

FOURTH DIVISION
March 31, 2014

No. 1-13-0077

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 10137
)	
RONNY BROUGHTON,)	Honorable
)	William J. Kunkle,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

- ¶ 1 *Held:* Burglary conviction affirmed over defendant's challenge to identification testimony; fines and fees order modified.
- ¶ 2 Following a bench trial, defendant Ronny Broughton was found guilty of burglary and sentenced to seven years' imprisonment. On appeal, defendant contends that his conviction should be reversed because it was based entirely on an uncorroborated identification by a single witness who had a limited opportunity to view the offender and previously provided a contrary description to a 911 operator. He also challenges the propriety of the DNA fee imposed by the

trial court and contends that he is entitled to *per diem* credit for the time he spent in presentence custody.

¶ 3 At trial, Jose Rivera, Jr., testified that about 4:10 a.m. on May 24, 2010, he was inside the living room of his second floor apartment at 4608 South Karlov Avenue in Chicago when he heard glass break outside and saw three black males in and around his neighbor's Chevrolet Trailblazer parked across the street. He specifically testified that from his vantage point, he saw "a gentleman with a black tee-shirt and the other two had kind of, like, a white shirt on them." Rivera identified defendant in court as the individual wearing the black shirt inside the Trailblazer, and testified that one of the other two individuals wearing white shirts stood outside the Trailblazer while the other stood at the corner of the street. Rivera dialed 911 and walked outside.

¶ 4 Before he reached the middle of the street, Rivera saw defendant hand a radio through the broken driver's side window to the individual standing outside, who then took off running with the individual at the street corner. Meanwhile, defendant climbed out of the broken window, looked at Rivera and ran north up Karlov Avenue. Rivera estimated that he was no more than 15 to 20 feet away from the Trailblazer at the time he saw defendant's face. Immediately thereafter, police arrived on the scene and returned shortly with defendant in the back of a squad car. Rivera positively identified defendant to the police officers as the individual he had seen break into his neighbor's Trailblazer. Rivera acknowledged that he had a prior misdemeanor conviction for unlawful use of a credit card, and on cross-examination, admitted that he was not good with distance, but he remained firm in his identification of defendant.

¶ 5 Chicago police officer Hurtado testified that about 4:12 a.m. on May 24, 2010, she and her partner, Officer Reyes, responded to a radio dispatch about a vehicular burglary in the area of 4607 South Karlov Avenue and spoke to Jose Rivera. They searched the area north of Karlov Avenue and discovered defendant wearing "dark clothing," attempting to climb over a chain link fence in the residential yard at 4523 South Komensky Avenue. They stopped defendant and transported him back to the scene where he was identified by Jose Rivera as the "same person" he had seen inside the Trailblazer.

¶ 6 On cross-examination, Officer Hurtado stated that the driver's side window of the Trailblazer was broken, and, inside, wires were pulled out and a face plate was missing. Whatever had been removed was never recovered, and no fingerprints were taken from the Trailblazer. As to the show up procedure, Officer Hurtado testified that Rivera was seated inside a squad car directly in front of theirs when he identified defendant. Neither she, nor her partner, said anything to Rivera before the identification.

¶ 7 Antonio Viramontes, Jr., testified that he lived in the 4600 block of South Karlov Avenue and borrowed a 2003 Chevrolet Trailblazer from his brother, Susano Viramontes, because he was moving into a new apartment. He parked the Trailblazer in front of 4607 South Karlov Avenue the afternoon of May 23, 2010, and about 4:15 the next morning, he received a notification concerning the Trailblazer and went outside to investigate. The Trailblazer was parked where he had left it, but the driver's side window was broken and the stereo was missing.

¶ 8 Susano Viramontes testified that he loaned his 2003 Chevrolet Trailblazer to his brother in May 2010, but had not given anyone other than Antonio permission to enter the vehicle or

take anything from it. The State then rested its case-in-chief and the trial court denied defendant's motion for a directed finding.

¶ 9 Defendant presented the testimony of Christy Fields, the police dispatcher who received the report from 911 emergency services about the vehicular burglary at bar. Specifically, Fields testified that she dispatched the report "for two male blacks breaking into a vehicle and both wearing white. One of them was already in the vehicle." Thereafter, defendant exercised his constitutional right not to testify, and the defense rested.

¶ 10 Following closing arguments, the trial court found defendant guilty of burglary. In reaching that determination, the trial court acknowledged defendant's challenge to the sufficiency of the single witness identification, but noted that it was corroborated by other evidence, "circumstantial and otherwise." The court found that Rivera dialed 911 as he was going downstairs and outside, but before he observed defendant inside the Trailblazer, which explained his report of two male blacks wearing white. The court also noted Rivera's testimony that he then observed defendant inside the Trailblazer from a short distance away, and it did not consider whether or not defendant was wearing a black shirt to be dispositive. Instead, the court found it "substantial and significant" that the police officers discovered defendant trying to climb over a residential fence within two blocks of the crime scene, that Rivera identified defendant when he was brought back "within minutes" of the burglary, and that Rivera's in-court identification of defendant was "clear and believable."

¶ 11 In this court, defendant first contends that his identification as the offender was insufficient to sustain his conviction because it was based entirely on the uncorroborated

identification by Rivera, who had a limited opportunity to view the offender and provided a contrary description to a 911 operator.

¶ 12 When defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Brown*, 2013 IL 114196, ¶ 48. This standard gives " 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *People v. Jackson*, 232 Ill. 2d 246, 281 (2009) (quoting *Jackson*, 443 U.S. at 319). In a bench trial, it is for the trial judge to determine the credibility of the witnesses' identification testimony, weigh the evidence and draw reasonable inferences therefrom. *People v. Jefferson*, 183 Ill. App. 3d 497, 503-04 (1989). The trial court's judgment will not be set aside on review unless the evidence is so unsatisfactory, improbable or implausible as to justify a reasonable doubt as to defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 13 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *Slim*, 127 Ill. 2d at 306. An identification of the accused by a single witness is sufficient to sustain a conviction, even in the presence of contradictory alibi testimony, provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible. *Slim*, 127 Ill. 2d at 307. We generally evaluate the reliability of identification testimony using the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the opportunity the victim had to

view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Slim*, 127 Ill. 2d at 307-08. In addition to these 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.

¶ 14 Applying these factors to the facts in the case at bar indicates that the identification of defendant was reliable under the totality of the surrounding circumstances. *People v. Hicks*, 134 Ill. App. 3d 1031, 1037 (1985). In considering the opportunity of a witness to view the offender at the time of the offense, courts look at " 'whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation.' " *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40 (quoting *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979)). Here, Rivera's opportunity to view the offender's face was limited to when the offender climbed out of the driver's side window, looked at him, and ran away; however, that short time frame alone does not render Rivera's identification unreliable. *People v. Adams*, 394 Ill. App. 3d 217, 233 (2009). In *People v. Wallace*, 210 Ill. App. 3d 325, 339 (1991), this court found that a witness's identification was reliable where she observed the offender at close range, even if only for a few seconds. Similarly, in *People v. Herrett*, 137 Ill. 2d 195, 200 (1990), the supreme court found that there was sufficient opportunity to view the offender where the witness observed the offender's face for only a few seconds in a dimly lit pawnshop. Here, as in *Herrett* and *Wallace*, Rivera had a sufficient opportunity, though brief, to view the face of the offender, and he

positively identified the offender as defendant when police returned him to the scene shortly thereafter, and again at trial.

¶ 15 Defendant further argues that Rivera's attention was "interrupted" by the few seconds while he was walking downstairs and then "divided" among three individuals, not just the one inside the Trailblazer. However, nothing in the record shows that Rivera's degree of attention was deficient in that regard. *People v. Holmes*, 141 Ill. 2d 204, 240 (1990). Despite walking downstairs toward the Trailblazer, into what defendant describes as a threatening situation that would have paid his attention to all three individuals, Rivera testified that the two individuals wearing white took off running after receiving the car radio and that he saw the defendant's face as he climbed out of the vehicle and looked at him from a distance of 15 to 25 feet. Under these circumstances, a rational trier of fact could have found Rivera's degree of attention sufficient to make a positive identification of defendant, and we will not substitute our judgment for that of the trial court. *Tomei*, 2013 IL App (1st) 112632, ¶ 47.

¶ 16 Defendant next challenges the accuracy of Rivera's prior description of the offender based on his contrary description to a 911 operator about "two male blacks breaking into a vehicle and both wearing white. One of them was already in the vehicle." However, this description did not conflict or rule out defendant as the offender. Discrepancies between a witness's description of the accused and defendant's physical appearance do not, alone, create a reasonable doubt as long as a positive identification has been made. *Slim*, 127 Ill. 2d at 309. Here, we note, as does the State, that the trial court found that Rivera dialed 911 as he was going downstairs and outside, but before he observed defendant inside the Trailblazer, which explained his report of two male blacks wearing white. The court did not consider the color of defendant's

shirt to be dispositive and noted Rivera's testimony that he then observed defendant inside the Trailblazer from a short distance away. Any discrepancies perceived by defendant in the testimony of the witnesses were within the province of the trier of fact to consider and resolve. *People v. Buford*, 235 Ill. App. 3d 393, 405 (1992). The trial court found Rivera to be credible in his identification of defendant, and we will not substitute our judgment for that of the trial court. *Tomei*, 2013 IL App (1st) 112632, ¶ 52.

¶ 17 Defendant further argues that this court should give Rivera's certainty of identification little weight because since *Biggers*, this factor has been discredited by a large body of social science research and "by a legion of cases." Defendant cites, *inter alia*, *State v. Long*, 721 P.2d 483 (Utah 1986), and *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003), in support. We initially note that we are not bound by decisions from foreign jurisdictions (*People v. Wright*, 2013 IL App (1st) 103232, ¶ 66), and observe that we rejected the same argument in *Tomei*, 2013 IL App (1st) 112632, ¶¶ 54-56, and discern no reason to depart from that ruling here. See also *State v. Stilling*, 770 P.2d 137, 143 (Utah 1989) ("We decided *Long* on neither federal nor state constitutional principles, but rather as a result of our supervisory capacity over the lower courts").

¶ 18 With respect to the fifth *Biggers* factor, defendant does not dispute the brief length of time that elapsed between the crime and the identification confrontation, but argues that the identification was unreliable and insufficient to support his conviction given the lack of any corroborating evidence, *i.e.*, burglary tools, the stereo taken from the vehicle, fingerprints, or inculpatory statements. However, the lack of physical evidence corroborating eyewitness identifications is not, alone, a reason for reversal because a single witness's identification can

sustain a conviction. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23; *People v. Tatum*, 389 Ill. App. 3d 656, 661 (2009). Here, the lack of corroborating evidence had no bearing on defendant's conviction because the trial court found Rivera's identification of defendant and testimony, that he saw defendant hand a radio through the broken driver's side window to the individual standing outside, who then took off running with the individual at the street corner, to be credible. *Herron*, 2012 IL App (1st) 090663, ¶ 23.

¶ 19 Notwithstanding, defendant parenthetically notes that the efficacy of eyewitness identification and current safeguards about its reliability is a cutting-edge topic in modern criminal procedure, and the law in this area is rapidly evolving, citing *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 53. Although defendant asserts that the modern trend generally is to eliminate the fourth *Biggers* factor and to identify additional, relevant factors supported by more than four decades of scientific research conducted since *Biggers* was decided, we observe that "the trend in Illinois is to preclude expert testimony on the reliability of eyewitness identification on the ground that it invades the province of the jury as the trier of fact." *McGhee*, 2012 IL App (1st) 093404, ¶ 54. Although reviewing courts have previously observed that the Illinois Pattern Instructions permit a trial court to omit one of the *Biggers* factors in the place of the kind of social science evidence espoused by defendant here, no such evidence was offered at trial, and we find defendant's argument unpersuasive. *Tomei*, 2013 IL App (1st) 112632, ¶¶ 55-56.

¶ 20 Defendant continues to argue that the show-up procedure in this case diminished the reliability of Rivera's subsequent in-court identification. However, here, as in *Tomei*, 2013 IL App (1st) 112632, ¶ 58, defendant does not claim the show-up is so suggestive as to be inadmissible under the due process clause, but rather that it was not sufficiently reliable to prove

him guilty beyond a reasonable doubt. Here, as in *Tomei*, 2013 IL App (1st) 112632, ¶ 59, defendant did not present expert testimony regarding the prejudicial nature of the show-up procedure, nor did he present any evidence at trial that the procedure was suggestive or unreliable; and the trial court weighed the evidence presented and found that Rivera's identification was reliable. Viewing the evidence in the light most favorable to the prosecution, we cannot say that the show-up procedure undermined the reliability of the witness's identification. *Tomei*, 2013 IL App (1st) 112632, ¶ 59. We reach the same conclusion with regard to defendant's abbreviated argument that the reliability of Rivera's in-court identification was diminished by the cross-racial identification in this case. See *People v. Brown*, 100 Ill. App. 3d 57, 71-72 (1981) (factors such as stress, distortion of memory, and problems of interracial identification are within the realm of common experience and can be evaluated by the trier of fact without expert assistance). Based on the record before us, we affirm defendant's burglary conviction.

¶ 21 Defendant also challenges the propriety of the \$200 DNA fee because his DNA profile was already in the Illinois State Police database in connection with a prior conviction. Citing the supreme court's decision in *People v. Marshall*, 242 Ill. 2d 285, 297 (2011), the State concedes that defendant may not be assessed the fee a second time. We agree and vacate that fee pursuant to our authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999).

¶ 22 Relatedly, defendant contends that he is entitled to a \$5-per-day credit against his fines for the time he spent in presentence custody. The State concedes, and we agree, that defendant's \$10 mental health court, \$5 youth diversion/peer court, \$5 drug court, \$30 children's advocacy center, and \$30 juvenile expungement assessments are all fines subject to a \$5-per-day credit for

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the time he spent in presentence custody. 725 ILCS 5/110-14(a) (West 2010); *People v. Wynn*, 2013 IL App (2d) 120575, ¶¶ 16, 18. These charges total \$80 and defendant is entitled to that amount in credit from his presentence incarceration credit. *People v. Williams*, 2011 IL App (1st) 091667-B, ¶19.

¶ 23 For the reasons stated, we amend the fines and fees order as indicated, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 24 Affirmed as modified.