2014 IL App (1st) 122131-U

SECOND DIVISION
February 4, 2014

No. 1-12-2131

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. 11 CR 16097
	)	
OSVALDO MARTINEZ,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to prove defendant was the person who committed the subject burglary; 11-year prison sentence was not excessive; defendant was properly sentenced to three years of MSR as a Class X offender; conviction and sentence affirmed.

¶ 2 Following a bench trial, defendant Osvaldo Martinez was convicted of burglary and sentenced to 11 years in prison as a Class X offender. On appeal, defendant contends that: (1) the evidence was insufficient to prove he was the person who committed the burglary because

the identification testimony was unreliable; (2) his sentence is excessive; and (3) his mandatory supervised release (MSR) term should be reduced. We affirm.

¶ 3 At trial, Veronica Garcia testified that on September 18, 2011, she was living on the second story of a building located in the area of Division and Harding in Chicago. Returning from the bathroom around 3 a.m., she looked outside a window and observed a person, identified as defendant, reach for the driver's side handles of two cars that were on the side of the street closest to her building. Garcia recalled that there were street lights, it was "pretty clear outside," and she could "fully see everything outside the window." As defendant was trying the door handles, Garcia could see his whole body but could not see his face too clearly. Garcia called the police and stated that a "tall skinny black male" was "trying to get into cars." Garcia further told the police that defendant had on a "hoodie" and had a backpack. Defendant, meanwhile, kept walking alongside cars parked on the street, passing over a car that had an alarm. Defendant then entered the front driver's seat of a green Jeep, whereupon Garcia called the police a second time. At this point, defendant exited the Jeep and began walking toward Division with his backpack. A woman was waiting for defendant, although Garcia was not sure whether the woman had instead "just stopped by and noticed that she knew him." Defendant and the woman walked off.

¶ 4 When the police arrived, Garcia stated that the offender was a "tall dark skinned male with [a] backpack" and that a woman had been standing on the corner waiting for him, and pointed the police in the direction the offender had gone. A few minutes later, the police returned and asked Garcia to identify the offender. Garcia entered a squad car and identified defendant, who was standing up outside another squad car in handcuffs. A woman was in a

separate vehicle. Garcia estimated that less than 10 minutes had passed from the moment she first saw defendant pull on the handle on the first car to when he walked out of sight with the woman. Approximately a few minutes passed between when the officer first arrived and when the officer returned.

¶ 5 Officer Corey Deanes testified that he and his partner responded to a message regarding a burglary in progress and were directed to Division and Harding. The message indicated that the offender was a tall and skinny black male. On the way, Officer Deanes saw a person who fit the description, but continued to the assigned location. Following a conversation that Officer Deanes's partner had at the scene, they returned to where they had seen the initial person and determined that this person, identified as defendant, indeed matched the description given, and was a tall and skinny black male. Additionally, defendant was with a woman and had a backpack that contained paper, glasses, an iPod, and lottery tickets. Defendant was placed in handcuffs, put in the police car with the woman, and taken to 1205 North Harding. The owner of the Jeep, Robbie Harris, spoke with Officer Deanes and stated he was missing an iPod, glasses, and lottery tickets that had been in his glove box. When Officer Deanes showed Harris the items recovered from defendant's backpack, Harris responded that the items were his.

¶ 6 In his defense, defendant testified that he had been fixing a friend's house on September 18. He finished working at about 10:30 p.m. and then stayed outside talking with the friend until he went home around 3:40 a.m. On his way home, defendant was stopped by the police and placed in a patrol car. Defendant acknowledged he had a backpack that night, but stated that it contained construction work clothes.

¶ 7 In its ruling, the trial court stated that the testimony of the State's witnesses proved beyond a reasonable doubt that defendant was guilty of burglary. The court did not find defendant's testimony to be credible.

¶ 8 A presentence investigation report (PSI) revealed that 53-year-old defendant had two prior misdemeanor convictions and six prior felony convictions, including two offenses that were out-of-state. The felonies included burglary, possession of a controlled substance, theft, and retrieving, possessing, or selling a stolen motor vehicle. As to his social history, defendant reported he was close to his family members. He was in a 26-year relationship with a woman with whom he had four children, ranging in age from 19 to 26. Most recently, defendant was a self-employed construction worker and had been previously employed as a factory worker for a leather company. Defendant admitted to having a substance abuse problem, having begun using cocaine when he was 40 years old, and would welcome any treatment offered by the court.

¶ 9 Attached to the PSI were three documents: a certificate of completion awarded to defendant for a custodial training program conducted through the Cook County Department of Corrections and two letters from the instructor of the training program, who was also the president of Aztec Supply Corporation. The letters stated that defendant was an exemplary student and had displayed a desire to learn as much about the cleaning industry as he could while incarcerated. Additionally, defendant would be referred to a custodial training program upon his release and following an interview.

¶ 10 At the sentencing hearing, the court acknowledged receipt of the PSI, certificate of completion, and letters. In aggravation, the State asserted that defendant had no less than six felony convictions spanning two states over the last 30 years. The State also noted that most

recently, defendant had been sentenced to six years in prison for possessing a stolen motor vehicle. Additionally, the State asserted that due to his background, defendant must be sentenced as a Class X offender, and contended that the minimum sentence would not be appropriate.

¶ 11 In mitigation, defense counsel stated that defendant took advantage of available programs while he was incarcerated. Contending that defendant could be rehabilitated and had a family he needed to return to and that could benefit from his support, defense counsel asked for the minimum six-year sentence.

¶ 12 In allocution, defendant stated he wished he could return to his family.

¶ 13 In announcing the sentence, the court stated as follows:

> "Well, I have considered the presentence report. I have considered in addition to the presentence report***letters from the Aztec Supply Company and also a certificate from the program that he completed while he was incarcerated in the Cook County Jail.
>
> Considering his background, considering the facts in the case, considering the fact that he has had six prior felony convictions and now comes before the court for sentencing as a [C]lass X felon, taking all that into consideration, apparently the repeated incarceration***for [defendant] has resulted in him coming out and committing further crimes. This is the example that is before the court today. It is a [C]lass X felony."

Defendant was sentenced as a Class X offender to 11 years in prison with a three-year term of mandatory supervised release (MSR).

¶ 14 On appeal, defendant contends his guilt was not proven beyond a reasonable doubt because the eyewitness identification was unreliable. The only eyewitness, Garcia, was unable to see the offender clearly and only gave a vague and general description to the police. Defendant further argues that Garcia was not alert when she observed the crime and her attention was divided.

¶ 15 When presented with a challenge to the sufficiency of the evidence, "the relevant question 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." (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not our function to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Rather, in a bench trial, it is for the trial judge, as the trier of fact, to determine the credibility of witnesses, weigh and draw reasonable inferences from the evidence, and resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). It is sufficient if all the evidence taken as a whole satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *People v. Saxon*, 374 Ill. App. 3d 409, 417 (2007). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 16 Here, defendant challenges the evidence showing that he was the person who committed the burglary. The prosecution has the burden of proving beyond a reasonable doubt the identity

of the person who committed the crime. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The identification testimony of a single eyewitness is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). However, an identification will not be deemed sufficient to support a conviction if it is vague or doubtful. *People v. Ramos*, 339 Ill. App. 3d 891, 901 (2003). To assess identification testimony, we use the following five factors set out by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the opportunity the witness 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. We consider whether the identification was reliable under the totality of the circumstances. *Biggers*, 409 U.S. at 199.

¶ 17 Applying the factors above, Garcia had ample opportunity to view defendant. She testified that her street had street lights, it was "pretty clear outside," and she could "fully see everything" from her second-story window. Garcia also stated that while she could not see defendant's face too clearly, she could see his entire body. According to her testimony, Garcia's attention was fixed on defendant. After observing defendant pull the handles on two cars, she called the police, and then watched the defendant pass over a car with an alarm, enter a green Jeep, and then walk away and meet a woman. Garcia's description of the offender as a tall, skinny black male who was with a woman and had a backpack matched the description of the person the police observed and apprehended and was identified as defendant. Garcia's

identification was unequivocal and occurred shortly after the crime. Under these circumstances, Garcia's testimony was sufficiently reliable to sustain defendant's conviction.

¶ 18 That Garcia's description was general and she admitted she could not see defendant's face too clearly does not change this result. The presence of discrepancies or omissions in a witness's description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made. *Slim*, 127 Ill. 2d at 309. Further, a witness's positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made. *Id.* Garcia's description, although general, does not render her identification unreliable.

¶ 19 Next, defendant challenges Garcia's identification at the show-up as unreliable because it was suggestive. Defendant contends the show-up, which occurred while defendant was standing outside of a squad car in handcuffs, was likely to persuade Garcia that defendant was the offender. In defendant's opening brief, defendant seems to challenge the show-up as a violation of due process. In his reply brief, however, defendant denies that he challenges the admission of the show-up identification on due process grounds. Instead, as part of his challenge to the sufficiency of the evidence, he asserts that the suggestiveness of the procedure made the identification unreliable. We will address both arguments.

¶ 20 In response to defendant's due process claim, the State asserts that defendant forfeited this argument because he failed to raise this issue at trial. Indeed, a defendant who does not move to suppress an identification waives the right to argue that the identification was the result of suggestive procedures. *People v. Brooks*, 187 Ill. 2d 91, 125-26 (1999). However, even if this argument had been preserved, we would not find error. Claims that a show-up should be

suppressed under the due process clause are subject to a two-part test. *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008). First, the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *Ramos*, 339 Ill. App. 3d at 897. If the defendant satisfies this burden, the State must prove that the identification was independently reliable, which is measured by the five *Biggers* factors. *Id*. at 897-98.

¶ 21 Although one-person show-ups are inherently suggestive and not favored as a means of identification, they are justified under limited circumstances, such as when a witness had an excellent opportunity to observe the offender during the commission of the offense or prompt identification is necessary for the police to determine whether or not to continue their search. *People v. Hughes*, 259 Ill. App. 3d 172, 176 (1994). Here, the show-up procedure could be justified by Garcia's ample opportunity to view defendant and the need to facilitate the police search. See also *People v. Thorne*, 352 Ill. App. 3d 1062, 1076-77 (2004) (immediate show-up identification near the scene of the crime was proper where the police were in hot pursuit of the suspected perpetrators a short time after a robbery). Moreover, even if the procedure was suggestive, based on our above analysis of the *Biggers* factors, we believe the identification was independently reliable. As a result, a due process claim fails.

¶ 22 Further, we do not find that the show-up procedure otherwise undermined the reliability of the identification. The trier of fact decides the weight that an identification deserves, and the less reliable the trier of fact finds the identification to be, the less weight the trier of fact will give it. *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 59. The trial court heard the identification testimony and weighed the evidence. The trial court also explicitly found that defendant's

testimony was not credible. We may not substitute our judgment for that of the trier of fact on questions involving the credibility of witnesses or the weight of the evidence. *Hughes*, 259 Ill. App. 3d at 178.

¶ 23 Moreover, other circumstantial evidence also supports defendant's conviction. A conviction may be sustained upon circumstantial evidence as well as direct evidence. *People v. Patterson*, 217 Ill. 2d 407, 435 (2005). According to Officer Deane's testimony, the contents of defendant's backpack matched exactly the items missing from the Jeep. The unexplained possession of recently stolen property raises the inference that the property was obtained by theft. *People v. Smith*, 51 Ill. App. 3d 87, 92 (1977). In light of all the evidence, a rational trier of fact could find that defendant committed the burglary.

¶ 24 Next, defendant contends his 11-year sentence is excessive. Defendant asserts that the offense was nonviolent and did not cause substantial financial harm to the victim and that all but one of his prior convictions were for nonviolent offenses. Defendant also argues that the trial court failed to weigh his rehabilitative potential, which is demonstrated by his certificate from the custodial training program and accompanying letters.

¶ 25 A trial court has broad discretionary powers in imposing a sentence, and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A sentence will be disturbed on appeal only if the sentencing court abused its discretion. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). If the sentence imposed is within the

statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law and the nature of the offense. *People v. Bobo*, 375 Ill. App. 3d 966, 988 (2007).

¶ 26 Where mitigating evidence is presented to the trial court, we may presume the trial court considered it, absent some indication to the contrary other than the sentence itself. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). Although the court may not disregard evidence in mitigation, the court may determine the weight to attribute to it. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993).

¶ 27 Based on defendant's status as a Class X offender, the sentencing range for the offense was 6 to 30 years in prison. 730 ILCS 5/5-4.5-95(b) (West 2010); 720 ILCS 5/5-4.5-25(a) (West 2010). Defendant has failed to show that his 11-year prison sentence is excessive because the record demonstrates that the court considered and weighed relevant mitigating evidence. During the sentencing hearing, the trial court explicitly stated it had considered the PSI, the certificate of completion from the custodial training program, and the letters. The trial court also stated it considered defendant's background and the facts of the case, and noted that defendant had been incarcerated repeatedly, but continued to commit crimes when released. In total, the record shows that the trial court considered mitigating evidence, but likely gave aggravating evidence, such as defendant's criminal history, greater weight. We may not substitute our judgment for that of the trial court merely because we would have weighed the relevant factors differently. *Stacey*, 193 Ill. 2d at 209. Accordingly, we do not find defendant's sentence excessive.

¶ 28 Lastly, defendant contends his mittimus should be amended to require only two years of MSR, rather than three years, because although he was sentenced as a Class X offender, his underlying conviction was for a Class 2 felony, which carries a two-year MSR term.

¶ 29 This court has repeatedly held that a defendant sentenced as a Class X offender receives the Class X MSR term of three years, regardless of the class of the underlying conviction. See *People v. Lenoir*, 2013 IL App (1st) 113615, ¶ 22-25; *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 47-49; *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 79-83 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 416-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995).

¶ 30 Defendant acknowledges this precedent, but contends that *People v. Pullen*, 192 Ill. 2d 36 (2000), requires a two-year term of MSR. We disagree. *Pullen* held that the maximum length of consecutive sentences is determined with reference to the classification of the felonies committed (*Pullen*, 192 Ill. 2d at 46) and did not address MSR. We decline to abandon the above well-reasoned cases in favor of defendant's interpretation.

¶ 31 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 32 Affirmed.