2019 IL App (1st) 152651-U

No. 1-15-2651

Order filed February 6, 2019

Third 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. 12 CR 15229
	)	
DAVID WILLIARD,	)	Honorable
	)	Tommy Brewer,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for attempted first-degree murder affirmed. State proved beyond reasonable doubt that defendant was shooter. Trial counsel was not ineffective for failing to rehabilitate alibi witness's credibility with readily available information.

¶ 2 Following a bench trial, defendant David Williard was found guilty of attempted first degree murder and sentenced to 31 years' imprisonment. On appeal, defendant claims the State failed to prove him guilty beyond a reasonable doubt, because the victim's eyewitness

identification was unreliable. He also argues that his trial counsel was ineffective for failing to rehabilitate an alibi witness's credibility with readily available information. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with, among other things, multiple counts of attempted first degree murder (720 ILCS 5/8-4(A) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012)) stemming from the July 10, 2012 shooting of Lamont Jackson. Defendant waived his right to a jury trial, and the case proceeded to a bench trial.

¶ 5 At trial, Lamont Jackson testified that in the early morning hours of July 9, 2012, he was involved in a verbal altercation with defendant. As he was talking to his friend and walking backwards on a sidewalk near his home, Jackson accidently brushed up against defendant, who was standing in the middle of the sidewalk with a group of people. Defendant asked, "what the f--- you doing bumping into me," to which Jackson replied, "my bad." Defendant then told Jackson "I'm not no punk" in an aggressive tone. Jackson did not want to get into a fight, and the people who were standing with defendant intervened. During the encounter, Jackson stood four to five feet away from defendant; he was looking at defendant's face for 20 to 25 seconds. Although it was dark out, streetlights shone down "right on top of the pavement" where the men were standing.

¶ 6 Jackson and his friend continued walking on the sidewalk and entered his home, which was located less than a block away. When he got home, Jackson asked his friend what defendant's name was, and his friend responded with a name. Jackson testified that he did not know defendant before that night, although "he may [have] seen him around" before the incident.

¶ 7 After Jackson and his friend were in his house for a short period of time, they left the house and walked back toward the sidewalk, where they again encountered defendant. Defendant, who at that point was not wearing a shirt, walked toward Jackson and tried to "start it back up." Jackson noticed that defendant had a tattoo of a six-pointed star on his chest. Defendant said "what's up now" and Jackson told him "we can take it to the street" if he wanted to fight. Defendant said "I got you," got into a green station wagon with tinted windows, and drove away from the scene. Jackson estimated that this second encounter lasted two to three minutes, and he testified that the area was illuminated by street lighting.

¶ 8 Around 1 a.m. on July 10, 2012, Jackson and his friend Jerry Fort were walking back to his house from a friend's house when they heard a sound coming from the bushes just off the path. The men could not determine the source of the sound and continued walking. Fort told Jackson that he needed to use the restroom and stopped in between two parked cars to urinate. Jackson continued walking down the street. A short time later, Jackson "felt something" and turned around. When he turned around, he saw defendant wearing a hood and pointing a gun toward him. He was able look directly at defendant's face from a foot away for "a couple of seconds." Jackson further testified that the area was illuminated by street lighting and porch lights on nearby houses.

¶ 9 Jackson hit defendant's arm, and the gun discharged. Defendant then shot him in the right thigh. Jackson fell to the ground, and defendant shot him a total of seven times in the back, side, and right thigh. Defendant then ran away. When police responded to the scene, Jackson said that "Midnight" had shot him.

¶ 10 On July 12, 2012, Hazel Crest Police Detective Ed Beard visited Jackson in the hospital. During the visit, Jackson told Detective Beard that "Midnight" shot him and gave Detective Beard a physical description of defendant. After signing a lineup advisory from, Jackson viewed a photo array and identified a photograph of defendant. He testified that he had no doubt that defendant was the person who had shot him.

¶ 11 On cross-examination, Jackson testified that he had consumed a shot of alcohol on the night of the shooting but denied telling Detective Beard that he was walking home "to get back to his drink." He explained that defendant's hood was up over his head but was not tightly wrapped around his face. He did not recall telling Detective Beard that the hood "was pulled to his face tightly." He did not recall telling Detective Beard that the shooter had a tattoo on his chest, because the shooter was wearing a hoodie and it would be "impossible to see [his] chest through his hoodie."

¶ 12 Hazel Crest Police Officer Alicia Pennington testified that around 1:15 a.m. on July 10, 2012, she responded to a "shots fired" call in the vicinity of 2143 West 171st Street. When she arrived on scene, Officer Pennington found Jackson lying on his back and bleeding through his shirt. Jackson told her that he had been shot by "Midnight." On cross-examination, Officer Pennington testified that she had talked to Jerry Fort, who was also at the scene, and that he was unable to name the person who had shot Jackson.

¶ 13 Detective Beard testified that he responded to the shooting and spoke to Fort. During that conversation, Detective Beard learned that Jackson had indicated that a man named "Midnight" had shot him. On July 12, 2102, Detective Beard went to the hospital to interview Jackson, who told him that he was shot by a man named "Midnight" and that the man who shot him had a

tattoo of a six-pointed star on his chest. Upon speaking with other police officers, Detective Beard learned that defendant went by the nickname "Midnight."

¶ 14 Based on this information, Detective Beard compiled a six-person photo array, and showed it to Jackson. After signing a lineup advisory form, Jackson identified a photograph of defendant as the man who had shot him.

¶ 15 Detective Beard eventually found defendant in Carbondale, Illinois, and arrested him. According to Detective Beard, while defendant was being booked, he started talking about the events that took place "on Sunday" and stated, without prompting or questioning, that he "felt he was getting set up for a fight because of the subject walking towards him on the sidewalk."

¶ 16 In addition, Detective Beard testified, that on July 10, 2012, Fort told him that the shooter was between 5 feet 11 inches and 6 feet tall and had a dark skin complexion and a thick build. On cross-examination, Detective Beard testified that Jackson had told him that he and Fort had been walking home to "get his drink."

¶ 17 Shacora Mohead testified that she was with defendant, who had the nickname "Midnight," in the early morning hours of July 9, 2012. While sitting in her green station wagon, she observed defendant and Jackson have a verbal argument after Jackson bumped into him on the sidewalk. She testified that defendant reacted calmly and told Jackson that he was too close to him. Jackson said "my bad" but began yelling and swearing at defendant. When it looked like the men were going to fight each other, Mohead told defendant to get in her vehicle. As she and defendant began to drive away, Jackson stood up on a light pole and said "come on, bitch, I will stomp your mother---ing ass up under this motherf---ing light." On July 13, 2012, Mohead spoke

with Detective Beard and identified a photograph of Jackson as "the guy that Midnight got into a fight with."

¶ 18 On cross-examination, Mohead explained that she watched Jackson and defendant out of a side mirror, and that the men were not standing under a streetlight when they were arguing. Defendant did not say anything to Jackson when he got into the vehicle.

¶ 19 The parties stipulated that Doctor Jane Lee, a trauma specialist at Christ Hospital, would testify that she examined Jackson and found three gunshot wounds to his left thigh, three gunshot wounds to his pelvic region, and one gunshot wound to his right thigh. These wounds required multiple surgeries over the course of the 18 days that Jackson remained in the hospital. Upon admission to the hospital, Jackson had a blood alcohol content (BAC) of .033 grams per deciliter.

¶ 20 The parties also stipulated that Hazel Crest Police Officer Rollins would testify that he recovered six 9 millimeter shell casings at 2143 W. 171st Street. The parties further stipulated that Jeffrey Parise, a ballistics expert with the Illinois State Police Crime Lab, would testify the six cartridges Officer Rollins recovered were fired from the same gun.

¶ 21 During the defendant's case-in-chief, Fort testified that in the early morning hours of July 10, he, Jackson, and two other men were smoking, drinking, and playing a game in Jackson's basement. When the other men left the house, Jackson and Fort went outside to see them off. After the men drove away, Jackson and Fort walked to a friend's house, where people were standing on a back porch socializing. After staying at the friend's house for five to ten minutes, Jackson told Fort that he wanted to go back home to grab a drink, and the two men began to walk back to Jackson's house. On the way back, the men heard a noise come from the bushes but continued walking because they could not see what was making the noise.

¶ 22 Fort then walked off of the sidewalk to urinate and saw someone wearing a black hoodie run past him. After the person in the hoodie exited his field of view, Fort heard gunshots. Fort went back to the sidewalk and saw Jackson lying on the ground 40 to 45 feet away. He testified that the street had street lighting, but that all of the street lights were on the opposite side of the street, and that Jackson was lying in a dark area between two streetlights. The person with the black hoodie was standing over Jackson. Fort could not see the person's face, and testified that the person's hood was "kind of like real tight, like they had the strings pulled tight." When officers arrived on the scene, he told them that he did not know who the shooter had been. A couple of days later, he went to the Hazel Crest police station to speak with Detective Beard. He could not recall the details of his conversations with Detective Beard because he was "kind of shooken [*sic*] up." He testified that defendant's nickname was "Midnight," and that he had known defendant for 10 or 12 years, but that he did not see defendant at the scene of the shooting.

¶ 23 On cross-examination, Fort denied telling Detective Beard that the shooter has been 5 feet 10 inches to 6 feet tall or that he had a dark skin complexion and a thick build. On the night of the shooting, Jackson told Fort that "Midnight" had shot him.

¶ 24 Shonta Baker testified that she remembered July 9, 2012, because her favorite television show "Love & Hip Hop" was on at 7 p.m. On Mondays, a rerun of "Love & Hip Hop" airs at 7 p.m. and a new episode airs at 7:30 p.m. At 10 that morning, Baker's boyfriend Marcus left her apartment to go to the store. Defendant, who was Marcus's friend, knocked on the door to the apartment at 10:30 a.m. Baker told defendant that he would have to wait until Marcus came home before he could come in the apartment. When Marcus came home at 10:45 a.m., he and

defendant entered the apartment. Baker made breakfast at 11 a.m., and they finished eating breakfast at 11:30 a.m. At sometime between 2 or 3 p.m., defendant left the apartment to get a pizza from a restaurant "right up the street" and returned to the apartment by 4 p.m. Defendant was still at Baker's apartment when "Love & Hip Hop" came on and did not leave her apartment until 11 p.m. on July 10, 2012. In other words, at the time of the shooting at 1:15 am on July 10, 2012, defendant was at her house.

¶ 25 On cross-examination, Baker explained that defendant stayed at her apartment from the evening of July 9 until 11p.m. on July 10 because her car had broken down and he was waiting for a ride. She denied telling a State's Attorney investigator that she did not see defendant on Tuesday, July 10, 2012. She also denied telling the investigator that "she was unsure that the shooting took place on Tuesday at 1:15 a.m.[,] but even if [she] was mistaken, [defendant] didn't come until Tuesday at 11:30 in the morning."

¶ 26 In rebuttal, State's Attorney investigator Marta Kucharczyk testified that she interviewed Baker on October 30, 2014. Baker told her that she saw defendant on the day of the shooting, but that he did not stay at her house. Baker expressed uncertainty about the time and date of the shooting but told Kucharczyk that "even if she was mistaken—that he came on Tuesday rather than Wednesday—that he came at 11:30 a.m."

¶ 27 On cross-examination, Kucharczyk testified that Baker had told her that she was uncertain about the dates that she was speaking about. Baker did not sign Kucharczyk's report and was not under oath when she spoke to her.

¶ 28 On redirect examination, Kucharczyk testified that Baker told her that new episodes of "Love & Hip Hop" air on Wednesday, and that defendant must have come to her house on a Wednesday (*i.e.*, the day after the shooting).

¶ 29 During closing argument, defense counsel argued that Jackson's identification of defendant was unreliable because of his poor opportunity to observe the shooter and low degree of attention at the time of the shooting. Counsel also argued that Baker credibly testified that new episodes of "Love & Hip Hop" air on Mondays, and that defendant had stayed at her house from Monday evening until Tuesday at 11:30 pm.

¶ 30 The trial court found defendant guilty of attempted first degree murder and aggravated battery. The court noted that it found Jackson's testimony to be "coherent, consistent, and credible." The court found Baker's testimony that defendant had been at her house from 10:45 a.m. on July 9 to 11 p.m. on July 10, because he could not find a ride, to be incredible. It also found that Baker's testimony was "totally impeach[ed]" by Kucharczyk. After a sentencing hearing, the court merged one count of attempted first degree murder and the aggravated battery count into the remaining attempted first degree murder count and sentenced defendant to 31 years' imprisonment. This appeal followed.

¶ 31 ANALYSIS

¶ 32 Defendant claims that the State failed to prove him guilty beyond a reasonable doubt, as Jackson's identification was unreliable, and there was no forensic evidence linking him to the shooting.

¶ 33 When reviewing a challenge to the sufficiency of the evidence, the question is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find

the elements of the offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. A reviewing court must decide 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 offense beyond a reasonable doubt. *People v. Lloyd*, 2013 IL 113510, ¶ 42. This means that a reviewing court must draw all reasonable inferences from the record in favor of the prosecution. *Cunningham*, 212 Ill. 2d at 280. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 9. A reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses, and will reverse a defendant's conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt regarding defendant's guilt remains. *Id.*

¶ 34 "It is well established that a single witness's identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Starks*, 2014 IL App (1st) 121169, ¶ 48. When assessing identification testimony, this court relies on the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* Those factors are: (1) the opportunity the witness had to view the offender 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 level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Id.* (citing *Biggers*, 409 U.S. at 199-200). "In addition to these specific factors, courts also consider the totality of the circumstances when reviewing the

reliability of an identification." *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 24 (citing *Biggers*, 409 U.S. at 199-200).

¶ 35 In his appellate brief, defendant concedes that the last three *Biggers* factors—the accuracy of the prior description, the witness' level of certainty, and the interval between the crime and the identification—"do not weigh in [his]" favor. Nevertheless, defendant contends that Jackson had a poor opportunity to observe the shooter, that his degree of attention was compromised, and that Jackson incorrectly identified him as a result of their earlier encounters. We cannot agree.

¶ 36 Regarding the first factor, Jackson testified that immediately before the shooting, he looked directly at defendant's face from a foot away for "a couple of seconds." He explained that the area was illuminated by street lights and the porch lights of nearby houses. Our supreme court has upheld identifications made after viewing the offender for similar amounts of time, even under less than ideal lighting conditions. *People v. Herrett*, 137 Ill. 2d 195, 200, 204 (1990) (finding that witness had sufficient opportunity to view offender when he saw him for "several seconds" in dimly lit pawnshop). And the fact that Jackson had had recent, prolonged interactions with defendant weighs in favor of the reliability of his identification of defendant. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 49 (noting that witness's familiarity with defendant weighs in favor of his identification of defendant).

¶ 37 Defendant argues that Jerry Fort's testimony that the offender was wearing a hood pulled tightly around his head, that the shooting occurred on a dark portion of the street, and that he could not identify the defendant as the shooter, demonstrates that Jackson had a poor opportunity to view the shooter. We do not agree. Jackson and Fort are different people, and they had

different opportunities to view the shooter. While Fort saw the shooter run by him as he stood off the sidewalk while urinating and later saw the shooter from 45 feet away, Jackson observed the shooter from a distance of one foot. Jackson testified that the shooter was wearing a hood, and that the hood was "a little tight," but the hood was not "wrapped around the shooter's face." He also testified that the area was illuminated by street lights and lighting from nearby houses. Insofar as the testimony of Fort and Jackson conflicted, it was the trial court's duty, as the trier of fact, to resolve any conflicts in the testimony. *People v. Gray*, 2017 IL 120958, ¶ 35 ("It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts.").

¶ 38 The second *Biggers* factor—the witness's degree of attention—also favors the State. Jackson testified the shooter came up from behind him and pointed a gun at the back of his head. When he turned around, he saw defendant, whom he had seem the day before. After the shooting, Jackson watched defendant run away and was able to call the police on his cell phone. Jackson's detailed narration of events does not suggest that his degree of attention was compromised at the time of the shooting, and, accordingly, this factor weighs in favor of the reliability of his identification of defendant. *People v. Mister*, 2016 IL App (4th) 130180, ¶ 106.

¶ 39 Defendant contends that Jackson's degree of attention was compromised by the fact that he had been drinking that night. Jackson testified that he had a shot of alcohol earlier in the evening, and his BAC was .033 grams per deciliter when he was admitted to the hospital. However, Jackson's BAC was less than half of the legal limit to drive a car in Illinois. See 625 ILCS 5/11-501(a)(1) (West 2016). Further, there is no indication in the record that his degree of attention was affected by his consumption of alcohol. See *People v. Carini*, 254 Ill. App. 3d 1,

10 (1993) (identification upheld where trier of fact was adequately informed of victim's alcohol consumption and victim testified that she was not intoxicated at the time of the attack).

¶ 40 Defendant also contends, citing scientific studies, that Jackson's degree of attention was compromised because of the presence of a weapon and the high degree of stress surrounding the encounter. He claims, citing *People v. Lerma*, 2016 IL 118496, that this court can take judicial notice of the studies, even though they were not presented at trial. However, the issue presented in *Lerma* was whether a trial court abused its discretion by denying the defendant's request to have an expert witness testify about the reliability of eyewitness identifications. *Id.* at ¶ 25. Here, defendant did not attempt to call an expert witness at trial, and did not attempt to present these studies to the trial court. As such, the reasoning of *Lerma* does not apply to this case, and we will not consider scientific studies that were raised for the first time on appeal. See *People v. Heaton*, 266 Ill. App 3d 469, 477 (1994) ("Judicial notice cannot be extended to permit the introduction of new factual evidence not presented to the trial court."); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993) (citations to such studies on appeal constituted "an attempt to interject expert-opinion evidence into the record" that was neither subject to cross-examination by the State nor considered by the trial court).

¶ 41 Defendant has conceded that the last three *Biggers* factors do not weigh against the reliability of Jackson's identification. We find that the third *Biggers* factor, the accuracy of the witness's prior description of defendant, is neutral in this case, as the record does not contain the specific details of any physical description of the shooter that Jackson gave to the police.

¶ 42 However, the last two *Biggers* factors, the level of certainty demonstrated by the witness and the length of time between the crime and the identification, weigh decisively in favor of the

reliability of Jackson's identification. Jackson immediately informed responding officers and Detective Beard that he was shot by "Midnight" and picked defendant, whom he knew as "Midnight," out of a photo array two days after the shooting. He also testified that he "had no doubt" that defendant was the shooter. Thus, we find that the *Biggers* factors, and the totality of the circumstances surrounding the identification, weigh in favor of the reliability of Jackson's identification of defendant as the shooter. As the testimony of a single witness is sufficient to sustain a conviction, we cannot say that no rational trier of fact could have found defendant guilty of attempt first degree murder. See *Starks*, 2014 IL App (1st) 121169, ¶ 48.

¶ 43 We next consider defendant's argument that trial counsel was ineffective for failing to rehabilitate Baker's credibility by introducing evidence that new episodes of "Love & Hip Hop" air on Mondays. He claims this evidence was readily available to trial counsel and would have strengthened Baker's testimony that he was with her at the time of the shooting, as well as cast doubt on Kucharczyk's testimony that Baker told her that defendant was at her house on a Wednesday.

¶ 44 Ineffective assistance of counsel claims are governed by the familiar two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, to establish an ineffective assistance of counsel claim, a defendant must show: (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To prove deficient performance, a defendant must show "that counsel's performance was objectively unreasonable under prevailing professional norms." *People v. Domagala*, 2013 IL 113688, ¶ 36. Under this prong, a defendant

"must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *Strickland*, 466 U.S. at 688.

¶ 45 "To establish prejudice, a defendant must show that but for counsel's deficiency, 'there is a reasonable probability that the result of the proceeding would have been different.' " *People v. Brown*, 2015 IL App (1st) 122940, ¶ 47 (quoting *People v. Houston*, 229 Ill. 2d 1, 11 (2008)). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 46 Here, we find that defendant's claim fails, because he cannot show a reasonable probability that the introduction of evidence that new episodes of "Love & Hip Hop" aired on Mondays would have changed the result of his trial. See *People v. Brown*, 2017 IL App (1st) 142877, ¶ 55 (ineffective assistance claims may be resolved on prejudice grounds without reaching the issue of deficient performance). Although the circuit court found that Kucharczyk's testimony impeached Baker's testimony regarding which day "Love & Hip Hop" aired and, therefore, which day defendant was at her apartment, it also discredited Baker's testimony because it found her explanation for the extraordinary length of defendant's visit to her apartment—that defendant was waiting for a ride because his car broke down—was unbelievable. The court specifically stated:

> "There is testimony of the alibi witness who testified that the defendant was at her house, in essence, for about 36 hours from 10:45 on July 9th all the way to 11:00 p.m. on July 10th.

> But what's interesting, she indicated during the course of her testimony a couple of times, maybe three times, that he was there all that time because he couldn't get a ride.
>
> I don't find that credible. She said their car was broken down. It's almost like he was stuck there for 36 hours. I don't believe that. I don't find her credible in that regard."

¶ 47 Thus, even if trial counsel had rehabilitated Baker by showing that "Love & Hip Hop" aired on Mondays, it is not reasonably probable that the outcome at trial would have changed. Defendant's ineffective assistance of counsel claim therefore fails.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 50 Affirmed.