

2018 IL App (1st) 160648U

No. 1-16-0648

Order filed August 13, 2018

FIRST 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.)	Nos. 15 CR 5934
)	15 CR 5935
)	15 CR 5936
)	
JOSEPH TALLEY,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to prove defendant guilty of theft beyond a reasonable doubt over his contentions that the witnesses' identifications of him were unreliable and the photographic array procedure used was flawed.

¶ 2 Following a bench trial, defendant Joseph Talley was convicted of three counts of theft (720 ILCS 5/16-1(a)(1) (West 2014)) and sentenced to two years of felony probation on each count, to be served concurrently, and ordered to participate in a substance abuse treatment program commonly known as “TASC.” On appeal, defendant contends he was misidentified as the individual who participated in the thefts because the witnesses’ identifications of him were unreliable and the photographic array procedure used was flawed. We affirm.

¶ 3 In three separate cases, defendant was charged with committing theft at various T-Mobile stores located in Chicago. The three cases were presented in the same bench trial. A T-Mobile employee from each store testified about the respective theft incidents. Each witness positively identified defendant in a photographic array and at trial as one of the persons who used wire cutters to remove phones and tablets from displays.

¶ 4 Michael Roeder, the store manager of the T-Mobile store located at 1639 North Milwaukee, in Chicago, testified that, at about 12:55 p.m., on July 23, 2014, three African American men came into the store. Roeder, who was standing in the middle of the store, greeted them. The men went straight to the equipment located to the right of the front door and used a wire cutter to clip the cords securing the items to the display case. It took them about 20 or 25 seconds to retrieve the display items, which included phones and tablets. As soon as the men removed the items, they walked out of the store, down the street, and took an immediate left on a side street.

¶ 5 Asked whether he could see the faces of the individuals, Roeder testified “[t]hey walked right through me. Yeah.” On August 6, 2014, Roeder met with Chicago police detective Patricia Pedroza and, before he viewed a photographic array, he read, signed, and understood the

contents of a photograph spread advisory form. Roeder identified defendant in position number two of the photographic array as one of the individuals involved in the theft. Roeder identified defendant in court as one of the three individuals who was involved in the theft.

¶ 6 Video surveillance consisting of three different video clips was taken from the incident. The State played a portion of the video and Roeder testified that one video clip showed three individuals walk into the store, clip the wire from the products, and leave. Roeder testified that another video clip showed three men leaving the store and a portion of their persons or faces. Neither defendant nor the other two men had consent or authority to take possession of the items and remove them from Roeder's store.

¶ 7 On cross-examination, Roeder testified that the T-Mobile store was relatively small. When the men walked into the store, one of Roeder's employees said "hello" to the men and then Roeder walked over to them and said "hello." The individuals walked by him, did not make eye contact, and were focused on the wall so their faces were away from Roeder. When the men were clipping the items from the display, their backs were facing Roeder, who was about 10 feet away from them. Roeder did not see where the individuals put the devices after they removed them. Roeder identified defendant in the video.

¶ 8 Roeder testified that he would describe defendant as having "darker" skin and he described the offenders to the police after the incident as "medium brown complexion." He told the police after the incident that the offenders were: (1) 6 foot 2 inches tall and weighed 225 pounds with dreads; (2) 6 foot 2 inches tall and weighed 200 pounds with an "afro-style haircut"; and (3) 6 foot 2 inches tall and weighed 170 pounds. The photographic array that Roeder viewed

did not have defendant's height or weight because the photographs were just faces. Roeder was 5 foot 11 inches tall and believed all of the suspects were taller than him.

¶ 9 Vyacheslav Shtern testified he was the retail store manager at the T-Mobile store located at 4809 West Irving Park Road, in Chicago. At about 12:45 p.m. on July 26, 2014, defendant, whom Shtern identified in court, and at least two other individuals entered the store, went straight to the "demo" devices, and cut them off. Shtern was about five or six feet away from the individuals and nothing obstructed his view of defendant's face. Neither defendant nor the other individuals had consent or authority to take possession or remove the items. On August 6, 2014, Shtern met with Pedroza and read, signed, and understood a photograph advisory form. Shtern viewed a photographic array of six different individuals and identified defendant in slot number two as one of the offenders.

¶ 10 On cross-examination, Shtern testified that about four employees were working at the store on July 26, 2014, they were positioned by the door, the business was slow, and they were just waiting to get customers into the location to greet them. Shtern did not see where the offenders put the stolen items and the whole incident took under two minutes.

¶ 11 After the incident, Shtern told the police that one of individuals was 5 foot 10 inches tall and weighed 170 pounds and could not recall whether he described another offender as being 6 foot 2 inches tall and weighing 200 pounds. Shtern testified he was 5 foot 11 inches tall and the offenders were about the same height as him. In the photographic array that Shtern viewed on August 6, 2014, he could not tell the height or weight of the individuals in the photographs.

¶ 12 Justin Anderson testified that he was a sales associate at the T-Mobile store located at 1958 West Irving Park Road, in Chicago, and on July 11, 2014, at about 1:50 p.m., two

individuals entered the store, went to the front, and took two phones by cutting the security cords. Anderson identified defendant in court as one of the individuals. He testified that the individuals' faces were not covered and nothing obstructed his view of their faces. After the offenders cut the phones, they left the store probably within one minute.

¶ 13 On August 7, 2014, Anderson met with Pedroza and read a photograph spread advisory form, signed it, and understood its contents. Anderson was shown a photographic array consisting of six different individuals and he identified defendant in slot number two as one of the two people who took the phones.

¶ 14 On cross-examination, Anderson testified that, when the individuals came into the store, he was behind the counter, which was about four or five feet from the front door, and greeted them. They did not respond. The individuals stood in the store for about a minute or a minute and a half before they did anything. Anderson and his employees walked up to the individuals who were looking around for a second. Asked whether it was fair to say that the view he had was the "back of the head for the most of the time," Anderson responded, "[o]n the side, probably the front side." The whole incident took about five minutes. After the incident, Anderson told the police that the individuals were between 20 to 25 years old, one offender was 5 foot 11 inches to 6 foot tall and weighed 160 pounds, and another offender was 6 foot 2 inches tall and weighed 200 pounds.

¶ 15 In the photographic array that Anderson viewed on August 7, 2014, he could not tell the height or weight of the individuals in the photographs. During Anderson's testimony, the parties stipulated that defendant was introducing as an exhibit video surveillance from the incident at Anderson's store.

¶ 16 Chicago police detective Patricia Pedroza testified that, on August 6, 2014, she showed Roeder a photographic array and Roeder identified the person in position number two, or the top middle, as the person who participated in the theft at his store. On August 6, 2014, Pedroza showed Shtern a photographic array and Shtern identified the person in the top middle portion of the array as the person who participated in the theft at his store. On August 7, 2014, Pedroza showed Anderson a photographic array and Anderson identified the person in position number two, or the middle top area, as the person who participated in the theft at his store. Pedroza identified a booking photograph of defendant taken on August 30, 2013, which she used to generate the photographic array.

¶ 17 On cross-examination, Pedroza testified she did not know defendant's name before she started her investigation. She received a "bulletin" from the Hickory Hills Police Department, which "had several thefts of cell phones from their stores." Pedroza sent a screen shot taken from the video surveillance of the theft at the Milwaukee Avenue store to a Hickory Hills police detective. To create the photographic array, she focused on defendant as a suspect and tried to choose fillers similar to defendant. Pedroza showed the same photographic array to Roeder, Shtern, and Anderson. The photographs in the array were booking photographs, the individuals were not standing, and the array did not include demographic information, including height, weight, or age.

¶ 18 On re-direct, Pedroza testified that, before she had defendant's name as a suspect, she sent screen shots from the video surveillance showing the theft at the Milwaukee Avenue store to the Hickory Hills Police Department. She then got a name and generated the photographic array with defendant's photograph.

¶ 19 Defendant testified he was 33 years old, about 5 foot 8 or 9 inches tall, weighed about 148 pounds, and worked at M & M Landscaping. In July 2014, he worked in Country Club Hills doing landscaping at multiple places in the south suburbs. On July 11, 2014, he worked with three people from 7 a.m. to 6 p.m. and was never at the T-Mobile store located at 1958 West Irving Park Road. On July 23, 2014, he was doing landscaping around the south suburbs and was never at 1639 North Milwaukee Avenue. On July 26, 2014, which was a Saturday, defendant did not know where he was and testified he was not at any time at 4809 West Irving Park Road or a T-Mobile store located on the north side. In 2006, defendant received a sentence of 12 months conditional discharge for obstruction of justice.

¶ 20 On cross-examination, defendant testified that he had never been to a T-Mobile store located at 1639 North Milwaukee Avenue, 1958 West Irving Park Road, or 4809 West Irving Park Road. Defendant testified he knew the people who were in the video that was shown.

¶ 21 The court found defendant guilty of theft in each case. In doing so, the court noted: “[Defendant] was identified by three separate people on three separate occasions, as doing all the same things, running in with other guys and taking cell phones.” The court denied defendant’s motion for new trial and sentenced him to two years of felony probation on each count, to be served concurrently, and ordered defendant to participate in a substance abuse treatment program. After sentencing defendant, the court stated:

“I know how much was made by [defense counsel] about some height discrepancies in the original descriptions about people that were being stolen from during the time of the crime. I don’t find that to be particularly persuasive or dispositive. I found the identifications to be clear. They were all the same. They were done immediately - - he

was identified by three credible witnesses, so a height discrepancy by a couple of the witnesses, notwithstanding I don't believe there were any other issues about identity.”

¶ 22 Defendant contends on appeal that he was misidentified as one of the individuals involved in the thefts and that the witnesses' identifications of him were unreliable. He claims the witnesses gave general and vague descriptions of the suspects, the identifications were cross-racial, the time each witness had to view defendant was brief, and their attention was poor, as they gave inconsistent descriptions and none of the witnesses described defendant's personal features, such as his beard, tattoos, or hairstyle. Defendant argues that the witnesses' descriptions did not match any of his physical characteristics.

¶ 23 As an initial matter, defendant asserts that the trial court erred when it denied his motion for a new trial and his due process rights were violated because the trial court mistakenly recalled the evidence and failed to review all of the evidence, including the video evidence. Defendant claims that, because the court mistakenly recalled the evidence, our review is *de novo*.

¶ 24 When a trial court fails to recall and consider testimony crucial to the defense, a defendant's due process rights may be violated. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. However, in a bench trial, we must presume the trial court considered only competent evidence in reaching its judgment, which may be rebutted if the record affirmatively shows otherwise. *People v. Gilbert*, 68 Ill. 2d 252, 258 (1977). When the record affirmatively shows that the trial court failed to recall crucial evidence for the defense when it entered judgment, the defendant did not receive a fair trial. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75.

¶ 25 Here, defendant does not direct us to anything in the record to support his contention that the court failed to review all the evidence in this case, including the video evidence. From our

review, we find no indication that the trial court did not consider all of the evidence or that it mistakenly recalled the evidence. Thus, we will presume the trial court considered only competent evidence when it found defendant guilty. We therefore reject defendant's argument that we should apply a *de novo* standard of review.

¶ 26 When we review the sufficiency of the evidence, we must determine 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.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In a bench trial, as here, it is the trial court's responsibility to determine the credibility of the witnesses, weigh evidence and draw reasonable inferences therefrom, and resolve any conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). We will not retry a case (*People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010)) and will only reverse a conviction if the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt (*People v. Thompson*, 2016 IL App (1st) 133648, ¶ 32).

¶ 27 When identification is an issue, the State must prove beyond a reasonable doubt the identity of the individual who committed the offense. *People v. White*, 2017 IL App (1st) 142358, ¶ 15. Vague or doubtful identification testimony is insufficient to support a conviction. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 47. However, a positive identification by one eyewitness who had ample opportunity to observe is sufficient to support a defendant's conviction. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007).

¶ 28 When we review the reliability of identification testimony, we consider the following factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200

(1972). *Slim*, 127 Ill. 2d at 307-08. These factors are: (1) the witness's opportunity to view the defendant during the offense; (2) the witness's degree of attention at the time of the offense; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty at the subsequent identification; and (5) the length of time between the crime and the identification. *Gabriel*, 398 Ill. App. 3d at 341. It is the fact finder's responsibility to determine the reliability of a witness's identification (*In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007)) and we will not substitute our judgment for that of the fact finder on questions involving witness credibility (*People v. Negron*, 297 Ill. App. 3d 519, 530 (1998)).

¶ 29 We conclude that the *Biggers* factors demonstrate that the witnesses' identifications of defendant were reliable. With respect to the first factor, the witnesses' opportunity to view defendant during the offenses, each witness testified that they could see defendant when he committed the thefts. Roeder, who greeted the offenders when they walked into his store, testified he could see defendant's face, as they walked "right through" him and he was only 10 feet away when the offenders were cutting the items from the display. Further, Roeder testified that the video surveillance showed the three offenders leaving the store and a portion of their faces and he identified defendant in the video. Shtern testified that he was five or six feet away from defendant when he was cutting the devices off and nothing obstructed his view of defendant's face. Likewise, Anderson testified that defendant's face was not covered and nothing obstructed his view of his face.

¶ 30 In addition, all the thefts occurred in the daytime and each witness had sufficient time to view defendant. Specifically, Roeder testified it took 20 to 25 seconds for the men to cut the display items and Shtern and Anderson testified that the entire incidents at their stores took,

respectively, two and five minutes. See *White*, 2017 IL App (1st) 142358, ¶ 16 (finding the identification reliable, noting, “[a]lthough the transaction was brief in time, it occurred in broad daylight”); see *People v. Reed*, 80 Ill. App. 3d 771, 777-78 (1980) (finding the witness’s observations of the defendant for 10 seconds was sufficient, noting “[i]t is not required that the validity of the identification be based upon perfect conditions for observation or that the time for observation be of a prolonged nature”). Accordingly, the witnesses’ opportunity to view defendant weighs in favor of the reliability of the identifications.

¶ 31 With respect to the second factor, the degree of the witnesses’ attention at the time of the offenses, each witness described what occurred between the time defendant entered their stores and the time he left, thus demonstrating that the witnesses were focused on observing the thefts occurring at their stores. See *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 106. Nothing in their testimonies showed that any of them had their attention diverted elsewhere. Rather, Roeder and Anderson both testified that they actually greeted defendant and the other individuals when they walked into their stores and Roeder testified that defendant walked “right through” him. Shtern testified that the store was really slow and his employees were just waiting to get customers into the location. Accordingly, the record shows that the witnesses had a high degree of attention on defendant, not on any other events or customers and, thus, this factor supports the reliability of the witnesses’ identifications.

¶ 32 With respect to the third factor, the accuracies of the witnesses’ prior identifications, defendant asserts that the witnesses gave general and vague descriptions that did not match any of his characteristics. The witnesses testified about the height and weight descriptions they gave to the police of all of the offenders involved in the thefts, but their testimony did not indicate

which description corresponded to defendant. The witnesses described all of the offenders as being over 5 foot 10 inches tall, weighing between 170 pounds and 225 pounds, and being about 20 to 25 years old. Defendant testified he was 33 years old, 5 foot 8 or 9 inches tall, and weighed 148 pounds. Although defendant testified he was shorter and weighed less than any of the individuals described by the witnesses, “[c]ourts typically have not considered discrepancies as to height and weight alone as decisive factors on review because few persons are capable of making accurate estimations of such characteristics.” *Slim*, 127 Ill. 2d at 312.

¶ 33 Further, height and weight errors in a witness’s description of the offender affect only the credibility of the witness and the weight to be given their testimony. *People v. Brown*, 110 Ill. App. 3d 1125, 1129 (1982). All three witnesses positively and separately identified defendant in a photographic array within one-month after the incident and each identified him at trial. The trial court heard defendant’s testimony about his height, age, and weight as well as the witnesses’ descriptions of the offenders told to the police after the thefts. It was the trial court’s role to judge the credibility and weigh the evidence and, after doing so, it found the witnesses credible and that they made positive identifications. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 34 (finding the identification reliable over the defendant’s contention that the witnesses gave descriptions that were “at odds” with the defendant’s actual appearance, noting that the trial court heard the discrepancies, weighed them accordingly, and found that positive identifications were made).

¶ 34 In addition, defendant asserts that none of the witnesses described defendant’s personal features such as his beard, build, tattoos, or hairstyle. However, any omissions in the descriptions do not by themselves raise a reasonable doubt regarding the witnesses’ positive identifications.

See *White*, 2017 IL App (1st) 142358, ¶ 18 (where the witnesses did not recall the defendant having a tattoo, the court noted that, it did “not render the officers identification of defendant entirely unreliable” or “outweigh the factors in favor of the State”); see *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 50.

¶ 35 With respect to the fourth and fifth factors, the certainty of the witnesses’ subsequent identifications and the time between the crimes and identifications, all three witnesses positively identified defendant in the photographic array and in court and the record does not indicate that they expressed any uncertainty when they made their identifications. See *White*, 2017 IL App (1st) 142358, ¶ 19 (where the witness made a positive identification, the court noted that “no evidence in the record shows any uncertainty” in the witness’s identification). Further, the witnesses all identified defendant within one month of the thefts. Thus, the length of time between the crime and the witnesses’ subsequent identifications of defendant favors the reliability of the identifications. See *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (this court has found that an identification made one year and four months after the crime was reliable).

¶ 36 Defendant claims that the witnesses’ identifications were unreliable because they made cross-racial identifications, which is “fraught with problems.” The cases defendant cites to support his argument discuss whether the trial court abused its discretion in denying the defendant’s request to allow expert testimony on the reliability of eyewitness identification. See *People v. Lerma*, 2016 IL 118496, ¶ 24; see *People v. Ortiz*, 2017 IL App (1st) 142559, ¶ 29. However, defendant never presented expert testimony on the issue of cross-racial identification.

We are therefore unpersuaded by defendant's argument that the witnesses' identifications of defendant were unreliable because they made cross-racial identifications.

¶ 37 Defendant also argues he was misidentified and was not in any of the three T-Mobile stores on the date of the thefts. However, the trial court heard this testimony and, in finding defendant guilty, the court found the identification witnesses credible and necessarily rejected defendant's testimony. See *Petermon*, 2014 IL App (1st) 113536, ¶ 38. Accordingly, after viewing the evidence in the light most favorable to the State and weighing the *Biggers* factors, we conclude that a rational trier of fact could have found that the witnesses' identifications of defendant were sufficiently reliable to prove him guilty beyond a reasonable doubt of the thefts.

¶ 38 Defendant also contends that the photographic array procedure used was contrary to best practices, flawed, and led to an irreparable misidentification. The State asserts that defendant forfeited his challenge because he did not file a motion to suppress, object at trial, or raise the issue in a posttrial motion. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Defendant asks this court to consider the issue under the doctrine of plain error. However, we first must determine whether error occurred at all. *Id.* at 187.

¶ 39 Defendant claims the photographic array procedure was contrary to best practices because defendant was placed in the same position in the photographic array that was administered for each witness. Defendant cites section 107A-2A(f)(4) of the Code of Criminal Procedure of 1963, which provides that, "[i]f there are multiple eyewitnesses, subject to the requirements in subsection (a) of this Section and to the extent possible, the suspected perpetrator shall be placed in a different position in the lineup or photo array for each eyewitness." 725 ILCS 5/107A-2(f)(4) (West 2014). This statute became effective January 1,

2015, which was after the August 2014 dates in which the photographic array was administered to the witnesses here. *Id.* The procedures set forth in the statute therefore do not govern the photographic array procedure of this case. See *People v. Moore*, 2015 IL App (1st) 141451, ¶ 21, *overruled on other grounds by People v. Hardman*, 2017 IL 121453.

¶ 40 All three witnesses positively and separately identified defendant in the photographic array within one-month of the thefts. The witnesses testified that, before they viewed the photographic arrays, they read, signed, and understood the contents of the photograph advisory forms, which stated that they were not required to make an identification. See *People v. Ortiz*, 2017 IL App (1st) 142559, ¶¶ 25-26 (finding the pretrial procedures not unduly suggestive, noting that the witness signed a lineup advisory form that informed him the police had a suspect in custody but the suspect may or may not be in the lineup). Although defendant asserts that Pedroza focused on defendant as a suspect based on a “misguided hunch,” there is nothing in the record to indicate that she directed the witnesses to defendant or suggested to them that he was the offender. See *Ortiz*, 2017 IL App (1st) 142559, ¶ 26. Further, our review of the photographic array, which consists of six photographs showing only the individuals’ heads, shows that all of the men had similar general characteristics. See *People v. Allen*, 376, Ill. App. 3d 511, 521 (2007) (finding that the photographic array was not impermissibly suggestive, noting “[a]ll individuals displayed in the photographic array had similar general physical characteristics”).

¶ 41 Defendant also asserts that the photographic array procedure used was flawed because the photographs were presented simultaneously in one photographic array rather than sequentially, where each photograph is presented separately. Defendant cites section 5/107A-10(c) of the Code of Criminal Procedure, which was repealed by P.A. 98-1014, § 15 (eff. Jan. 1, 2015), and

states that “[f]or any offense alleged to have been committed in a pilot jurisdiction on or after July 1, 2004, selected lineup identification procedure shall be presented in the sequential method.” 725 ILCS 5/107A-10(c) (West 2012). Defendant however does not cite any authority to support that the photographic array here was administered in a pilot jurisdiction such that this section applied. He also provides no authority to support that when a photographic array is presented simultaneously in one photographic array we must find the procedure impermissibly suggestive or that the identification was necessarily unreliable. Defendant also cites a 2006 report entitled “Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures.” Defendant did not present this material in the trial court so we will not consider it. See *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994). Accordingly, we are unpersuaded by defendant’s argument that he was irreparably misidentified because the array was administered simultaneously to the witnesses rather than sequentially.

¶ 42 Defendant likewise provides no authority to support his argument that the photographic array procedure used was flawed because none of the photographs included the individuals’ physical features such as height or weight. For these reasons, we are unpersuaded by defendant’s arguments that he was misidentified because the photographic array procedure used was flawed. Since no error occurred, there is no plain error. *Herron*, 215 Ill. 2d at 187.

¶ 43 In sum, the *Biggers* factors demonstrate that the three witnesses’ positive identifications of defendant were reliable and this evidence was sufficient to find defendant guilty beyond a reasonable doubt.

¶ 44 For the reasons explained above, we affirm defendant’s convictions.

¶ 45 Affirmed.