot her. Garcia was able to see the man’s face. In court, she identified defendant as the robber. Prior to the day of the robbery, Garcia had noticed the defendant in the store as a customer.

¶ 15 Garcia testified that the surveillance video accurately depicted the robbery. As the video played in court, she testified that defendant was the man in the video. She pointed out a man

entering the store with a sweater on his head. She was, however, able to see his face. She indicated where the video showed the man pointing a weapon at her, and she handed him the money. He instructed her to lift up the drawer and she did so. He then grabbed the money and left the store.

¶ 16 On May 12, 2013, Garcia viewed a lineup. Prior to the viewing, the police explained to her that the offender may or may not be in the lineup, and that she was not required to identify anyone. A photograph of the lineup accurately depicted how it appeared that day. When Garcia viewed the lineup, she identified defendant as the person who robbed her on April 30.

¶ 17 On cross-examination, Garcia testified that she viewed the store's surveillance video with Lopez right after the robbery, and before she spoke with the police. She subsequently watched the video three or four times. She did not watch it before she went to view the lineup. Garcia testified that she "recognized him instantly" and "that the day before he had gone to the store." She shared that information with the police. The time stamp on the video indicated that the robber was in the store for 22 seconds.

¶ 18 Defense counsel asked Garcia who was in the room with her when she made her identification at the lineup. Garcia asked "[w]here the police were?" Counsel replied "[y]es." Garcia then replied Gilberto Hernandez, the officer who was in court whose name she did not recall, and a female officer. Counsel then asked "[w]as anyone else in the room with you when you made your identification?" Garcia replied "Mr. Lopez and the girl, the other girl." On redirect examination, Garcia testified that she was alone with the detective when she identified defendant in the lineup. Garcia acknowledged that Spanish was her first language, and that she could communicate a little bit in English.

¶ 19 The State presented a stipulation that Detective Gorman would testify the same as he did at the suppression hearing, except that the court should disregard his testimony regarding the lineup identifications by Lopez and Rodriguez, and any testimony about Officer Murtaugh's conversations with the witnesses that they knew or saw the offender on prior occasions. The State presented a second stipulation that Officer Brienzo was the first reporting officer on the scene, and that his report did not contain any reference about the witnesses having known or seen the defendant inside the store on a prior occasion.

¶ 20 Following the State's case, defendant renewed his motion to suppress the identification based on Garcia's testimony that others were present in the room at the time of her identification. The trial court pointed out that Gorman testified that there were three separate lineups conducted. The court found that there may have been "something gained or lost in translation" and denied the renewed motion.

¶ 21 The court also denied defendant's motion for a directed finding. The court noted that one view from the surveillance video clearly showed Garcia taking money out of the cash register and lifting the drawer to take money out from underneath, but one was completely unable to see the offender. From another view inside the store, one could see a brief glance of the offender as he exited. The video outside the store showed a person with a hood pulled over his head, and some angles showed his beard. The court found that from viewing the video, it could not specifically say one way or the other whether or not defendant was the robber. The court noted, however, that Garcia testified that she knew defendant as a customer and that "she instantly recognized him."

¶ 22 Following closing arguments, the trial court found that the State proved that defendant was the individual inside the store. It found, however, that the State did not prove beyond a reasonable doubt that defendant was armed with an actual firearm. Consequently, the court found defendant not guilty of armed robbery and aggravated unlawful restraint, but instead, guilty of the lesser-included offenses of aggravated robbery and unlawful restraint.

¶ 23 Defendant filed a posttrial motion to reconsider his motion to suppress the identification, maintaining that the lineup was suggestive because he was the only person with a pronounced beard. The trial court acknowledged that defendant had the fullest facial hair, but pointed out that two other men in the lineup had partial facial hair, both with goatees. The court also noted that Garcia testified that she previously saw defendant as a customer. Accordingly, the court denied the motion. The court also denied defendant's separate motion for a new trial. The court then sentenced defendant to six years' imprisonment for aggravated robbery, merging the unlawful restraint conviction into the robbery conviction.

¶ 24 On appeal, defendant contends that the trial court erred when it denied his motion to suppress his identification because the lineup was unduly suggestive. Defendant argues that he looks radically different than the other men because he has the heaviest beard. He claims this factor was suggestive because the surveillance video from outside the store showed that the offender had a beard and moustache. He further argues that his light-colored clothing and lesser weight also rendered the lineup suggestive. In addition, defendant argues that the State was unable to prove that Garcia's identification was based solely on her memory of the offense.

¶ 25 The State responds that the court's denial of defendant's motion to suppress was not against the manifest weight of the evidence because the lineup was not unduly suggestive. The

State points out that the description the witnesses gave police did not indicate whether or not the offender had any facial hair. Furthermore, the evidence showed that the offender wore a sweatshirt tied around that portion of his face. The State points out that defendant was arrested two weeks after the robbery, and he could have grown or shaved his facial hair during that time. The State further argues that defendant's clothing was not suggestive because it did not match the description, and although he was of a slighter build than the other men, his weight matched the heavier end of the description. In addition, the State asserts that defendant's argument that it did not meet its burden to prove that Garcia had an independent recollection of the offender is improper because that issue was never litigated or ruled upon in the trial court after the court found that the lineup was not suggestive.

¶ 26 Our review of the trial court's ruling on a motion to suppress presents questions of both fact and law. *People v. McCarty*, 223 Ill. 2d 109, 148 (2006). The trial court's factual determination that an identification procedure was not unduly suggestive will not be disturbed on review unless it is against the manifest weight of the evidence. *People v. Moore*, 2015 IL App (1st) 141451, ¶ 16. However, the trial court's ultimate ruling on a motion to suppress is a question of law which we review *de novo*. *People v. Close*, 238 Ill. 2d 497, 504 (2010).

¶ 27 A witness' pretrial identification of an accused must be suppressed only where the procedure was unnecessarily suggestive, and there was a substantial likelihood of misidentification. *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 39. It is defendant's burden to prove that the pretrial identification was impermissibly suggestive. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). If he does so, the burden then shifts to the State to show by clear and convincing

evidence that the witness identified defendant based on his or her own independent recollection of the offense. *Id.*

¶ 28 When reviewing a claim of an unduly suggestive identification, the court must consider the totality of the circumstances. *Lawson*, 2015 IL App (1st) 120751, ¶ 39. The court may also consider the evidence presented at trial as well as the suppression hearing. *Id.* “Participants in a lineup are not required to be physically identical.” *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). Differences in the appearances of the participants go to the weight of a witness’ identification, not to its admissibility. *People v. Jones*, 2012 IL App (1st) 100527, ¶ 24.

¶ 29 Here, the record reveals that the trial court’s determination that the lineup was not unduly suggestive was not against the manifest weight of the evidence. Although defendant had a heavier beard and moustache than the other participants, he was not the only person in the lineup with facial hair. Two other men had goatees, and one of those men also had a slight moustache. The police were not required to find someone with a beard and moustache identical to defendant. Significantly, as noted by the trial court, the witnesses’ description of the offender did not include any indication whether or not he had any facial hair. The witnesses informed police that the offender wore a black hooded sweatshirt tied around his face. The surveillance video from inside the store shows the offender with the neckline of his sweatshirt on top of his head and the sleeves tied together in front of his chin where his beard would be. Therefore, it is quite possible that the witnesses did not see defendant’s beard during the robbery. Glimpses of a beard and moustache can be seen at certain angles of the surveillance video recorded outside the store. Regardless, the witnesses never described the offender as having a full beard and moustache, and there is no indication that they identified defendant during the lineup on that basis.

¶ 30 Nor do we find that the lineup was suggestive due to defendant's light-colored clothing. The record shows that the clothes worn by defendant during the lineup were those he was wearing when arrested. He was not ordered to wear the lighter clothing by police, but instead, merely wore his own clothing. The fact that the other men were wearing darker shirts and pants was not by any design of the police to highlight defendant, and thus, was not unduly suggestive. See *Larson*, 2015 IL App (1st) 120751, ¶ 40. In fact, the darker shirts worn by three of the other men during the lineup more closely matched the description given by the witnesses. We note that the photograph of the lineup is a bit misleading in regards to the clothing. Gorman testified that during the actual lineup, the fifth man was wearing only a white T-shirt, which was more similar to defendant's shirt, and he put on the dark-colored sweatshirt after the viewings by the witnesses were complete.

¶ 31 Furthermore, although defendant has a somewhat slighter build than the other men, the difference is not so significant as to render the lineup suggestive. The police were not required to find other individuals who were physically identical to defendant. The photograph shows that all of the men in the lineup are Hispanic, they are roughly the same height, and they all have similar complexions and hair color. In addition, Gorman testified that all three witnesses were told that the suspect may or may not be in the lineup, and that they were not required to identify anyone.

¶ 32 When considering the totality of the circumstances, we find that the trial court's determination that the lineup was not unduly suggestive was not against the manifest weight of the evidence. As the State correctly points out, because the trial court found that the lineup was not suggestive, the burden never shifted to the State to prove that Garcia had an independent recollection of defendant from the offense. We note that at trial, Garcia testified that she

“instantly” recognized defendant because he had been a customer at the store the previous day. Nevertheless, because the issue of establishing Garcia’s independent recollection was never litigated before the trial court, we decline to address that portion of defendant’s argument on appeal. Based on this record, we conclude that the trial court’s denial of defendant’s motion to suppress the identification was proper.

¶ 33 Defendant next contends that the State failed to prove him guilty beyond a reasonable doubt because Garcia’s testimony was unconvincing and not credible. Defendant argues that because Officer Brienzo’s police report did not indicate that Garcia told police that she recognized defendant as a customer at the store, her testimony on that point is suspect. Defendant further argues that Garcia contradicted herself when she first testified that Lopez and Rodriguez were in the room with her when she viewed the lineup, then subsequently testified that they were not, rendering her testimony unreliable. Defendant also claims that Garcia’s identification of him was unreliable because her opportunity to observe him during the offense was very limited, and the identification process was suggestive.

¶ 34 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81

(2009). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 35 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), nor simply because defendant claims that a witness was not credible or that the evidence was contradictory (*Siguenza-Brito*, 235 Ill. 2d at 228). The testimony of a single witness, if positive and credible, is sufficient to sustain a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 36 To prove defendant guilty of aggravated robbery in this case, the State was required to show that he knowingly took money from Garcia by the use of force or threatening the imminent use of force, while indicating to her verbally or by his actions that he was armed with a firearm. 720 ILCS 5/18-1(b)(1) (West 2012). To prove defendant guilty of unlawful restraint, the State had to show that he knowingly, and without legal authority, detained Garcia. 720 ILCS 5/10-3 (West 2012).

¶ 37 Viewed in the light most favorable to the State, we find that the evidence in this case was sufficient for the trial court to find defendant guilty of aggravated robbery. Garcia testified that defendant entered the store, pointed a gun at her, and told her to give him the money. He also ordered her to remove the drawer from the cash register, and told her not to look at him or follow him when he left or he would shoot her. Garcia testified that she could see defendant's face

during the robbery, and she “recognized him instantly” as a customer who had been in the store on the previous day. Garcia identified defendant in a lineup and in court.

¶ 38 The State corroborated Garcia’s testimony with the surveillance video which shows a man entering the store with a sweatshirt tied around his head. He approaches the counter where the cash register is and leans in towards Garcia. Another angle of the video shows Garcia handing the man money and shows her lifting the drawer out of the cash register. As the man leaves the store, he appears to be holding a gun in his right hand and a handful of money in his left hand. The record thus shows that the evidence was sufficient for the trial court to find defendant guilty of aggravated robbery and unlawful restraint.

¶ 39 In making this finding, we reject defendant’s claim that Garcia’s testimony was not credible. The fact that Brienzo’s police report did not indicate that Garcia told police that she recognized defendant as a customer at the store does not make her testimony suspect. Garcia testified that she shared that information with police. She obviously had no control over what information the officer wrote in his report. Moreover, the contents of a police report may only be used to impeach the officer who actually wrote the report. *People v. Gagliani*, 210 Ill. App. 3d 617, 629 (1991). The testimony of a complainant may not be impeached based on an alleged omission in a police report. *Id.*

¶ 40 Nor do we find that there was a significant contradiction in Garcia’s testimony regarding who was present in the room when she viewed the lineup. When initially asked that question on cross-examination, Garcia named Officer Hernandez, the other officer who was in court, who was presumably Gorman, and a female officer, who was likely Detective Anderson. Defense counsel then asked if anyone else was in the room when Garcia made her identification, and

Garcia replied Lopez and Rodriguez. However, on redirect examination, Garcia testified that she was alone in the room with Gorman when she identified defendant. In rejecting this same argument after trial, the court noted that Gorman had testified that the three witnesses viewed the lineup separately. The court found that the discrepancy in Garcia's testimony was due to confusion in the translation with the interpreter. We defer to the finding of the trial court, which was in the superior position to hear Garcia's testimony and resolve the alleged discrepancy.

¶ 41 Finally, we find that Garcia's identification of defendant was credible. Identification of defendant by a single witness is sufficient to sustain a conviction where the witness viewed defendant under circumstances that permitted a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In assessing identification testimony, the court considers: (1) the witness' opportunity to view the offender at the time of the offense; (2) her degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the witness' level of certainty at the identification confrontation; and (5) the length of time between the offense and the identification confrontation. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).

¶ 42 Here, the record shows that the factors support the trial court's finding that Garcia's identification of defendant was credible. The evidence demonstrates that defendant was in close proximity to Garcia during the offense as he leaned against the counter by the cash register. Garcia testified that she was able to see his face and she "recognized him instantly" as a customer who had been in the store the previous day. Thus, Garcia had a good opportunity to view defendant, and her degree of attention was high. Although there was a description of defendant given to police by the witnesses, we do not know which part of that description was specifically given by Garcia. Therefore, we cannot say that the prior description favors either

party. The record further shows that Garcia identified defendant in a lineup less than two weeks after the robbery, and she was certain that defendant was the man who robbed her.

¶ 43 The determination of Garcia's credibility was a matter entirely within the province of the trial court which heard and observed her testify. *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court found her testimony credible, and we find no reason to disturb that determination.

¶ 44 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.