

2018 IL App (1st) 160162-U  
No. 1-16-0162  
Order filed August 10, 2018

Sixth Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 18076
	)	
MICHAEL DIXON,	)	
	)	Honorable William H. Hooks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE DELORT delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

**ORDER**

- ¶ 1 **Held:** We affirm defendant's conviction for aggravated criminal sexual assault, as the victim's identification testimony was reliable, and the trial court's error in recalling evidence did not deprive defendant of his due process right to a fair trial. We modify defendant's mittimus to reflect the correct convictions.
- ¶ 2 Defendant Michael Dixon was found guilty of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(3) (West 2012)) following a bench trial and was sentenced to ten years' imprisonment. On appeal, he argues that the State failed to prove his guilt beyond a reasonable

doubt, his due process right to a fair trial was violated when the judge incorrectly recalled the evidence, and his mittimus is incorrect. We affirm defendant's conviction and correct the mittimus.

¶ 3 Defendant was charged with three counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(2), (3), (4) (West 2012)) and one count each of attempted aggravated robbery (720 ILCS 5/8-4 (West 2012); 720 ILCS (18-1)(b)(1) (West 2012)) and unlawful restraint (720 ILCS 5/10-3 (West 2012)). The State nolle prossed one count of aggravated criminal sexual assault and defendant proceeded to a bench trial on the remaining counts. In relevant part, the State charged that defendant knowingly penetrated the vagina of the victim, J.V., with his finger by force or threat of force, and threatened her by indicating he had a gun.

¶ 4 At trial, J.V. testified that she left work on August 17, 2013, around midnight and went to a bar where she consumed one beer and part of a second. She left the bar around 3 a.m. to go home and felt no effects of the alcohol. Following a 40-minute train ride and a short walk, she arrived at her apartment building on West Albion Avenue. The building had a fluorescent-lit, 25-foot vestibule, which led to another door leading to the apartments.

¶ 5 As J.V. unlocked the vestibule door, she noticed someone was behind her. The man, whom she identified in court as defendant, put his hand around her mouth and pushed her to the opposite wall of the vestibule. J.V. tried to fight him off by throwing her elbows out, kicking, and trying to hit him in the back of his head with her keys. She screamed and defendant told her to "shut up." Defendant had one hand on her mouth and put his other hand up her skirt and put his finger in her vagina, which was "painful." J.V. kept screaming "no" and trying to push defendant away and stab him with her keys. He threatened to shoot her when she kept resisting. Defendant then told J.V. to give him her money. She responded that she had none, and he let go

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of her, giving her the chance to open the door and run to her apartment. J.V. first tried to call two of her friends, who did not answer. Next, she spoke with her mother, and then called the police.

¶ 6 J.V. testified that she was able to see defendant's face when he threatened to shoot her and that they were six inches apart at that moment. Defendant was not directly behind her during the entire attack. He was on her right side and she could see his face when she turned her head. She saw his face for a total of 15 seconds. She testified that she first saw his face for five seconds before he threatened to shoot her, then another five seconds after he asked for her money, and a final five seconds right before he let go of her and ran off.

¶ 7 J.V. then testified that two police officers arrived about 15 minutes later. She told the officers her attacker was in his mid- to late-30's, black, anywhere from 5'8" to 5'11", a wore a polo-type shirt with blue stripes and denim shorts. One of the officers used his radio to relay the description. The officers were with J.V. for about 10 minutes when they brought her to a location on Sheridan Road three minutes away from her apartment. There, she saw defendant with police officers. After having defendant take off the hat he was wearing, J.V. identified him as the man who attacked her. Defendant was not wearing a hat when he attacked her. In court, J.V. was shown a photograph of defendant marked as People's Exhibit 1. She stated she recognized the shirt in the picture as what he was wearing when he attacked her, and that the photograph truly and accurately depicted the way defendant looked the night of the attack. In the photograph, defendant is shown in a black (or dark blue) and white striped shirt with a single narrow purple stripe on the shoulders and a single narrow red stripe across the chest. He appears bald and has a goatee covering his chin.

¶ 8 On cross-examination, J.V. stated she never saw or felt a gun and defendant never tried to take her purse, but just asked for her money. As defendant ran away, J.V. noticed he was wearing

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a striped polo shirt. She told the officers it had blue and gray stripes. She could not recall if she told police it was a polo shirt or that she saw his face. J.V. thought that she told the officers that the man was bald, but did not recall to which officer she told this, or if she provided them an age range or height description. The car ride to the location on Sheridan took no more than five minutes and took place at approximately 4:30 a.m. J.V. was 10 feet away from defendant when she identified him as the man who attacked her. The show-up occurred about 20 minutes after the attack.

¶ 9 Chicago police officer Anthony Zamora testified that he was working on August 18, 2013, with his partner, Officer Accardo, when they received a call to respond to a criminal sexual assault at an apartment complex on Albion Avenue around 4:20 a.m. J.V. gave Accardo a description that her attacker was a black male wearing a blue and white striped shirt and black shorts. The majority of the conversation took place between J.V. and Accardo. The officers had been in the apartment five minutes before Zamora sent out a flash message with this description of the possible suspect. Less than five minutes later, Zamora received a call from patrol officers that they found a suspect matching the description. He asked J.V. to ride with them in the squad car to the 6800 block of North Sheridan, which took about two minutes.

¶ 10 When they arrived, the other officers took defendant out of their squad car and had him face Zamora's car. Zamora identified defendant in court as the man who was brought out of the squad car. J.V. was sitting directly behind Zamora. The officers flashed their spotlights on defendant's face, and J.V. identified him as the man who attacked her. Zamora stated that defendant was wearing a blue and white striped collared shirt and black shorts.

¶ 11 On cross-examination, Zamora stated that he did not think J.V. gave his partner a height description or state that her attacker was bald. He testified that she did not give a weight or body

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type, nor say she saw his face or any facial hair. The flash message he sent specified the clothing description and that the suspect was a black male. Zamora stated the street was lit up and they used the spotlights to illuminate defendant. Zamora noticed defendant had a goatee, and did not see a red stripe on his shirt.

¶ 12 Chicago police officer Liliana Zepeda testified that she was working on August 18, 2013, with field training officer Camp and Officer Collins. Around 4:00 a.m., they received a call of a sexual assault assailant described as a black male wearing a striped shirt that was gray and blue and jean shorts. They were at Sheridan Road and Pratt Boulevard when Zepeda noticed a man matching the description. Defendant passed their vehicle riding a bicycle. The officers followed and stopped him on the 6800 block of Sheridan. One of the officers radioed that they had a possible suspect in custody. Zamora and Accardo arrived on the scene with J.V. in their car. They shined their spotlights on defendant and confirmed over the radio that J.V. identified him as her attacker. Defendant was then placed under arrest and transported to the 24th District police station. Zepeda was shown People's Exhibit 1 and testified that it showed defendant in the same striped shirt as he wore when he was arrested.

¶ 13 On cross-examination, Zepeda stated that the officers followed defendant from behind. Defendant put his bicycle down and tried to blend in with a crowd outside of a bar, but he never ran. The officers told defendant to stop and asked him to walk to them. Defendant was not out of breath, he was not sweating, and he had no injuries on his body. The officers stopped defendant because he matched the description of a black male with a striped shirt and jean shorts. Nothing in the call they received mentioned defendant's complexion or that he was bald or had facial hair.

¶ 14 After Zepeda's testimony, the State rested and the court denied defendant's motion for a directed finding. The parties then stipulated that, if called, Illinois State Police forensic scientist Lisa Fallara would testify that DNA testing of fingernail clippings from both of defendant's hands did not show a match with the DNA profile of J.V. The parties also stipulated that, if called, licensed dentist Dr. Randy Rabin would testify that he saw defendant on November 6, 2013, and treated him for halitosis, bleeding gums, and heavy oral hygiene deficiency. Defendant presented no other evidence or testimony.

¶ 15 In closing, defendant argued in relevant part, mistaken identity. He argued that J.V. was not a credible witness because she was impeached in her testimony when she testified that she told the officers that defendant was a black male, in his mid to late 30's, between 5'8" to 5'11" tall, with a blue striped polo shirt and denim shorts, but the officers testified that the only description they received was of a black man in a striped shirt with black shorts. Defendant also noted inconsistencies in the description of defendant's shirt and the short period of time J.V. had to view her assailant.

¶ 16 The court found defendant guilty of two counts of criminal sexual assault and of attempted aggravated robbery, and not guilty of unlawful restraint. The court stated that J.V. provided "very specific, very clear testimony as to the events that took place on the date of August 18th, 2013," and found her a credible witness. It found that she provided a description of a striped shirt with some sort of color combination and consistent testimony that her assailant wore shorts. The court recalled that the police responded in a timely manner and sent out a "prominent message" with as much information as they had, including the description of a black male, wearing a striped shirt and shorts. The court recalled there was a description of the assailant being broad and 5'8" to 5'11". It stated that the victim and law enforcement officers

testified as to defendant's age and "may have been communicated" his weight. The court found that this description led officers to stop defendant in an area five minutes away from the location of the attack by car. The court found both officers credible. It then examined the factors relevant to identification testimony set forth in *Neal v. Biggers*, 409 U.S. 188 (1972), and found J.V.'s testimony satisfied the factors, and she identified defendant as her attacker beyond a reasonable doubt.

¶ 17 The court subsequently denied defendant's motion to reconsider and sentenced him to 10 years' imprisonment on each count of aggravated criminal sexual assault and 3 years' imprisonment for attempt aggravated robbery, with the sentences running concurrently. However, on defendant's motion to reconsider sentence, the court revised its guilty findings "in the interest of justice" and found defendant not guilty on attempt aggravated robbery, and on the aggravated criminal sexual assault count premised on its occurring during the commission of a felony. The court then reiterated that defendant was sentenced to 10 years' imprisonment on the remaining aggravated criminal sexual assault count premised on the threat to J.V.'s life.

¶ 18 Defendant appeals his conviction, arguing the following: (1) J.V.'s identification of him was insufficient to sustain his conviction and (2) his due process right to a fair trial was violated because the judge incorrectly recalled the evidence. Defendant also argues that this court should remand to the circuit court in order to amend the mittimus because it incorrectly shows defendant was convicted of three offenses rather than one count of aggravated criminal sexual assault.

¶ 19 Defendant first argues J.V.'s testimony was insufficient to prove him guilty beyond a reasonable doubt. When reviewing the sufficiency of the evidence, this court will not retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, we must consider "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.’ ” (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *People v. Howery*, 178 Ill. 2d 1, 38 (1997). Accordingly, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). A reviewing court must draw all reasonable inferences from the record in favor of the State. *Davison*, 233 Ill. 2d at 43. We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 20 To prove defendant guilty of aggravated criminal sexual assault as charged, the State had to demonstrate that defendant committed criminal sexual assault (an act of sexual penetration on J.V. using force or threat of force (720 ILCS 5/11-1.20(a)(1) (West 2012)) and acted in a matter that threatened or endangered her life (720 ILCS 5/11-1.30(a)(3) (West 2012)). Defendant challenges only J.V.’s identification of him as the man who committed the aggravated criminal sexual assault upon her.

¶ 21 There was evidence sufficient to prove defendant guilty of the offense beyond a reasonable doubt. The positive testimony of a single credible witness is sufficient to support a conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Here, approximately 20 minutes after the attack, J.V. positively identified defendant as the man who sexually assaulted and threatened to shoot her in the well-lit vestibule of her apartment building. The trial court found J.V.’s testimony was “very credible” and “very specific” and found that her identification of defendant as her attacker



proved defendant's guilt beyond a reasonable doubt. The court was in the "superior position to assess the credibility of witnesses," and we must give proper deference to its determination that J.V.'s positive identification of defendant as the man who sexually assaulted her was credible. See *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 22 Further, the description that J.V. provided the officers was sufficient to allow them to immediately detain someone matching that description a few blocks away from the scene of the crime. Officer Zamora relayed the description of the attacker as a black man wearing a blue and white striped shirt with black shorts over his radio. Within five minutes, he received word from Officer Zepeda that she had a man in custody a few blocks away. Zamora brought J.V. to the location where defendant was detained. Once defendant took off his hat, J.V. identified him as her attacker. Defendant was wearing a black and white striped shirt that also had one red and one purple stripe. The court found the fact that J.V. did not remember the red and purple stripes insignificant to her identification testimony, and we defer to this determination. See *People v. Soler*, 228 Ill. App. 3d 183, 199 (1992) (in a bench trial, it is for the trial court to judge the credibility of witnesses, determine the weight to be accorded their testimony, and draw inferences from the testimony).

¶ 23 Nevertheless, defendant contends J.V.'s identification testimony was insufficient to prove him guilty beyond a reasonable doubt because she did not have an adequate opportunity to view her attacker, which resulted in a vague description being given to police, and her trial testimony was impeached by the responding and arresting officers' testimony. Defendant argues that J.V.'s testimony was unreliable because she got a "full-frontal" view of his face for 15 seconds, but failed to inform the police that she saw his face and failed to inform them that he had facial hair, a distinctive feature. Defendant similarly argues that J.V.'s testimony that she told the officers

her attacker was “mid to late 30’s, black, about anywhere from 5’8” to 5’11”, in a polo type shirt with blue stripes and denim shorts” and that she believed she told officers that he was bald or slightly bald was impeached by Zamora and Zepeda’s testimony. Zamora testified that J.V.’s description was solely of a black man wearing shorts and a striped shirt that was either blue and white or gray and white, and Zepeda testified that the flash message described the suspect as a black man with a gray and blue striped shirt and jean shorts.

¶ 24 The State must prove beyond a reasonable doubt the identity of the person who committed the charged offense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Vague and doubtful identification testimony is insufficient to sustain a conviction. *Id.* 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. *Id.* When examining a witness’s identification testimony, courts utilize the following factors established by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972): (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 witness’s identification. *Lewis*, 165 Ill. 2d at 356.

¶ 25 J.V. had ample opportunity to view the man who attacked her in the vestibule. The vestibule was lit with fluorescent lights, and she was able to see his face for 15 seconds during the attack, at one point from six inches away. The brevity of the encounter does not render J.V.’s identification of defendant as her attacker unreliable. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 32 (upholding an identification where victims had less than a minute to observe offender); *People v. Barnes*, 364 Ill. App. 3d 888, 894 (rejecting defendant’s argument that identification testimony was unreliable due to the brevity of the witness’s observation).

¶ 26 Although J.V. did not provide officers with every detail of her attacker's appearance, such as that he was bald and had facial hair, it was clear she had a high degree of attention when she was able to provide them with sufficient details that led to the detention of a suspect within five minutes of its transmission. She testified that she told officers her attacker was a black male, mid to late 30's, anywhere from 5'8" to 5'11", wearing a polo type shirt with blue stripes and denim shorts. Zamora testified that the description he sent out over the radio was a black male, wearing a blue and white striped shirt and black shorts. Defendant was located wearing a black and white striped polo shirt that had one purple and one red stripe, and black shorts. There was a discrepancy in the testimony regarding whether J.V. provided officers with a description of defendant's height or build, and she could not remember whether she mentioned his facial hair and that he was bald. However, discrepancies and omissions as to physical characteristics are not fatal to identification; rather, they affect the weight to be given to the identification testimony. *People v. Slim*, 127 Ill. 2d 302, 308 (1989). Thus, J.V.'s failure to initially tell police at the scene everything she observed about defendant is not fatal to her subsequent positive and otherwise credible identification of defendant. See *id.* at 309-10 (compiling cases). A witness is not expected or required to distinguish individual and separate features of a suspect when making an identification. *Id.* at 309. Rather, a witness's positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made. *Id.* The trial court found that J.V.'s description to officers was sufficient despite the color variations of the shirt and the discrepancy regarding what she initially told police. Because it was in the superior position to weigh this testimony, we will not reweigh this evidence. *Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 27 J.V. was consistently certain in her identification of defendant both at the scene and at trial, although she did not specifically testify regarding her level of certainty. Defendant argues that, because J.V. requested that defendant take off his hat before she identified him on the street, she was not certain in her identification. We disagree. J.V.'s attacker was not wearing a hat during the assault, so it logically follows that J.V. would request defendant take off his hat in order to see his face before making her identification.

¶ 28 Lastly, the length of time between the assault and J.V.'s identification of defendant, approximately 20 minutes, strongly supports an inference of reliability in her identification. Defendant admits this factor supports a reliable identification but still argues it is only relevant if she had an adequate opportunity to view her attacker, which he argues she did not.

¶ 29 Weighing the *Biggers* factors and taking the evidence in the light most favorable to the prosecution, a rational trier of fact could have found J.V.'s identification of defendant as her attacker was reliable. Although she failed to mention to police that she saw defendant's face, his shirt had a red and a purple stripe, or he was bald and had facial hair, we do not find her apparent failure to do so renders her identification so unreliable as to raise a doubt of defendant's guilt.

¶ 30 Defendant next argues his due process right to a fair trial was violated when "the judge incorrectly stated that J.V. described her attacker's height, weight, age and build to police on the night of the incident but failed to recall that J.V. was impeached by police testimony regarding her description of the attacker."

¶ 31 The failure of the trial court to recall and consider evidence that is crucial to a criminal defendant's defense is a denial of the defendant's right to due process. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). During a bench trial, a trial judge must consider all matters in the record before deciding the case. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75. If the record

affirmatively shows that the trial court did not remember the “crux” of the defense, the defendant did not receive a fair trial. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. However, minor misstatements by the court that have “no effect on the basis of the trial court’s ruling” and do not “result in a mistake in the decision-making process” will not result in a denial of the defendant’s right to due process. *Id.* at ¶ 107. A claim that the court did not accurately recall the evidence is reviewed under a *de novo* standard. *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 105.

¶ 32 Defendant argues that, when the court found defendant guilty, it incorrectly stated that J.V. gave a more detailed description of her attacker to police than she actually did, and it failed to recall that J.V. was “impeached” by Officers Zamora and Zepeda’s testimonies. Defendant argues this resulted in the court failing to correctly recall and consider evidence critical to their misidentification defense.

¶ 33 During its ruling, the trial court stated that J.V. gave the officers a description of the assailant as being 5’8” to 5’11”, and broad. The court also stated, “There was a weight given to law enforcement. I believe the weight may have been communicated. The weight was not a distinctive weight.” It continued, “There was an age description given. I believe it was from mid to late 30’s basically. That was the testimony of the victim. And there was some testimony from the law enforcement officers as to what they recalled the age description was.”

¶ 34 Defendant argues that these statements made by the trial court resulted in the denial of his due process right to a fair trial because J.V. was impeached on her claim that she told police anything beyond defendant’s race, gender, and clothing. Specifically, Officer Zamora denied that J.V. had described her attacker’s height, weight, body type, baldness, or given a description of his facial hair, which was corroborated by Officer Zepeda’s testimony that the radio description

only included race, gender, and a clothing description. Zamora also stated he did not think J.V. gave a height in her description, and neither officer testified as to any age description from J.V.

¶ 35 While the court's recitation of the evidence was not precisely accurate, we do not find that this fact affirmatively shows that it failed to accurately recall evidence that was crucial to defendant's defense. The crux of defendant's argument at trial was that J.V.'s identification was unreliable and that she had identified the wrong man. The record shows the court addressed this defense directly. For example, when reviewing J.V.'s testimony, the court acknowledged the contradictory testimony regarding defendant's shirt, stating "the description provided with respect to the striped shirt and shorts, there was some testimony as to various combinations of the striped shirt. Black and white, gray and white, at the minimum blue and white. There was consistent testimony that the assailant wore shorts." It agreed with defendant's argument that there was no testimony by J.V. concerning the defendant's complexion or facial hair. It also noted J.V. "may have" communicated defendant's weight to police, demonstrating it was aware of the contradictory testimony in this regard. Our review of the court's detailed findings shows it was well aware of the gist of defendant's arguments, and took defendant's extensive misidentification argument into consideration in making its findings. It is clear that the trial court did not consider only J.V.'s testimony regarding the description she provided to the officers, but also considered the officers' testimony demonstrating otherwise. Accordingly, the record shows the court's misstatements were minor and did not affect the fairness of defendant's trial.

¶ 36 Lastly, the parties agree the mittimus is incorrect. The mittimus reflects defendant was convicted of two counts of aggravated criminal sexual assault and one count of attempt aggravated robbery. We agree it must be amended to reflect the court's oral pronouncement that defendant was convicted of only one count of aggravated criminal sexual assault/threat to life.

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*People v. Jones*, 376 Ill. App. 3d 372, 395 (2007) (when an oral pronouncement of the court and written order are in conflict, the oral pronouncement controls). Remand is unnecessary because, under Illinois Supreme Court Rule 615(b)(1), the appellate court may modify any order entered by the circuit court. Therefore, we correct the mittimus to reflect defendant's single conviction on Count 2 for aggravated criminal sexual assault/threat to life.

¶ 37 Affirmed as modified.