

FOURTH DIVISION
April 19, 2012

No. 1-10-2412

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. 09 CR 12123
	)	
MICHAEL BROWN,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Where burglary victim had sufficient opportunity to view defendant and accurately described defendant to police, and where identification did not constitute an impermissible showup procedure, victim's testimony was sufficiently reliable to support conviction; the judgment of the trial court was affirmed.

¶ 2 Following a bench trial, defendant Michael Brown was convicted of burglary and sentenced as a Class X offender to nine years in prison, to be followed by a three-year period of mandatory supervised release (MSR). On appeal, defendant challenges the sufficiency of the evidence, arguing he was only pointed out to police by a single witness who viewed defendant in a showup identification. Defendant further contends that although he was eligible for sentencing

as a Class X offender, he was convicted of a Class 2 felony and therefore should have received the two-year MSR term prescribed for that class of offense, rather than the three-year period prescribed for Class X offenders. We affirm.

¶ 3 *Background*

¶ 4 At trial, Harry Minter testified that on June 20, 2009, he lived at 5319 South Prairie in Chicago. At about 5:47 p.m., Minter received a telephone call from a neighbor and went directly to his garage, where he observed defendant pushing a lawn mower out the garage door.

¶ 5 Minter, who was 73 years old, asked defendant what he was doing, and defendant responded he was taking the lawn mower. Minter held onto the mower while defendant tried to push it. Minter went to his back porch and retrieved an axe. He returned to where defendant was and told him he was not taking the mower. Because neighbors told Minter they had summoned the police, Minter attempted to detain defendant until police arrived. Defendant let go of the mower and fled into an alley toward 51st Street.

¶ 6 About three minutes later, police arrived and asked Minter for a description of the offender. Minter testified defendant wore a white T-shirt and wore his hair in a ponytail, which he related to officers, who located defendant. Officers then took Minter several blocks away, where Minter identified defendant as the offender. Defendant wore a T-shirt and a ponytail but had a cap on his head when he was identified. Minter testified that about 10 minutes elapsed from his initial encounter with defendant until he identified defendant. Minter later observed his garage door had been damaged.

¶ 7 On cross-examination, Minter stated he did not wear glasses and that he last had an eye examination eight years earlier while renewing his driver's license. During the two minutes in which Minter retrieved the axe from his back porch, he looked back at defendant, though he did not see defendant's face during that time.

¶ 8 When Minter returned, defendant had proceeded through the back gate with the mower. Before defendant fled, Minter held onto the mower for about five minutes, during which Minter looked at defendant because he did not know what defendant "had." Minter said he believed defendant was the man who tried to take the mower because defendant was with the police when Minter identified him. On redirect examination, Minter stated he identified defendant as the offender because he was the same man who took the mower from his garage. Minter said when he initially encountered defendant and they argued about the mower, his face was about two feet away from defendant's face.

¶ 9 Chicago police officer Thiry testified he and his partner were near Minter's house at the time in question, responding to a call of a different burglary in progress. When the officers were a block from Minter's residence, Officer Thiry saw defendant run across the street in front of their squad car. Defendant wore a white T-shirt and had his hair in a ponytail.

¶ 10 The officers then spoke to Minter, who described the offender. The officers pursued defendant and apprehended him pushing a lawn mower across a vacant lot. A second squad car remained with defendant while Minter was brought to defendant's location and identified defendant as the man who stole his property. Thiry identified a photograph of a silver-colored mower as the one belonging to Minter and a red-colored mower as the one they saw defendant pushing across a vacant lot. Officer Thiry also testified that upon searching defendant, officers recovered a knife, a pair of pliers and a chisel.

¶ 11 Defendant testified he was in the area in question when these events occurred but said he retrieved the mower from a dumpster. Defendant denied taking a mower from a garage. For impeachment purposes, the State introduced evidence of defendant's previous convictions in 2006 for escape and attempted burglary.

¶ 12 The trial court convicted defendant of burglary. Due to his prior convictions, defendant was subject to mandatory Class X sentencing. The court sentenced defendant to nine years in prison, to be followed by a three-year MSR period. Defendant timely filed this appeal.

¶ 13 *Analysis*

¶ 14 On appeal, defendant first contends his conviction should be reversed because it relied only on a suggestive "show-up" identification of him by Minter. He argues Minter's indication that he was the burglar was influenced by his viewing of defendant in the presence of police.

¶ 15 When addressing a challenge to the sufficiency of the evidence of a criminal conviction, it is not the role of this court to retry the defendant; rather, we determine whether, 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Ward*, 215 Ill. 2d 317, 322 (2005). It is the task of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence, and this court will not substitute its judgment for that of the trier of fact on those points. *People v. Howard*, 376 Ill. App. 3d 322, 328 (2007), citing *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). A conviction will be reversed only when the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Howard*, 376 Ill. App. 3d at 328.

¶ 16 At the outset, we note defendant's contention that no physical evidence connected him to the burglary, making the identification by Minter the sole evidence that supported his conviction. It is well-settled that the identification of a defendant as the offender by a single witness is sufficient to support a conviction if the witness viewed the offender under circumstances permitting a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989) (listing five

factors). Therefore, the absence of physical evidence linking the defendant to the offense is not dispositive.

¶ 17 Defendant next argues that Minter's identification constituted an impermissible showup procedure. He points out that when police brought Minter to where he was stopped, which was several blocks from Minter's residence, Minter observed and identified him as he stood with police near a maroon-colored lawn mower.

¶ 18 Although showup identifications involving a single individual have been disfavored as unduly suggestive (*People v. Manion*, 67 Ill. 2d 564, 569 (1977)), the use of that procedure does not automatically weaken the veracity of an identification in all situations. *People v. Howard*, 376 Ill. App. 3d 322, 331 (2007) (and cases cited therein). Illinois courts have consistently held that an immediate showup identification near the scene of the crime is proper police procedure under certain circumstances, such as when police are in pursuit of the offender a short time after the crime has occurred. *People v. Lippert*, 89 Ill. 2d 171, 181-84 (1982); see also, *e.g.*, *People v. McKinley*, 69 Ill. 2d 145, 152 (1977); *People v. Rodriguez*, 387 Ill. App. 3d 812, 830 (2008).

¶ 19 Showup identification procedures are appropriate in situations involving a "fleeing offender." *People v. Johnson*, 262 Ill. App. 3d 781, 792 (1994). Here, the police stopped defendant within 10 minutes of the crime within several blocks of the victim's residence. The testimony did not establish that the officers told Minter they had captured the offender before bringing him to view defendant. Moreover, while defendant emphasizes Minter's testimony that he believed defendant was the offender because he saw defendant with the police and the lawn mower, those answers were given on cross-examination in response to defense counsel's leading questions. Furthermore, on redirect, Minter clarified that the person he identified at the showup was the same person who he struggled with over the lawn mower.

¶ 20 The reliability of an identification depends on the following factors: 1) the opportunity the witness had to view the offender at the time of the offense; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the offender; 4) the level of certainty demonstrated by the witness at the showup; and 5) the length of time between the crime and the identification. *People v. Smith*, 274 Ill. App. 3d 84, 89-91 (1995). In this case, each of those factors weighs in favor of the reliability of the showup identification. Minter viewed defendant's face at close range while they spoke and grappled over control of the lawn mower. Because Minter and defendant exchanged words and Minter was attempting to protect his personal property, Minter likely paid a high degree of attention to defendant. Minter's description of defendant's clothing and hairstyle was accurate, and no evidence established that Minter's identification of defendant was uncertain. Lastly, only 10 minutes elapsed between the crime and the identification.

¶ 21 Defendant raises two additional challenges to the reliability of Minter's identification. He describes Minter as a "senior citizen who does not wear glasses" and also contends Minter's description of the offender was vague and did not completely match defendant's appearance when he was identified because defendant wore a hat.

¶ 22 The trial court, having heard the evidence and drawn all reasonable inferences therefrom, is "not obligated to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *People v. Evans*, 209 Ill. 2d 194, 212 (2004). No evidence was offered that Minter's sight was impaired in any way and that he needed to wear glasses. As to the accuracy of Minter's physical description of the offender, the fact that defendant wore a hat at the time of his identification does not negate Minter's otherwise accurate account of the offender, as a hat is an item that defendant could have donned between the crime and the identification. Minter's description did not otherwise conflict with defendant's

appearance. In conclusion on this point, because the showup identification was not unduly suggestive and Minter's description of defendant was reliable, the evidence was sufficient to support defendant's conviction.

¶ 23 Defendant's remaining contention on appeal is that the mittimus in this case should be amended to include a two-year MSR period, rather than the three-year MSR term to which he was sentenced. He asserts the longer MSR term applies to an offender who has committed a Class X felony, whereas he committed the Class 2 felony of burglary.

¶ 24 This court has consistently rejected the argument set out by defendant that, under *People v. Pullen*, 192 Ill. 2d 36, 43 (2000), a three-year MSR term imposed in a case involving Class X sentencing is void when the underlying offense would require only a two-year MSR period. Where, as here, a defendant is sentenced as a Class X offender, he is to receive the same MSR term as a defendant who is convicted of a Class X felony. See *People v. Lampley*, 2011 IL App (1st) 090661-B (December 14, 2011) (and cases cited therein); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010), *People v. McKinney*, 399 Ill. App. 3d 77, 80-81 (2010). Sentencing as a Class X offender requires a term of three years of MSR to be served after the offender completes his prison term. 730 ILCS 5/5-8-1(d)(1) (West 2010). Therefore, defendant's three-year MSR term is not void.

¶ 25 Accordingly, defendant's conviction and sentence are affirmed.

¶ 26 Affirmed.