2012 IL App (1st) 1101917-U

FIFTH DIVISION
June 22, 2012

No. 1-10-1917

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal
	)	from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 20493 (01)
	)	
MICHAEL BUFORD,	)	Honorable
	)	Kevin M. Sheehan,
	)	Judge Presiding.
	)	
Defendant-Appellant.	)	

JUSTICE JOSEPH GORDON delivered the judgment of the court.

Presiding Justice Epstein and Justice McBride concur in the judgment.

O R D E R

¶ 1 *HELD*: Because defendant provided no reason to cast doubt upon the unimpeached and uncontested testimony of two eyewitnesses, both of whom identified defendant as being armed with a firearm during and immediately after a robbery, and because the circumstantial evidence

tended to support their testimony, there was sufficient evidence to sustain defendant's conviction for armed robbery. Furthermore, under *People v. Tisdel*, evidence that an eyewitness negatively identified an individual other than defendant was properly admitted as relevant evidence.

¶ 2 Defendant Michael Buford was tried and convicted by a jury of two counts of armed robbery against Manuel Alvarez and Gabriella Rojas (Rojas), and sentenced to two concurrent terms of 8 years imprisonment. Defendant now appeals, arguing that the State presented insufficient evidence of his guilt and that the trial court improperly admitted negative identification evidence. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant and his co-defendant, Antwone Hall, were charged by indictment with two counts of armed robbery with a firearm and two counts of aggravated unlawful restraint against Manuel Alvarez and Gabriella Rojas following an incident occurring on October 15, 2008. The aggravated unlawful restraint charges were nolle prossed by the State and defendants were tried jointly by jury.

¶ 5 Manuel Alvarez testified first for the State at trial. He stated that on October 15, 2008, he attended a fund raiser at the Garfield Park Conservatory with his fiancé (now wife) Gabriella Rojas (now Gabriella Alvarez). At approximately 9:00 p.m., the two exited the Conservatory and walked south towards their vehicle along a sidewalk. Alvarez described the sidewalk as "well-lit." Upon reaching the parking lot and nearing their vehicle, Alvarez heard a voice say "don't move, stop, don't try anything," and observed an individual in a red

baseball cap and dark clothing walking towards him. He stated that the individual was a black male of similar height and weight to himself, and that he was 5'11", 155 pounds. Alvarez testified that the parking lot was illuminated "pretty good" by "real tall streetlamps." The individual stood approximately 10 feet away from a street lamp. Alvarez identified this individual as defendant from the witness stand.

¶ 6 Alvarez testified that defendant grabbed Rojas's purse, and that defendant was "really close" at the time, facing him from a distance of approximately 4 feet. Alvarez stated that he was able to see defendant's "entire face." As defendant took Rojas's purse, a second individual approached, whom Alvarez identified as co-defendant Hall, and took Alvarez's phone and wallet and Rojas's phone. While Hall was searching Alvarez, he observed a small, silver, handgun with a brownish grip in defendant's right hand. He described the gun as a semiautomatic, which did not have the characteristics of a revolver. Alvarez testified that while he was being searched by Hall, defendant repeatedly told him "don't try anything, don't move," while covering and uncovering the weapon in his right hand with his left. While testifying, Alvarez demonstrated for the jury how defendant made these movements. Alvarez stated that a minute or two elapsed from the time defendant grabbed Rojas's purse to the time he displayed the weapon. After Hall took the items from Alvarez and Rojas, he and defendant said something to each other that Alvarez was unable to hear, and the two men walked away.

¶ 7 Alvarez testified that he and Rojas then began heading towards their vehicle, at which time they were approached by an individual driving a maroon Cadillac. The driver, later identified as Martin Howard, asked if the two were okay. Alvarez told Howard that he had just been robbed and then Howard drove off in the direction of defendant, Hall, and a third individual, all of whom were running northbound on Central Park. Alvarez testified that he and Rojas then began walking back to the Conservatory when an unnamed individual asked them what had happened and offered us his phone. Alvarez then called 9-1-1 and went back inside the Conservatory.

¶ 8 Alvarez stated that police arrived approximately 5 to 10 minutes later. The officers asked him if he could identify the offenders. He described defendant as a black male wearing a red hat and a black jacket who was "close to [his] height and had a "skinny face." Alvarez estimated that defendant weighed about 155 pounds or "a little more." The officers then asked Alvarez if he "wanted to ride along with them to see if [he] could spot [the offenders] on the street. Alvarez then drove with two police officers through the area in search of defendant and Hall, but returned to the scene a few minutes later when the officers received a call that police had an individual in custody at the Conservatory that they wanted him to see.

¶ 9 Alvarez testified that upon returning to the Conservatory, a female officer approached him with an individual and asked if he could identify him. Alvarez described that individual as an African American in his twenties with medium complexion who was comparable in

weight and "fit" to him, approximately 150 pounds. According to Alvarez, the individual was not wearing a red hat, but was wearing a black jacket. Over defense objection, Alvarez was permitted to state that he told police that individual was not one of the offenders. This was consistent with the ruling of the trial court, prior to the commencement of trial, granting the State's motion *in limine* to introduce evidence of a negative show-up identification pursuant to *People v. Tisdel*, 201 Ill. 2d 210 (2002).

¶ 10 Continuing his testimony, Alvarez stated that he then resumed riding around the area with police. A few moments later, the officers with whom he was riding received another call and returned to the Conservatory so that Alvarez could identify another individual. Upon their return, Alvarez testified that he was brought to the front of the building where police put an individual "in front of a light" for him to identify, whom Alvarez then identified as Hall. At that time, approximately 15 minutes had elapsed since the robbery. Alvarez then waited with Roajs inside the Conservatory for another 10 to 15 minutes, at which point the two police officers with whom he had been riding asked him to identify a second individual. Alvarez exited the Conservatory and identified defendant as the individual with the gun who has robbed him. Even though defendant was not wearing the red baseball cap, Alvarez stated that he was "a hundred percent" certain that defendant was one of the offenders.

¶ 11 Gabriella Alvarez testified next for the State. Her testimony regarding the robbery mirrored that of Alvarez, except she stated that she was unable to get a good luck at either individual because she was frightened and did not make eye contact. She testified that

following the robbery, the men ran off when a car started approaching them. She stated that the man who took her purse ran un towards a railroad track, but that she did not see where the other went.

¶ 12 Chicago Police Officer Martin Howard testified next for the State. He stated that on October 15, 2008, he was off-duty and working as a security guard on behalf of the Chicago Park District at the Garfield Park Conservatory. At approximately 9:00 p.m. that evening, he observed a Hispanic couple engage in a conversation with two or three subjects in the Conservatory's parking lot. He testified that one of the subjects was wearing a red hat From a distance of about 25 yards and under artificial lighting, he observed two subjects abruptly walk northbound from the parking lot. Howard said that he suspected that something illegal had happened, and approached the Hispanic couple in his vehicle, and asked them if they were alright. The couple informed him that they had just been robbed, and he left in pursuit of the offenders.

¶ 13 Howard testified that he gave chase in his vehicle, initially pursuing "two to three" of the individuals as they ran northbound on Central Park while driving on the sidewalk. At the intersection of Fulton and Central Park, two of the individuals "veered off" and Howard continued pursuing the third, whom he described as a black male wearing "a red cap, a blue do-rag or black scarf beneath it and a black shirt." Howard stated that the individual was carrying a chrome plated handgun in one hand and a purse in the other. Howard drove next to this individual at approximately 2-3 miles per hour for several blocks, while yelling at the

individual to stop and telling him that he was a police officer. Howard continued to follow the individual, driving next to him in the oncoming lane of traffic, until he reached an overpass at Kinzie Street, at which point the individual scaled the overpass and crossed the railroad tracks, heading westbound. Howard stated that he did not follow the individual further because he was not in uniform and did not have his weapon. At that time, Howard observed a uniformed police officer approaching. He spoke to that officer and then returned to the conservatory. While he drove next to the individual, he was able to see a "full facial" view of the individual during the chase, which occurred under artificial street lighting. He stated that during the chase, his focus remained on this individual because he was armed.

¶ 14 Howard then went back to the conservatory and spoke to officers there about what had happened. Approximately 15 to 20 minutes later, police asked Howard to view a potential subject, and identified that person as one of the individuals he had chased after the robbery who veered down Fulton. Howard identified that individual from the witness stand as Hall. Howard remained at the Conservatory and approximately 10 to 15 minutes later, police asked Howard to view another individual who they were holding in a squad car. Howard recognized that individual as the one who was carrying the purse and the weapon who ran up the embankment. He testified that he was able to identify him by his face and clothing, even though he was no longer wearing a hat or do-rag at the time of the identification. From the witness stand, Howard identified this individual as defendant.

¶ 15 Chicago police sergeant Fred Ullweit testified next for the State. He said that on October 15, 2008, he responded to a call regarding a robbery at the Garfield Park Conservatory. Upon arriving there, Ullweit toured the area around the Conservatory for the offenders, who had been described to him in a flash message. Near 700 Hamlin Avenue, he observed an individual matching the description of one of the offenders. The individual began running as Ullweit approached, but was apprehended by other officers and brought back to the Conservatory for a show up. Ullweit identified that individual as Hall from the witness stand. Ullweit then testified that at that show-up, a male victim, Alvarez, immediately identified Hall as the person who had gone through his pocket during the robbery.

¶ 16 The State then called Chicago police officer Robert Jackson as a witness. Jackson testified that on the night of the robbery, he and his partner, Officer Gordon, responded to a call regarding a robbery at the Garfield Park Conservatory. Once they arrived, he spoke with the robbery victim, Alvarez, and asked Alvarez to ride with him and Gordon to look for the suspects. During their ride, Jackson received a call that a possible suspect was being held near 400 North Pulaski. They proceeded to that location and asked Alvarez if he recognized the individual that was being held. Jackson testified, without objection, that Alvarez "immediately said 'that's not–I don't know him, that's not the man that robbed me.' "

¶ 17 Jackson then resumed driving around the area with Alvarez until they received a call to return to the Conservatory where another suspect was being held. Jackson accompanied

Alvarez to where that individual was being held. From the witness stand, Jackson identified that individual as Hall. Jackson testified that he then asked Alvarez if he recognized that individual and Alvarez identified Hall as the robber who had gone through his pockets.

¶ 18 Jackson testified that he then spoke with Howard and proceeded north on Central Park with another officer, Officer Kaczorowski. Jackson walked up the embankment that Howard described and, while searching the area, recovered a red baseball hat that he described as wet and damp. Jackson stated that he caught numerous burrs on his pants during his search. Jackson recovered the hat and, finding nothing else in the area, proceeded westward until he came to Lawndale Avenue. Once on Lawndale, he observed Kaczorowski speaking to an individual in front of 423 North Lawndale. The individual agreed to be taken back to the conservatory so Alvarez could attempt to identify him. According to Jackson, he then walked back to the conservatory and told Alvarez that there was another individual for him to look at. Officers shined a light on that individual and Alvarez "immediately *** said that, yes, that's the man that had the hat, that's the man that had the gun." Jackson identified that individual as defendant. Jackson testified that he then accompanied defendant to the 11th district police station where he conducted a custodial search and recovered a black do-rag covered in burrs from Defendant's pants pocket.

¶ 19 Kenen Hasanbegovic, a forensic scientist at the Illinois State Police Crime Lab, testified that on January 2, 2009, he tested the red baseball cap recovered by Jackson for DNA, but

was unable to recover any. He did not test the do-rag, but stated that its presence underneath a hat might adversely affect the recovery of DNA from a hat.

¶ 20 Officer Alan Kaczorowski testified that on the evening of October 15, 2008, he was on patrol in his squad car when he received a call of an armed robbery at the Garfield Park Conservatory. He arrived at the scene and, after speaking to Howard, went out to look for the offenders. After searching the embankment, he headed north where he saw an individual standing in a doorway of a house at 423 North Lawndale. Kaczorowski identified this individual as defendant. Kaczorowski testified that defendant matched the description of the suspect given to him by Howard, and was standing in the corner between a fence and the front door. Kaczorowski testified that he asked defendant what he was doing and defendant replied that he was visiting a cousin, but failed to provide that cousin's name. Kaczorowski stated that the house was dark and when he knocked on the door, nobody responded. Kaczorowski then transported defendant back to the conservatory for a show-up. Kaczorowski averred that upon their arrival, Howard walked up and immediately identified him as the individual in the red hat that he has pursued. A show-up was then conducted and Alvarez, as well, also immediately identified defendant as the person who held the gun during his robbery.

¶ 21 Once the State rested, both defendants moved for directed verdicts, both of which motions were denied. Defendant then presented his case in chief. Defendant first called Terry Lynn Webster, defendant's aunt. Webster testified on direct examination that another

one of her nephews, Burke Pledge, lived in the home at 423 North Lawndale where defendant was found on the night of the robbery. Webster, however, lived approximately 5 to 6 blocks away. She testified that on the day of the robbery, defendant was working at a day care center, a hardware store, and one other place, but she did not know his work schedule.

¶ 22 On cross-examination, Webster testified that on the night of the robbery, she was told by her nephew that defendant was on the first floor of her home. She further stated that she spent the evening upstairs and did not see defendant. She admitted that she never contacted the police to tell them that defendant was in her home that night because she was "busy a lot." Nor did she speak to the State's Attorney because she did not want to be bothered. Defendant did not call any other witnesses or testify on his own behalf.

¶ 23 After the defense rested, the jury was given an instruction for armed robbery without objection. The jury found both defendants guilty of armed robbery. Each defendant filed a motion for new trial, which the trial court denied. The defendants were each sentenced to 2 concurrent terms of 8 years' imprisonment. Both of their motions to reconsider were denied. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant raises the following four issues on appeal: (1) that the State failed to prove, beyond a reasonable doubt, that defendant was one of the perpetrators, (2) that his conviction should be reduced because the State failed to prove beyond a reasonable doubt that he used a

dangerous weapon, (3) that the trial court abused its discretion by allowing the State to introduce evidence of Alvarez's negative show-up, and (4) that the trial court erred by admitting inadmissible hearsay in the form of Jackson's statements regarding Alvarez's negative show-up identification. For the reasons that follow, we affirm.

¶ 26 A. Sufficiency of the Evidence of Defendant's Guilt

¶ 27 Defendant first contends that the State failed to prove him guilty of armed robbery beyond a reasonable doubt because the eyewitness identifications of Alvarez and Howard were unreliable. He argues that because of neither of the two men was able to accurately identify him as one of the robbers, there was insufficient evidence to support his conviction. The State, however, contends that because both Alvarez and Howard were able to view defendant under good conditions, because they unhesitatingly identified him as one of the robbers, and because the circumstantial evidence strongly corroborated both mens' identification of defendant, the evidence was sufficient to support defendant's conviction. We agree with the State.

¶ 28 When considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. Instead, the relevant question on appeal is 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. *People v. Hall*, 194 Ill. 2d 305, 329-330 (2000). The weight to be given the testimony, the credibility of the witnesses, the resolution of conflicting testimony, and the reasonable inferences to be

drawn from the evidence are the responsibility of the trier of fact. *People v. Walenksy*, 286 Ill. App. 3d 82, 97 (1996); *People v. Milka*, 211 Ill. 2d 150, 178 (2004). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify reasonable doubt of the defendant's guilt. *Hall,* 194 Ill. 2d at 330.

¶ 29 "[W]here the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 3d 274, 279-80 (2004). Our Illinois supreme court has held that even "a single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Those circumstances, which have been embodied in the Illinois Pattern Jury Instructions - Criminal, are as follows:

¶ 30 "(1) The opportunity the witness had to view the offender at the time of the offense.

(2) The witness's degree of attention at the time of the offense.

(3) The witness's earlier description of the offender.

(4) The level of certainty shown by the witness when confronting the defendant.

(5) The length of time between the offense and the identification

confrontation." Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000). See also *Lewis*, 165 Ill. 2d at 356

¶ 31 In the instant case, the jury could have found the eyewitness testimony credible beyond a reasonable doubt based on the above criteria. First, the State's eyewitnesses, Alvarez, the victim, and Howard, who pursued defendant following the robbery, both had ample opportunity to view defendant during and immediately after the offense. Alvarez testified that he had "a minute or two" to observe defendant under ample lighting and that he was able to see defendant's "entire face" during that time from a distance of approximately 4 feet. Similarly, Howard testified that he had a "full facial view" of defendant as he pursued him, and was able to observe defendant under artificial light as he fled.

¶ 32 The second factor, the witnesses' degree of attention, also weighs in favor of the State. Alvarez was able to clearly describe defendant's and Hall's actions before, during, and after the robbery. He testified as to what defendant was wearing, what he was saying, and how he was moving his left hand in relation to his right hand, which held a handgun. While defendant argues that Alvarez was too concerned for Rojas to sufficiently pay attention to defendant, the testimony adduced at trial does not support this contention. Aside from a statement that "[he] looked at [Rojas] and then [he] saw another individual," there is no other indication that Alvarez's degree of attention was in any way impaired. Similarly, Howard testified that during his pursuit, his focus was on defendant because defendant was armed and

posed an immediate threat. Howard testified that he clearly observed defendant with a chrome handgun in one hand and a purse in the other.

¶ 33 The third factor requires an evaluation of the eyewitness's earlier description of the offender. The degree of specificity of an eyewitness's description will not discredit his testimony, but rather will only affect the weight given to his identification. *People v. Slim* 127 Ill. 2d 302, 308 (1989). In *Slim*, our supreme court noted that "a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness' positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made." *Slim*, 127 Ill. 2d at 308-9. Here, while Alvarez did not specifically describe defendant's features to the police, he was nevertheless able to tell them that defendant was a black male with a skinny face who wore a red hat and a black jacket and who was close to his own height and weight. Similarly, Howard was able to describe defendant as a black male wearing a red hat with a scarf or do-rag underneath and carrying a pistol. Howard's testimony indicates that he was able to observe defendant for an extended period of time and that he immediately identified him as the offender when he was brought back to the conservatory. Under *Slim*, the fact that neither Alvarez or Howard did not provide explicit detail of defendant's features does not, as defendant suggests, discredit their testimony, but instead only affects the weight to be given to their identification. Here, it is undisputed that both eyewitnesses were able to identify defendant as the offender almost immediately upon

seeing him after he was brought back to the conservatory, and defendant has failed to indicate how any omissions in their initial descriptions of defendant create a reasonable doubt in light of their positive identifications. See *Slim*, 127 Ill. 2d at 309 ("omissions in a witness' description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made"). Thus, this factor, as well, favors the State.

¶ 34 The fourth factor we must consider is the eyewitness's degree of certainty when identifying the defendant as the offender. This factor favors the State. The undisputed testimony of Kaczorowski indicates that Howard immediately identified defendant as the individual in the red hat that he has pursued, while at a show-up identification, Alvarez also immediately identified defendant as the person who held the gun during his robbery. While defendant baldly suggests that Alvarez's identification may have somehow been influenced by Howard's prior identification of defendant as the offender, there is no evidence in the record that Alvarez was even aware of Howard's prior identification, let alone influenced by it.

¶ 35 The final factor, the length of time between when the offense occurred and when the eyewitness identification was made, also favors the State in this case. Both Alvarez and Howard viewed defendant at close range under well lit conditions during and immediately after the robbery occurred, and both immediately identified defendant as the offender within 45 minutes of the crime. Defendant has cited no authority which would suggest that this

short a time span is sufficient to cast a reasonable doubt on the veracity of an eyewitness identification.

¶ 36 While the fallibility of eyewitness identification has been subjected to greater study and analysis, it still retains probative impact, albeit with less visceral certainty than historically attributed to it. Thus, in the absence of more reliable countervailing scientific proof, reliance upon eyewitness testimony has not been substantially abandoned. Its probative value is determined by the weight attributed to it by the trier of fact guided by the criteria set forth in *Slim* and the Illinois Pattern Jury Instructions.

¶ 37 As previously discussed, the application of these criteria to the facts of this case does not present any basis to vitiate, as a matter of law, the testimony of the State's two eyewitnesses, which more than satisfied the test for reliability as provided in *Slim* and the Illinois Pattern Jury Instructions. In light of the foregoing, we reject defendant's contention that the evidence presented by the State was insufficient to prove him guilty of armed robbery beyond a reasonable doubt.

¶ 38B. Use of a Dangerous Weapon or Firearm

¶ 39 Defendant next contends that should this court not reverse his conviction for armed robbery, we should reduce it to simple robbery because the State failed to establish that he used "either a dangerous weapon or firearm in the commission of the offense." He argues that because the alleged firearm used in the robbery was not introduced, not discharged, and not adequately identified by either Alvarez or Howard, the State was unable to prove, beyond

a reasonable doubt, that he carried a firearm or dangerous weapon when he robbed Alvarez and Rojas. The State, however, argues that defendant has presented no evidence casting doubt on the uncontroverted testimony of Howard and Alvarez, both of whom indicated that defendant was carrying a silver or chrome plated semiautomatic handgun during and immediately after the robbery and, consequently, his conviction should stand. We agree with the State.

¶ 40 As stated above, it is not the province of a reviewing court to retry a defendant. *Hall*, 194 Ill. 2d at 329-330. Instead, when faced with a challenge to the sufficiency of the evidence, a reviewing court must simply determine, when viewing the evidence in a light most favorable to the State, whether a trier of fact could have found the defendant guilty beyond a reasonable doubt. *Hall*, 194 Ill. 2d at 329-330.

¶ 41 Here, defendant was indicted and tried for committing armed robbery with a firearm, in violation of subsection (a)(2) of the armed robbery statute, which provides that a defendant commits armed robbery when he "[takes property *** of another by the use of force or by threatening the imminent use of force]; and "he or she carries on or about his or her person or is otherwise armed with a firearm." 720 ILCS 5/18-2(a)(2) (West 2008)). That statute was amended in 2000 to create "substantively distinct offenses based on whether the offenses were committed with a dangerous weapon 'other than a firearm' or committed with a 'firearm.' " *People v. Washington*, 2012 IL 107993, ¶6. Prior to the 2000 amendments, the statute provided that a person committed the offense of armed robbery when"while he ***

carries on or about his *** person, or is otherwise armed with a dangerous weapon. 720 ILCS 5/18-2 (West 1998). The amended statute explicitly "deleted the requirement of proof of a 'dangerous weapon' when the defendant is armed with a firearm," (*People v. Hill*, 346 Ill. App. 3d 545, 548-49 (2004)).

¶ 42 Under this framework, the *mere possession* of a firearm during a robbery will suffice to sustain a conviction under the armed robbery statute. *Hill*, 346 Ill. App. 3d at 549 ("the focus is on the intended purpose of the firearm based upon its *design*, not the current status of its ability to be used as intended") (emphasis original). A firearm is defined as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," and specifically excludes items such as BB guns and pneumatic guns. 720 ILCS 5/2-7.5 (West 2008) (citing 430 ILCS 65/1.1 (West 2008).

¶ 43 Defendant argues that the State was unable to prove that he used a firearm during the robbery because the object he held "was not introduced into evidence, *** was not discharged, *** was not tested, *** [and] was not handled by either witness who claimed to see it." Moreover, he suggest that what Alvarez and Howard saw might have been "a pellet gun or some other object that does not qualify as a firearm by statute." He further suggests that even if it was a gun, there was no evidence to suggest that it was loaded or operable. We disagree with these contentions.

¶ 44 The fact that the gun in question was not produced at trial is inconsequential to our determination, and the jury "is not required to disregard the inferences that flow from the evidence in order to find guilt beyond a reasonable doubt. [Citation.]" *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007) (finding defendant guilty, in spite of the fact that the gun in question was not produced at trial and inconsistencies existed in witness testimony regarding the gun). Even without production of the actual weapon, the unimpeached testimony of a single eyewitness is sufficient to sustain a conviction for armed robbery. *People v. Garcia*, 229 Ill. App. 3d 436, 438 (1992) (defendant's armed robbery conviction sustained based upon eyewitness testimony that he carried a small black gun that "looked real"). See also *People v. Thomas*, 189 Ill. App. 3d 365 (1989) (evidence sufficient to sustain armed robbery conviction even though none of the victims were able to observe the actual weapon used), *People v. Meadows*, 92 Ill. App. 3d 1028 (1981) (the uncontroverted testimony by the victim that the weapon used was an object of substantial weight with a metal barrel and a wooden stock was sufficient to sustain an armed robbery conviction).

¶ 45 Defendant has given us no reason to cast any doubt upon the uncontraverted testimony of Alvarez and Howard, both of whom stated that he was carrying a firearm during and immediately after the robbery. Contrary to defendant's contentions, this evidence was sufficient to establish that defendant committed armed robbery with a firearm. Alvarez's testimony indicates that defendant was holding a handgun in his right hand throughout the course of the robbery. Alvarez was able to describe both the color of the gun and its grip, its

size, and the fact that it was a semiautomatic pistol rather than a revolver. Alvarez further described the manner in which defendant brandished the gun while telling him and Rojas, "don't try anything, don't move." The record indicates that Alvarez was even able to demonstrate to the jury exactly how defendant brandished the gun. His testimony indicates that Alvarez viewed the firearm under ample lighting. Similarly, Howard testified that he observed defendant carrying a chrome plated handgun in his right hand while he fled from the scene of the robbery, while Howard followed him at a close distance and at low speeds. Howard further testified that he did not pursue defendant once he began climbing the embankment because Howard was not in uniform and defendant, by virtue of being armed, posed an immediate threat to him.

¶ 46 Moreover, defendant has failed to point to anything in the record which lends support to his bald assertion that defendant may have actually been carrying "a pneumatic gun, a spring gun, a BB gun or a stud gun," rather than the firearm which Alvarez and Howard both described. Defendant relies on *Ross, Skelton,* and *Thorne* in support of his proposition that he may not have been carrying an actual firearm. In all of those cases, direct evidence affirmatively established that the defendants used items other than actual firearms to commit their crimes. *People v. Ross*, 229 Ill. 2d 255 (2008) (.177-caliber pellet gun), *People v. Skelton*, 83 Ill. 2d 58 (1980) (toy gun that did not fire blanks or shells), *People v. Thorne*, 352 Ill. App. 3d 1062 (2004) (BB gun). Unlike those cases, here there is absolutely no evidence

in the record which, when viewed in a light most favorable to the State, would support a finding that defendant committed armed robbery with anything other than a firearm.

¶ 47 Finally, defendant argues that the State failed to show that the gun he used was loaded or operable. The language of the armed robbery statute, however, indicates that State need only establish that a defendant "carr[ied] on or about his person" a firearm, with in order to establish guilt. 720 ILCS 5/18-2(a)(2) (West 2008). The statute makes no exception for firearms that are unloaded or inoperable. Subsequent appellate decisions have upheld this distinction, finding that the mere possession of a firearm during a robbery is sufficient to sustain a conviction. See *People v. Moore*, 2011 IL App (3d) 90993, ¶25 ("under section 18-2(a)(2) of the armed robbery statute, whether a firearm is loaded or unloaded is immaterial"); *Hill*, 346 Ill. App. 3d at 549 (evidence was sufficient to show that defendant carried a firearm "despite defendant's contention that it was inoperable"). Because the undisputed evidence indicates that defendant carried a firearm during the robbery, under the armed robbery statute, the question of whether it was loaded or operable is irrelevant. Accordingly, when viewing the evidence in a light most favorable to the State, and drawing all inferences from the record in its favor, we are unable to accept defendant's contention that there was insufficient evidence that defendant "used a dangerous weapon or firearm" to commit armed robbery.

¶ 48 C. Negative Show-Up Evidence

¶ 49 Defendant's last contentions relate to the trial court's decision to admit the testimony of Alvarez and Jackson regarding a negative show-up identification in which Alvarez told police that an individual they brought before him was not the individual who robbed him. Defendant first contends that the trial court abused its discretion in admitting this evidence on relevance grounds, because it was not probative and extremely prejudicial. He further contends that the trial court erred in admitting Jackson's testimony regarding Alvarez's negative identification because those statements constituted inadmissible hearsay. We disagree. Both of these contentions were explicitly raised and rejected by our Illinois supreme court in *People v. Tisdel*, 201 Ill. 2d 210 (2002).

¶ 50 1. Probative Value and Prejudice

¶ 51 Defendant first contends that the trial court erred in admitting the testimony of Alvarez and Jackson regarding Alvarez's negative identification. Defendant suggests that the State offered insufficient evidence regarding the unidentified individual to permit the jury to make any meaningful comparison between him and the defendant, thus preventing them from making a meaningful comparison in assessing the accuracy of Alvarez's identification of defendant. Thus, he claims, this evidence lacked probative value and was therefore inadmissible. We disagree.

¶ 52 Evidence is relevant when it has a tendency to make the existence of any fact that is of consequence to the determination of a matter more or less probable than it would be without that evidence. *People v. Edgeston*, 157 Ill. 2d 201, 237 (1993). Relevant evidence will be

excluded only where its probative value is substantially outweighed by its prejudicial effect, meaning that it has an undue tendency to suggest decision on an improper basis. *Edgeston*, 157 Ill. 2d at 237-38. A trial court's decision to admit or exclude evidence will not be overturned on appeal absent a clear abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). A trial court abuses its discretion when its decision was arbitrary, fanciful, or unreasonable. *Morgan*, 197 Ill. 2d at 455.

¶ 53 In *Tisdel*, our supreme court addressed the issue of admissibility of negative identification evidence and held that when similarities exist between a defendant and a negatively identified individual, testimony regarding that negative identification is competent, relevant evidence. *Tisdel*, 201 Ill. 2d at 220. There, the defendant was convicted for first degree murder, based in part on eyewitnesses who testified that approximately one year after observing the murder, they had viewed lineups containing individuals other than the defendant and did not identify the defendant in those lineups. *Tisdel*, 201 Ill. 2d at 216. The defendant appealed, arguing that this testimony was inadmissible and the supreme court affirmed the defendant's conviction, finding that sufficient similarities existed between the negatively identified individuals and the defendant to admit the disputed evidence. With respect to relevance, the court specifically noted that:

> "the admissibility of nonidentification evidence is limited by considerations of relevance. If nonidentification evidence is not relevant, it should be excluded from evidence. For example,

> evidence that a witness viewed a lineup containing red-haired, blue-eyed men would not be relevant or admissible if the witness described the perpetrator as a blond-haired, brown-eyed man. However, evidence that a witness viewed a lineup containing individuals similar in appearance to the defendant but did not identify anyone would be relevant to the identification process." *Tisdel*, 201 Ill. 2d at 220.

¶ 54 While *Tisdel* found nonidentification evidence relevant, defendant, nevertheless urges us to interpret the aforementioned language as barring the negative identification evidence here because "the jury was left to guess at the potential specific similarities between [defendant] and the non-identified person." The testimony of Alvarez and Jackson, however, belies this contention. Alvarez's testimony indicates that defendant and the non-identified individual shared many characteristics. He stated that both individuals were African-American males who were of similar height and weight to him, both in their early 20s, and both wearing black jackets. Given these similarities, the rejection by Alvarez of the negatively identified individual evidences the close scrutiny and discernment which he exercised in his ultimate identification of defendant.

¶ 55 Defendant further urges us to rely on the New York case of *People v. Wilder*, 712 N.E.2d 652 (N.Y. 1999), which, he contends, supports his position that non-identification evidence is irrelevant. In addition to being non-binding authority, that case's holding is entirely

consistent with the reasoning of *Tisdel* and actually supports the admission of the negative identification evidence when sufficient similarity is established between the negatively identified individual and the defendant.

¶ 56 There, the defendant, a black male, was wearing a black "bubble" coat and a black ski hat during a drug bust. The State also presented evidence that another black male, also wearing a black bubble jacket and ski hat, was negatively identified by that same witness. *Wilder*, 712 N.E.2d at 653-54. Like *Tisdel*, the *Wilder* court held that negative identification evidence was admissible when it "'can tend to prove that the eyewitness possessed the ability to distinguish the particular features of the perpetrator.'" *Wilder*, 712 N.E.2d at 654 (quoting *People v. Bolden*, 445 N.E.2d 198, 200 (1982). The court then found that sufficient similarity existed between the two individuals, based on their common race, gender, and clothing, to deem the evidence relevant and admissible. *Wilder*, 712 N.E. 2d at 655.

¶ 57 We further reject defendant's contention that public policy considerations render this evidence inadmissible. Defendant contends that negative show ups afford the actual offender "more time to flee," incentivize lazy police work, and subject innocent individuals to "the indignity of being investigated for crimes they did not commit." However, defendant concedes that these policy considerations are predicated on the lack of "a threshold showing of relevancy," which, as discussed above, is not the case here. Moreover, our supreme court, in *Tisdel*, held that policy considerations strongly favored the admission of this evidence, stating that:

> "[t]his type of nonidentification is crucial to the accuracy of the witness' identification because, in the typical case, a witness is shown a group of similar looking individuals and asked to pick out only the one who committed the crime. Consequently, the fact that the witness did not pick the other individuals in the lineup becomes as important as the fact that the witness did pick the defendant. *Tisdel*, 201 Ill. 2d 218-19.

¶ 58 Accordingly, we reject defendant's argument that the negative identification evidence was irrelevant and prejudicial.

¶ 59 2. Inadmissible Hearsay

¶ 60 In a related argument, defendant contends that the trial court erred in admitting Jackson's testimony regarding Alvarez's statements of negative identification because those statements were inadmissible hearsay. Defendant concedes that he never objected to the admission of this evidence on hearsay grounds and therefore asks us to review this issue for plain error.

¶ 61 Under a plain error analysis, we may review an otherwise forfeited issue in cases where the evidence is closely balanced or where the error was so serious so as to deprive a defendant of a constitutional right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, where there is no error to begin with, there can be no plain error. *People v.*

Hanson, 238 Ill. 2d 74, 114-15 (2010). Because, for the reasons to be discussed, no error occurred here, we decline to review this issue for plain error.

¶ 62 Section 115-12 of the Code of Criminal Procedure provides that:

> "A statement is not rendered inadmissible by the hearsay rule if
>
> (a) the declarant testifies at the trial or hearing, and
>
> (b) the declarant is subject to cross-examination concerning the statement, and
>
> (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2010).

¶ 63 Defendant does not dispute that the first two requirements of the statute are met, but contends that statements of negative identification are not explicitly exempted under the language of Section 115-12(c), which makes no mention of negative identifications. He therefore asserts that they are "flatly inadmissible under the general hearsay rule." Our Illinois supreme court, however, expressly held otherwise in *Tisdel*. There, as mentioned above, in addition to finding negative identification evidence relevant provided sufficient similarity exists between the defendant and the negatively identified individual, the *Tisdel* court also held that statements of non-identification were inherently statements of identification and therefore admissible under that exception to the general rule against hearsay. *Tisdel*, 201 Ill. 2d 210, 216 (2002). The court specifically held that:

> "nonidentification [evidence] is crucial to the accuracy of the

> witness' identification because, in the typical case, a witness is shown a group of similar looking individuals and asked to pick out only the one who committed the crime. Consequently, the fact that the witness *did not* pick the other individuals in the lineup becomes as important as the fact that the witness *did* pick the defendant." *Tisdel*, 201 Ill. 2d at 218-19 (emphasis original).

¶ 64 The court went on to find fault with previous decisions which restricted the admissibility of statements of identification to those that actually identified the defendant, stating that:

> "[t]his interpretation mistakenly focuses on the result rather than the process. As a consequence, a trier of fact may be deprived of information necessary to an informed decision concerning a witness' reliability. In contrast, construing 'statements of identification' to include the entire identification process would ensure that a trier of fact is fully informed concerning the reliability of a witness' identification, as well as the suggestiveness or lack thereof in that identification." *Tisdel*, 201 Ill. 2d at 219.

¶ 65 Defendant attempts to isolate *Tisdel's* conclusion that negative identification is a form of identification solely to the facts of that case. He contends that the *Tisdel* rationale only applies to lengthy extended investigation proceedings involving multiple individuals and

multiple negative identifications. This narrow reading is not reflected in the express language of *Tisdel*. There, our supreme court reconsidered its earlier ruling in *People v. Hayes*, which held that negative identifications by a witness from photobooks and arrays were not statements of identification. *People v. Hayes*, 139 Ill. 2d 89, 138 (1990). The *Tisdel* court instead stated that "the *Hayes* court erred in limiting 'statements of identification' to a witness'[s] actual identification of a defendant," (*Tisdel*, 201 Ill. 2d at 219) and adopted a more expansive view encompassing "the entire identification process." *Tisdel*, 201 Ill. 2d at 219. This reasoning in *Tisdel* applies without regard to the source of the identification, so long as there is requisite similarity between a defendant and the negatively identified individual to render such negative identification relevant. See also *People v. Newbill*, 374 Ill. App. 3d 847,852-53 (2007). Accordingly, because this evidence was admissible under the "statement of identification" exception to the rule against hearsay and the trial court's decision to admit it was proper under *Tisdel* and no error occurred.

¶ 66 III. CONCLUSION

¶ 67 For the foregoing reasons, we affirm the decision of the trial court.

¶ 68 Affirmed.