FIFTH DIVISION
August 12, 2016

No. 1-14-0869

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 3392
	)	
JUAN PEREZ,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm the judgment of the trial court where the evidence was sufficient to convict defendant of aggravated vehicular hijacking while armed with a firearm, unlawful restraint, aggravated battery based on bodily harm, and aggravated unlawful use of a weapon where the identification of defendant was reliable and the State successfully proved that the vehicle was taken from the victim's immediate presence beyond a reasonable doubt. We remand for sentencing for the counts of unlawful restraint, aggravated battery based on bodily harm, and aggravated unlawful use of a weapon for which no sentence was imposed.

¶ 2 Following a bench trial, the circuit court found defendant Juan Perez guilty of aggravated vehicular hijacking while armed with a firearm, two counts of unlawful restraint, aggravated

battery, and two counts aggravated unlawful use of a weapon and sentenced to 21 years in the Illinois Department of Corrections (IDOC). On appeal, defendant contends that the identification relied upon in securing the convictions was unreliable or alternatively that the State failed to prove a vehicle was taken from the immediate presence of the victim. Defendant further contends that the trial court failed to sentence defendant for any convictions other than aggravated vehicular hijacking. We affirm defendant's conviction for aggravated vehicular hijacking and remand for sentencing on the remaining counts.

¶ 3 Defendant was charged with two counts of aggravated vehicular hijacking while armed with a firearm, two counts of armed robbery while armed with a firearm, one count of aggravated battery, one count of aggravated battery causing great bodily harm, two counts of aggravated unlawful restraint, and eight counts of unlawful use of a weapon.

¶ 4 At trial, the victim, Oscar Burgos testified that, on February 9, 2011, he met with a customer, Howard Baker, outside his body shop in Melrose Park, Illinois. Burgos and Baker entered the shop through the main personnel door. Burgos then released and raised the overhead door before bringing Baker's vehicle, a white Lincoln Town Car, to where Baker could more easily access it. Burgos testified that two men then entered the store through the main personnel door. One man was a Latino and the other was African-American. Both were dressed in jeans and black hooded sweatshirts and neither was wearing a mask. Burgos identified the Latino man who entered his auto shop in court as defendant. He testified that initially he was about 12 to 13 feet from defendant. The African-American man had a revolver and defendant was had an "automatic firearm." Burgos was facing the two men. All of the fluorescent lights were on in his shop.

¶ 5 The African-American man instructed Burgos to approach him. Burgos complied and the man pointed his firearm at him. He grabbed Burgos by the collar. At his point, Burgos was approximately two to three feet from defendant. Defendant had a handgun pointed at Baker's head. The African-American man went through Burgos' pockets as defendant directed Baker to the shop's office.

¶ 6 Burgos ran towards the door in an attempt to escape. The African-American man struck him in the back of his head with his firearm. Burgos testified that he was dazed but was able to continue running towards the exit. He exited the shop and ran to his personal vehicle. He positioned his vehicle in a way that allowed him to view the garage of his shop. Burgos then witnessed Baker's Lincoln Town Car backing out of the garage and proceeded southbound on George Street.

¶ 7 Burgos returned to the shop and discovered Baker face down on the floor in the office. Baker's vehicle was gone. The police arrived shortly thereafter. They reported to Burgos that they had a suspect in custody and, after approximately 15 minutes, brought Burgos to the White Castle restaurant on North Avenue in Melrose Park where the suspect was detained.

¶ 8 Upon arriving at White Castle, Burgos observed defendant standing with two police officers next to a police vehicle. Defendant was wearing a white sweatshirt. Burgos stated to the officers, "He's the guy that robbed me." He further testified that defendant was the individual who pointed a firearm at Baker's head.

¶ 9 Baker testified that he was in Burgos' shop when two armed men entered. He identified one as African-American and the other as "pale-faced." He could not perceive the nationality or clothing of the pale-faced man, stating "I didn't see anything but a gun in my face." The pale-

faced man directed Baker into the office and instructed him to lie face down on the floor and then threw a coat over Baker's head. Baker remained on the ground for approximately 20 minutes before Burgos retrieved him from the office and brought him to where the police had recovered his vehicle.

¶ 10 Baker testified his vehicle was recovered in a parking lot. The police brought defendant to Baker, but Baker was unable to identify defendant.

¶ 11 Thomas Domanus testified he was employed at the Sparkle Car Wash located in Melrose Park on February 9, 2011. On that date, a vehicle pulled into the parking lot of the car wash. A man exited the vehicle and ran westbound over a snow bank. Domanus testified that he believed the man was Latino. He told police he was not sure if defendant was the man he observed fleeing from the vehicle.

¶ 12 Officer Chris Korsch testified that he responded to a call reporting that a stolen Lincoln Town Car was recovered at a car wash approximately one third of a mile from the body shop it was stolen from. He arrived on the scene where his fellow officers had detained defendant and conducted a "show-up." Korsch identified defendant in court. He testified that Burgos identified defendant as the man who was at his store and held him up at gun point.

¶ 13 Officer Migliore testified that on February 9, 2011, he responded to a report of a white Lincoln that was used in a crime. He arrived at Sparkle Car Wash and discovered an abandoned white Lincoln with the driver's door ajar and the engine running. Inside the vehicle was a coin bag inside of which was a stainless steel revolver. Underneath the bag was a black semiautomatic handgun. Both weapons were loaded. Migliore testified that he noticed footprints in the snow leading westbound.

¶ 14 Detective Tom Ferris testified that on February 9, 2011, he responded to a report that a suspect vehicle was reported on North Avenue. He arrived at the car wash where the vehicle was located. Ferris then traveled approximately one block to 9th Avenue and turned to travel southbound where he observed a suspect, identified in court as defendant, running westbound from the area. He detained defendant, who was not wearing a jacket, and prepared him for a show-up.

¶ 15 Officer Donald Giuliano testified that on February 9, 2011, it was extremely cold and he was wearing two jackets when he and his partner, Detective Ferris, found a white Lincoln Town Car that was reported stolen. After locating the vehicle, he looked for the suspect, described as a male Latino with facial hair wearing a black hooded sweatshirt. He observed someone matching that description running southwest. Giuliano identified the fleeing man in court as defendant. He testified that defendant was wearing "a short-sleeve shirt or a long-sleeve shirt with his sleeves rolled up" and not wearing a jacket, which he found "extremely strange in that weather." Giuliano testified that he suspected defendant had "just removed his black hoodie." He detained defendant and asked "where he was coming from," to which he responded that he was a prostitute from Indiana on his way to Bally's to meet with a client he met on Craig's list.

¶ 16 The parties stipulated that Detective Salvi recovered two firearms from the Lincoln. The State offered into evidence and published to the court an Illinois State Police record indicating defendant had not been issued a Firearm Owner's Identification Card at the time of arrest.

¶ 17 After the State rested, defendant made a motion for a directed finding which the trial court denied. Defendant did not testify. He offered one witness, Cook County Public Investigator

James Madden, who testified that he measured the distance between the middle of the Sparkle Car Wash parking lot to the middle of the White Castle parking lot to be 516 feet.

¶ 18 The court found Burgos and Baker to be "credible witnesses." It found defendant guilty of two counts of aggravated vehicular hijacking, one count of aggravated battery, two counts of aggravated unlawful restraint, and two counts of aggravated unlawful use of a weapon. The court explained that "the minimum sentence in this case is 21 years," before sentencing defendant to 21 years in the IDOC. A mittimus subsequently signed by a different judge indicates defendant was sentenced to 21 years on each count.

¶ 19 On appeal, defendant first contends that the identification relied upon by the State to secure his conviction was unreliable and thus he was not proved guilty beyond a reasonable doubt of any of the offenses.

¶ 20 The standard of review on a challenge to the sufficiency of the evidence is whether, after reviewing 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. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)) . The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). The reviewing court neither retries the defendant nor substitutes its judgment for that of the trier of fact. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *Siguenza-Brito*, 235 Ill. 2d at 224-25. To sustain a conviction, "it is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A defendant's conviction will be reversed only if the

evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 21 To sustain a conviction, the State must prove the identity of the offender beyond a reasonable doubt. *People v. Stanley*, 397 Ill. App. 3d 598, 610 (2009) (citing *People v. Lewis*, 165 Ill. 2d 305, 356 (1995)). Positive identification by a single witness who had ample opportunity to observe will support a conviction if the identification is not vague or doubtful. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007); *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 22 In evaluating the reliability of an eyewitness identification, Illinois courts apply the five factors identified by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the witness' opportunity to view the criminal at the time of the offense, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness when first identifying the defendant as the criminal, and (5) the length of time between the crime and the initial identification. *Slim*, 127 Ill. 2d at 307-08; *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 94. Where identification is reliable, precise consistency regarding collateral matters is not required and minor inconsistencies will not destroy the credibility of a witness. *People v. Miller*, 101 Ill. App. 3d 1029, 1040 (1981).

¶ 23 We find that the evidence was sufficient to support a finding that defendant was the offender. Defendant challenges Burgos' credibility, citing the fleeting opportunity Burgos had to observe defendant, the inherent distraction of having a firearm drawn on him, and inconsistencies in Burgos' description of his assailant's clothing and the clothing defendant was

wearing when he was arrested. The record establishes that the trial court could have reasonably found that Burgos reliably identified defendant and testified credibly.

¶ 24 Following the factors outlined in *Biggers*, we first note that Burgos had an extended opportunity to observe defendant. Burgos first observed defendant from 12 or 13 feet when he first entered the shop with his face unobstructed. He then observed defendant from a distance of 2 or 3 feet when the African-American assailant restrained him. The shop was well lit. As defendant points out in his brief, "a witness's opportunity to observe the suspect during the offense is the most important factor used to weigh the reliability of an identification." See *People v. Wehrwein*, 190 Ill. App. 3d 35, 39 (1989). Burgos' opportunity to view defendant at the time of the offense was sufficient to support a finding that the identification was reliable.

¶ 25 To the second *Biggers* factor, the witness's degree of attention, the record contradicts defendant's contention that Burgos was distracted by having a firearm drawn on him. Burgos observed defendant and his accomplice as they approached. He noted that they were each wearing a hooded sweatshirt and their hoods were up. Burgos noticed the guns as they approached but was still alert enough to perceive and recall the movements and clothing of the assailants. Defendant cites scientific studies that suggest threats and violence can affect a witness's ability to recall an event accurately. However, citation to studies and law review articles not presented at trial is not a substitute for evidence and shall not be considered on appeal. See *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993). Here, the evidence shows that Burgos was attentive throughout the course of the robbery.

¶ 26 The third *Biggers* factor regarding the accuracy of the description provided by the witness also supports a finding by the trial court that the identification was reliable. Officer

Froelich testified that he was looking "for the alleged offender who was described as a male Hispanic with facial hair." Defendant claims the accuracy of Burgos' description is undermined by the fact that he described the suspects only by their race and clothing. Our supreme court has found 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." *People v. Slim*, 127 Ill. 2d 302, 308–09 (1989). Burgos made a positive identification of defendant. He testified that he recognized defendant's face. The trial court found him to be credible in his identification, and we will not substitute our judgment for the trial court. *Jackson*, 232 Ill. 2d at 281.

¶ 27 The final two factors identified by *Biggers* further support a finding by the trial court that the identification was reliable. Burgos positively identified defendant to Officer Korsch approximately 15 to 20 minutes after the hijacking occurred. That limited length of time between the crime and the initial identification supports a finding that the identification was reliable. A subsequent positive identification was made in court. Burgos showed no signs of uncertainty at either opportunity to identify defendant. Noting once more that a witness's opportunity to observe the suspect during the offense is the most important factor used to weigh the reliability of an identification, along with the other factors outlined in *Biggers*, these factors indicate that Burgos could reliably identify defendant. See *Wehrwein*, 190 Ill. App. 3d at 39; *People v. Howard*, 376 Ill. App. 3d 322, 325-26, 329 (2007) (identification was reliable despite inconsistencies where one witness was struck on the head and the other was shot at).

¶ 28 Having determined that the circumstances of the identification were such that the trial court could reasonably find the identification reliable, we reject defendant's argument that the State failed to prove beyond a reasonable doubt that it was defendant who committed the offenses for which he was convicted. Positive identification by a single witness who had ample opportunity to observe will support a conviction if the identification is not vague or doubtful. *Piatkowski*, 225 Ill. 2d at 566; *Slim*, 127 Ill. 2d at 307. The fact that one witness contradicts another is not fatal to the credibility of either, as the finder of fact may accept or reject as much or as little of a witness' testimony as it pleases. *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22. Accordingly, we reject defendant's argument that Burgos's identification was unreliable because Baker was unable to identify defendant.

¶ 29 Further, defendant's argument that Burgos' testimony was the only evidence linking him to the offense is rebutted by the record. Defendant was apprehended running across a parking lot a short distance from where the stolen vehicle was abandoned. The abandoned automobile's engine was still running and weapons matching Burgos' description of the weapons the offenders utilized were recovered from the vehicle. When defendant was apprehended, he was not wearing a jacket despite the freezing weather. Finally, when given an opportunity to explain, defendant gave an implausible story of prostitution that accounted for neither his flight across the parking lot nor his lack of outerwear. Therefore, viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that defendant was the perpetrator beyond a reasonable doubt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 30 We turn to whether the State proved beyond a reasonable doubt that Baker's vehicle was taken from the immediate presence of either Burgos or Baker. A person commits aggravated

vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence 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 5/18-4(a)(4) (West 2010).

¶ 31 Defendant relies primarily on two cases which discuss the meaning of "immediate presence" as used in the vehicular hijacking statute: *People v. Cooksey*, 309 Ill. App. 3d 839 (1999), and *People v. McGee*, 326 Ill. App. 3d 165 (2001).

¶ 32 In *Cooksey*, the victim left a mall entrance when she was accosted by the defendant. *Cooksey*, 309 Ill. App. 3d at 842. She tried to run but the defendant caught up with her, stuck "something" in her back, and demanded her car keys. The victim gave her keys to the defendant and ran into the mall. A short time later she returned to the parking lot and her vehicle was gone. *Cooksey*, 309 Ill. App. 3d at 842. The defendant was convicted of vehicular hijacking and argued on appeal that the State failed to prove him that the victim was in the "immediate presence" of the vehicle when it was taken. *Cooksey*, 309 Ill. App. 3d at 846. The *Cooksey* court found that the driver or passenger must be in the "immediate vicinity of the car" at the time it is taken to constitute "immediate presence." *Cooksey*, 309 Ill. App. 3d at 847-48. It concluded that the State failed to prove the defendant guilty of vehicular hijacking because the undisputed evidence showed that at no time did the victim approach her vehicle, she was 25 feet away from it when the defendant first jumped her, and, when she ran, she fled away from the vehicle, not toward it. *Cooksey*, 309 Ill. App. 3d at 848.

¶ 33 In *McGee*, the defendant was convicted of aggravated vehicular hijacking and maintained on appeal that the State failed to prove him guilty beyond a reasonable doubt because it failed to

prove he took the victim's vehicle from her "immediate presence." *McGee*, 326 Ill. App. 3d at 166. The evidence showed that the victim was attacked inside a home, at which time her attackers took her car keys. *McGee*, 326 Ill. App. 3d at 167. They then fled from the home in her automobile, leaving her behind in the house. *McGee*, 326 Ill. App. 3d at 167. *McGee* found that "immediate presence" meant that the "vehicle is within the immediate control of the alleged victim at the time of the occurrence." *McGee*, 326 Ill. App. 3d at 170.

¶ 34 In contrast, the State relies on *In re Ricardo A.*, 356 Ill. App. 3d 980 (2005), *overruled on other grounds, In re Samantha V.*, 234 Ill. 2d 359 375 (2009) (holding that the one-act, one-crime rule applies to juvenile proceedings). In that case, the victim testified that he was driving his father's vehicle when he was waved into a driveway by one of the minor respondents. The victim had exited the vehicle and had his vehicle keys with him when he was beaten by six people. *Ricardo A.*, 356 Ill. App. 3d at 983. He was walking away when he heard his vehicle start and then observed it drive past him, whereupon he had words with the driver. The victim testified that he was 20 to 25 feet away from the automobile when it started, 5 to 10 feet away as the vehicle was taken, and ultimately about a foot away as it drove past him. *Ricardo A.*, 356 Ill. App. 3d at 984.

¶ 35 The *Ricardo A.* court stated:

> "*Cooksey* is distinguishable because it is clear the victim there was never less than 25 feet from her car, whereas here, the evidence showed that [the victim] was 5 to 10 feet away and even 1 foot away. *McGee* is also distinguishable since the victim was inside a house and nowhere near her car when it was taken." *Ricardo A.*, 356 Ill. App. 3d at 991-92.

In this case, the testimony regarding "immediate presence" is more analogous to *Ricardo A.* Burgos testified that he had just backed the vehicle into a position where Baker could better access it. He then stood by the heater, "[p]robably 8 feet, maybe 9 feet" from the vehicle. He walked towards the garage door when defendant and his accomplice entered his shop. Burgos testified that "right when they came in * * * I was at the corner of the car." He had already noticed that both defendant and his accomplice were armed. Burgos escaped while Baker was led into another room, after which defendant left the shop with Baker's vehicle. Unlike *Cooksey* or *McGee*, at the time the hijacking began, Baker's vehicle was within the immediate presence of both Burgos and Baker. Indeed, the *McGee* court ruled that "immediate presence" meant that the "vehicle is within the immediate control of the alleged victim at the time of the occurrence." *McGee*, 326 Ill. App. 3d at 170. A trier of fact could reasonably find that "at the corner of the car," having just moved the vehicle, inside his own shop is "within the immediate control of the alleged victim at the time of the occurrence." *Id*.

¶ 36 Defendant's attempt to distinguish *Ricardo A.* by arguing that Burgos was across the street and Baker was in the office "when the assailant forcibly [took] the vehicle" or "when it was taken," is misplaced because Illinois courts have long recognized that the force used in a vehicular hijacking need not be simultaneous with the taking provided that the force and the taking are part of "a series of continuous acts." *People v. Aguilar*, 286 Ill. App. 3d 493, 498 (1997). Here there was ample evidence of a concurrence between the threat of force, which occurred when the victims were standing near the automobile, and the taking, which occurred after Burgos had escaped across the street and Baker had been forced into the office. The fact that the victims had been reduced to a state of physical non-resistance before the vehicle was

taken does not relieve the crime of the quality constituting vehicular hijacking. See *id*., citing *People v. Strickland*, 154 Ill. 2d 489, 524 (1992).

¶ 37 We turn finally to defendant's alternate contention that the case should be remanded to the trial court for sentencing for the offenses for which no sentence was imposed. The State agrees that because defendant was never sentenced on his guilty findings for aggravated unlawful restraint, aggravated battery, and aggravated unlawful use of a weapon, this Court should remand to the trial court for sentencing on those offenses. "[W]here an unsentenced conviction is before a reviewing court as part of an appeal brought by a defendant, the court may remand the matter to the circuit court for sentencing on the conviction in order to 'complete the circuit court's order and render judgment final.' " *People v. Castleberry*, 2015 IL 116916, ¶ 25 (quoting *People v. Scott*, 69 Ill. 2d 85, 89 (1977)).

¶ 38 Here, the court stated that "the minimum sentence in this case is 21 years. It's based upon 6 years and 15 for having a gun." The court did not specify to which conviction it was referring. Amongst the offenses for which defendant was convicted, only aggravated vehicular hijacking was a Class X offense that carried with it a minimum sentence of six years. 720 ILCS 5/18-4(b) (West 2010). It is also the only offense for which a firearm enhancement applies. *Id*. No other sentences were imposed. Thus, the oral pronouncement reflects that the trial court sentenced defendant only for the offense of aggravated vehicular hijacking. To the extent the mittimus reflects concurrent 21-year sentences on each count, the parties agree it is in conflict with the oral pronouncement which controls. *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993) ("When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls."). In order to complete the circuit court's order and render final judgment, we remand to

the trial court for sentencing for defendant's guilty findings of two counts of unlawful restraint, aggravated battery, and two counts aggravated unlawful use of a weapon.

¶ 39 For all the aforementioned reasons, we affirm defendant's conviction and sentence for aggravated vehicular hijacking and remand for imposition of a sentence on each of the remaining counts.

¶ 40 Affirmed and remanded.