

No. 1-12-2922

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 10 CR 20463 |
| |) | |
| GREGORY COLLIER, |) | Honorable |
| |) | Nicholas R. Ford, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE SIMON delivered the judgment of the court.
Justice Pierce and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's convictions for aggravated discharge of a firearm and attempted armed robbery affirmed over claim that witness identifications were unreliable; defendant's mittimus corrected to reflect proper conviction.

¶ 2 Following a jury trial, defendant Gregory Collier was found guilty of aggravated discharge of a firearm and attempted armed robbery, then sentenced to concurrent, respective terms of ten and six years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because the identification testimony of the

eyewitnesses was unreliable. He also requests that his mittimus be amended to reflect that attempted armed robbery is a Class 1 felony.

¶ 3 The charges in this case arose from an incident that occurred on the south side of Chicago on August 28, 2010, when two individuals attempted to rob the patrons at the Ribs & Fish Unlimited Restaurant on West 79th Street and Loomis Boulevard. A shoot-out occurred during the course of the robbery between one of the offenders, who was armed, and an off-duty police officer who was a patron at the restaurant. The armed offender was shot, while the other offender escaped unharmed.

¶ 4 Samuel Rawls testified that he is a Chicago police officer and, on August 28, 2010, he attended a Chicago Bears game with his girlfriend, Chevonne Nixon. After the game, the couple stopped at the Ribs & Fish Unlimited Restaurant. They arrived around 11 p.m. and Rawls parked his car in front of a storefront church, approximately 30 feet from the restaurant. As he exited his car, he saw a black male sitting on the ledge of the storefront church, and identified defendant as that man. Rawls indicated that he could not see defendant's hair because he was wearing some type of doo-rag or black bandana on his head. Rawls and Nixon then entered the restaurant where approximately six to eight other people were present, and placed their order. As they waited for their food, Rawls noticed that defendant entered the restaurant and spoke to a young black male who was wearing a red shirt and had twists in his hair. After speaking to the young man, who appeared to be 16 years old, defendant exited the restaurant. The young man was later identified as Troy Mickle, defendant's nephew.

¶ 5 While Rawls and Nixon continued to wait, Nixon turned to him and said, "[B]aby, he have a gun." Rawls asked, "[W]ho?," and Nixon responded, "[R]ight over there." Rawls then looked around a pillar and saw Mickle with a revolver in his hand pointed at another patron

standing near an ATM in the opposite corner of the restaurant. The patron, an older black male, was throwing money and what appeared to be narcotics on the ground. Rawls grabbed Nixon's hand to leave, and estimated that defendant, who was standing in the doorway and blocking the exit, was seven or eight feet away from them. When another patron in front of Rawls tried to leave, Rawls heard defendant say, "[N]o." The patron responded, "I don't have anything to do with that over there." Rawls then heard defendant respond, "[N]o, we going to get all you mother fuckers."

¶ 6 At that point, defendant was standing in the doorway with his left hand out and his right hand to his side, as if he was hiding something there. After the patron in front of Rawls took a few steps back and stepped onto his toes, Rawls leaned against a pillar, and unholstered his service weapon, a 9mm pistol. Defendant then pointed his finger at Rawls, and said to Mickle, "[W]atch that mother fucker right there."

¶ 7 Mickle immediately fired his weapon near Rawls' face, and Rawls retreated behind the pillar and returned fire. Rawls testified that when he fired the first shot, defendant, who was in the doorway, said, "[O]h, shit" and ran out of the restaurant, eastbound on 79th Street. Rawls testified that he struck Mickle in the left lower abdomen, but Mickle continued to fire back. Rawls, who feared for Nixon's life and his own safety also continued to shoot. When Mickle did not fall, Rawls aimed for his legs, and Mickle eventually fell to the ground in a corner of the restaurant, where he lay bleeding with his revolver in his right hand. Rawls testified that he saw Mickle fire the gun at first, but then he could not see the shooter's face, although he knew it was Mickle who continued to fire the weapon.

¶ 8 When the shooting stopped, Rawls exited the restaurant with his empty pistol and attempted to call police with his cell phone. When he could not unlock the phone, he ran across

the street to a White Castle restaurant and was eventually able to make contact with police. Rawls recalled that the other patrons who were in the restaurant at the time of the shooting had left, including the man who was throwing his money on the ground. After police arrived, Rawls returned to the scene, where he observed Mickle being taken out on a gurney. Rawls next saw defendant in a police lineup on October 24, 2010, after he was contacted by Detective Forberg to come to Area 2. Detective Forberg did not tell Rawls that he had the offender in custody, and Rawls was in the room with another detective when he positively identified defendant as the offender. He confirmed his identification of defendant at trial as the man who was blocking the doorway.

¶ 9 Chevonne Nixon testified that she and her boyfriend, Rawls, went to a Chicago Bears game on August 28, 2011. Following the game, they stopped at Ribs & Fish Unlimited to get some food, and parked their car a few feet from the restaurant. When she exited the car, she noticed a man on the sidewalk who was wearing a black doo-rag, black T-shirt, and black shorts, whom she identified as defendant.

¶ 10 Nixon further testified that there were approximately seven people inside the restaurant, including herself and Rawls, and they got in line behind the other patrons. Nixon also noticed a "little boy" in the restaurant, who was standing at an angle from them and, when she first noticed him, he was not holding a gun. Defendant entered the restaurant behind them, said something to the boy, and then went back to the doorway.

¶ 11 As Nixon and Rawls were placing their order, she noticed that the boy was holding a gun in his right hand and pointing it at a customer who was standing near an ATM throwing money on the floor. Nixon told Rawls they were being robbed, and he grabbed her hand and turned to the door. Defendant, however, was standing in the doorway and pushed another patron back into

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the restaurant. Nixon testified that she had a clear view of defendant at that time. Soon after, Nixon heard defendant say, "[Y]ou watch that motherfucker right there," pointing at her and Rawls. At that time, the boy lifted up his gun and shot at Rawls. Nixon dropped to the ground next to Rawls' feet, thinking she was going to die. Multiple shots were fired, and Nixon could feel metal casings hitting her head, and she could "taste the gunpowder."

¶ 12 Eventually the gunshots stopped, but she did not lift her head until she heard somebody yell, "[S]omeone call 911." When she looked up she saw that it was Rawls yelling in the middle of the street, and that the boy was lying on the ground with the gun in his right hand. Nixon ran out to another restaurant where she called 911, and police arrived shortly thereafter. She saw the boy being carried out on a gurney and leaving in an ambulance, but did not see anyone else leave the restaurant after her.

¶ 13 On September 3, 2011, several detectives visited Nixon at her home, where she was shown an array of six photographs. She covered the hair of some of the photos because defendant was wearing a doo-rag that night, and she identified defendant from the array by marking an X on his photo and signing the array. Prior to making the identification, she also signed an advisory form stating she understood that the offender may or may not be in the array. On October 24, 2010, Nixon went to the police station to view a physical lineup, and was in the viewing room with a detective. She identified defendant in the lineup as the man who was in the doorway on August 28, 2010, and confirmed her identification at trial. On cross examination, Nixon testified that the man at the door was wearing a doo-rag, and she did not see dreadlocks sticking out of it.

¶ 14 Officer Carroll testified that he was on duty on August 28, 2010, and, at approximately 11:15 p.m., he received an emergency call and responded to the location of Ribs Unlimited

Restaurant within a minute. Upon his arrival, he observed people running from the area and, as he entered the restaurant, a couple of people were leaving. He observed an individual lying on the ground, later identified as Mickle, with a gun two feet away from him. Officer Carroll testified that he immediately placed himself between Mickle and the weapon to prevent contamination of the evidence or from anyone reaching out to grab the weapon. Officer Carroll asked Mickle what happened, and he responded that he was shot, and then started to moan. Officer Carroll did not see or speak to patrons other than Rawls and Nixon.

¶ 15 Detective Brian Forberg testified that he was assigned to Area 2, violent crimes. In the late evening hours of August 28, 2010, he was assigned to investigate the shooting at Ribs & Fish Unlimited Restaurant. He and his partner, Detective Eberle, examined the crime scene, and spoke to officers who were already present, then canvassed the area with assisting detectives. They found two victims, Rawls and Nixon, and interviewed a number of other individuals who were present on the scene, but did not witness the incident. They learned the identity of the individual who had been shot, Mickle, and went to Christ Hospital where Mickle had been transported and spoke with Mickle's family members.

¶ 16 After returning to the Area office, the detectives searched the database for an individual named Greg, who lived on Union Avenue. Detective Forberg and his partner then compiled a photo array including defendant and five other individuals. On September 3, 2010, they contacted Nixon and she identified defendant in the photo array. On October 24, 2010, defendant was brought to Area 2, and stood in a lineup, where both Nixon and Rawls positively identified him as the other offender.

¶ 17 Detective Forberg testified that defendant's hair was shorter at the lineup than at trial and, following his identification, defendant was advised of his *Miranda* rights. During the ensuing

interview, defendant indicated that Mickle was his nephew, his sister Candy's son.¹ When told that he had been identified in the lineup, defendant immediately asked why a police officer was looking at him. Detective Forberg testified that when Rawls viewed the lineup, he was not wearing a police uniform, and his handgun was not visible, nor were there any other indications that Rawls was a police officer. When Detective Forberg asked defendant how he knew the individual who identified him was a police officer, he stated that he could see the individual was wearing a yellow shirt and had a gun, but did not respond to further questions on the subject.

¶ 18 The parties stipulated to the forensic evidence, which connected Mickle to the revolver used in the incident. Defendant called Chicago police detective Kevin Eberle, who testified that he was assigned to the case and wrote a report after he interviewed Rawls on August 28, 2010. Rawls told Detective Eberle that he exited the restaurant to apprehend the second offender, but found that the offender had escaped by then. He also testified that Rawls did not describe the second offender as having dreadlocks.

¶ 19 Defendant testified on his own behalf and denied any involvement in the incident. He stated he was living at his girlfriend's house at the time and selling bottled water for a living. He had the same hairstyle on August 28, 2010, but denied wearing a doo-rag because he hated them and found them irritating. On the night of the incident, defendant testified that he was selling bottled water at 71st and Halsted Streets. About 11:30 p.m., his cousin, Jackie Lester, informed him that Mickle was shot, and defendant visited Mickle in the hospital that night. When the police came to arrest him on October 24, 2010, defendant complied with their requests and did not run. Defendant recalled the statement he made to police about how a police officer could

¹ Elsewhere in the record, Candy Collier's first name appears as "Khandi." The spelling of defendant's sister's name is not relevant to this appeal.

pick him out of the lineup, and testified that he had learned about the involvement of a police officer from conversations with his sister, Khandi Collier.

¶ 20 On cross examination, defendant stated that he had the same hairstyle on August 28, 2010, October 24, 2010, and at trial. When shown a picture of the lineup on October 24, 2010, defendant admitted that his hair was shoulder length at that time, but granted that it fell below his shoulders during trial. Defendant further testified that when he was selling water at 71st and Halsted Streets, "everyone" saw him there, including strangers. When pressed on the identities of the people who saw him, defendant revealed that his cousin, Jackie Lester, and an Arab restaurant owner named Mickey saw him. Defendant testified that Jackie Lester did not see him until 11:30 p.m., but Mickey saw him "all day" because defendant was hanging out in front of Mickey's restaurant from 5 p.m. until 11:30 p.m. Although defendant was living with his girlfriend from August 28, 2010 through October 24, 2010, he testified that he gave police his mother's address when he was arrested because it was on his identification card. Defendant testified that Troy Mickle was his nephew, and 15 years old at the time of the incident. Defendant further testified that he did not know and could not see the individual or individuals who picked him out of the lineup, but that he was able to see what they were wearing.

¶ 21 Following the close of evidence and argument, the jury was instructed on the charged offenses and the factors to be considered in weighing the identification testimony. The jury found defendant guilty of two counts of attempted armed robbery and two counts of aggravated discharge of a firearm, and not guilty of two counts of attempted first degree murder.

¶ 22 In this appeal from that judgment, defendant contends that his convictions should be reversed because the eyewitness identifications were not sufficiently reliable to find him guilty beyond a reasonable doubt. He specifically argues that eyewitness identifications are notoriously

unreliable, that Rawls and Nixon did not have sufficient time to view the offender, and they were unable to pay proper attention to the offender's face. He also claims that they did not provide a meaningful description of the offender, that there was a substantial time lapse between the incident and identification, and no physical evidence or inculpatory statements tied him to the crime.

¶ 23 Where, as here, defendant challenges the sufficiency of the evidence to sustain his convictions, a reviewing court will not retry defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, the reviewing 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 essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). This standard recognizes the responsibility of the jury, as the trier of fact, to determine the credibility of the witnesses and the weight to be given to their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences there from. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). In applying it, we allow all reasonable inferences from the record in favor of the prosecution (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), and will not overturn a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of defendant's guilt (*People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)).

¶ 24 In support of his contention that the identification testimony was unreliable, defendant makes sweeping arguments regarding the fallibility of all eyewitness identification testimony in general based, *inter alia*, on certain scientific studies and observations from foreign jurisdictions. We initially observe that the secondary sources cited do not qualify as relevant authority in support of defendant's arguments on appeal. *People v. Heaton*, 266 Ill. App. 3d 469, 476-78

(1994). Moreover, a reviewing court must determine the issues presented solely on the basis of the record made in the trial court, and will not consider evidentiary material which is not presented at trial or made part of the record. *Heaton*, 266 Ill. App. 3d at 476-477. Insofar as the secondary sources cited by defendant constitute an attempt to integrate expert opinion evidence into the record, which was not subject to cross-examination by the State or considered by the trier of fact, they will not be considered on appeal. *Heaton*, 266 Ill. App. 3d at 478 (1994), *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-532 (1993).

¶ 25 Under well settled principles, a conviction based solely on an unreliable eyewitness identification will not be sustained (*People v. Hernandez*, 312 Ill. App. 3d 1032, 1036 (1st Dist. 2010)), however, an identification by a single witness is sufficient to sustain a conviction if that witness viewed the accused under circumstances permitting a positive identification (*People v. Lewis*, 165 Ill. 2d 305, 356 (1995)). To assess the credibility of witness identification, the reviewing court examines: (1) the opportunity the witness had to view the offender at the time of the offense; (2) the witness' degree of attention at the time of the offense; (3) the accuracy of the witness' 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 offense and the identification confrontation. *People v. Slim*, 127 Ill. 2d 302, 307-308 (1989), citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

¶ 26 Defendant contends that amid the stress of an armed robbery, and the chaos of the shootout, the eyewitnesses could not have had adequate opportunity to view him and make a reliable identification. We disagree. The record clearly shows that Rawls and Nixon had multiple opportunities to observe defendant on August 28, 2010. They first observed him on the storefront church ledge, as they parked their car in an area illuminated by a street lamp, a

minimal distance away from defendant. Inside the small, one-room restaurant, Rawls and Nixon observed defendant a second time, when he briefly conversed with Mickle and returned to the doorway. After observing Mickle point a gun at another patron, Rawls and Nixon had a clear and unobstructed view of defendant for the third time, when defendant was standing seven to eight feet away, preventing them from leaving through the doorway. Once the shooting began, Rawls saw defendant for the fourth and final time, yelling out and running off eastbound on 79th Street. Considering the lighting conditions in the viewing areas, proximity of defendant to both eyewitnesses, and the number of times the eyewitnesses observed defendant during the incident, we find that the eyewitnesses had sufficient opportunity to view the offender and make a reliable identification that satisfied the first *Biggers* factor. *People v. Reed*, 80 Ill. App. 3d 771, 778 (1980).

¶ 27 Defendant next contends that the second factor favors him because the presence of a weapon diverts the witness' attention to the gun and increases the likelihood of misidentification. He argues that once Rawls and Nixon saw the gun, it "defies scientific belief to conclude that either eyewitness could remained [sic] focused on [the] face of the man at the door." The mere presence of a weapon does not render a witness' testimony unreliable (*See e.g., Slim*, 127 Ill. 2d at 305-306), and here, the evidence shows that the attention of Rawls and Nixon was heightened when they became aware of the gunman. They paid special attention to defendant as he blocked the front door and prevented them from exiting the restaurant, after he announced their intention to rob all the restaurant patrons, and commanded Mickle to watch Rawls. On this evidence, a jury could reasonably find that the eyewitnesses' attention to the offender at the time of the offense was sufficient to allow a reliable identification.

¶ 28 Defendant also contends that the third *Biggers* factor favors him because Rawls and

Nixon were unable to provide any meaningful description of the second offender to police beyond describing a black man with a black doo-rag and black clothing. He further contends that they gave convicting descriptions of the offender's hairstyle. Although Rawls and Nixon gave only general descriptions of defendant, any omissions in these descriptions do not create a reasonable doubt where, as here, both eyewitnesses positively identified defendant in a lineup based on their view of him at the time of the incident and remained consistent with their identifications at trial. *Slim*, 127 Ill. 2d at 308-309.

¶ 29 In reaching that conclusion, we necessarily reject defendant's contentions regarding the hairstyle descriptions given by the eyewitnesses. Rawls and Nixon consistently maintained that defendant was wearing a black doo-rag that covered his hair, and Rawls testified that he could see the imprints of defendant's twists through the doo-rag, while Nixon could not. This minor inconsistency is insufficient to negate their positive identifications of him, or to generate a reasonable doubt of defendant's identity as the second offender. *Slim*, 127 Ill. 2d at 309.

¶ 30 The record further shows that Nixon accurately identified defendant in a photo array less than one week after the incident, and confirmed her identification at the lineup two months later. Rawls identified defendant in the lineup two months after the incident, and both eyewitnesses remained consistent with their identifications throughout trial. Although defendant claims that the lapse of several months was "a seriously negative factor," citing *People v. Piatkowski*, 225 Ill. 2d 551, 570 (2007), the time lapse in this case between the offense and the identifications (*see Slim*, 127 Ill. 2d at 313-314), was not so significant as to render the identification testimony unreliable. Accordingly, we find that three remaining *Biggers* factors weigh in favor of the reliability of the identifications made by Rawls and Nixon and do not evince a reasonable doubt of his guilt. *Slim*, 127 Ill. 2d at 315.

¶ 31 Defendant's further contention that the guilty verdict is challenged by the State's lack of DNA or other physical evidence tying him to the crime is unpersuasive. Lack of physical evidence does not render the evidence so unreasonable, improbable, or unsatisfactory as to justify this court's reversal of the jury's determination that defendant is guilty beyond a reasonable doubt. *People v. Wheeler*, 401 Ill. App. 3d 304, 312 (2010). In this case, it is difficult to fathom what, if any, physical evidence connecting defendant to the crime could be present at the scene given that defendant was not alleged to have fired any weapons himself, or made physical contact with any patrons inside the restaurant. Thus, the lack of physical evidence linking him to the crime does not raise a reasonable doubt of his guilt.

¶ 32 Defendant finally asserts, the State concedes, and we agree that his mittimus should be corrected to reflect that attempted armed robbery is a Class 1 felony. 720 ILCS 5/8-4(c)(2) (West 2010). Defendant was convicted, *inter alia*, of two counts of attempted armed robbery, and one of those counts is incorrectly indicated on the mittimus as a Class X felony. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the court to modify defendant's mittimus to reflect that Count 3, attempted armed robbery, is a Class 1 felony.

¶ 33 For the reasons stated, we correct defendant's mittimus as indicated and affirm the judgment in all other respects.

¶ 34 Affirmed, mittimus corrected.