2017 IL App (1st) 143928-U

Sixth Division
Order filed: June 30, 2017

No. 1-14-3928

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CR 22819
	)	
JOHNNIE RUCKER,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction and sentence are affirmed where the State presented sufficient evidence to prove him guilty of aggravated unlawful use of a weapon; fines and fees order modified.

¶ 2 Following a bench trial, the defendant, Johnnie Rucker, was found guilty of aggravated unlawful use of a weapon (AUUW) in violation of section 24-1.6(a)(1)(3)(A) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2012)) and sentenced to two years' probation. On appeal, he argues that: (1) the State failed to prove him guilty beyond a reasonable

doubt; and (2) the trial court improperly assessed his fines and fees. For the following reasons, we affirm the defendant's conviction and sentence and modify his fines and fees order.

¶ 3 The defendant was charged by information with two counts of AUUW. Count I alleged that he possessed a gun that was uncased, loaded, and immediately accessible in violation of section 24-1.6(a)(1)(3)(A) of the Code (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2012)). Count II alleged that he possessed the gun without a currently valid firearm owner's identification card (FOID card) in violation of section 24-1.6(a)(1)(3)(C) of the Code (720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2012)). The State nol-prossed count I and the case proceeded to a bench trial on count II.

¶ 4 Officer Kevin Frye testified that, on December 1, 2012, he and his partner, Officer Noel Morgan, were on duty in plain clothes and driving an unmarked vehicle. At approximately 7 p.m., Officer Frye "received a phone call from an anonymous citizen" reporting that two black males—who were about 5 feet 10 inches tall and wearing black hoodies—were walking back and forth in front of the stores at a shopping mall, located at 8100 South Stony Island Avenue in Chicago, and looking into the windows. In response, Officer Frye and Officer Morgan drove to the mall.

¶ 5 Officer Frye stated that, when he arrived at the mall, he began surveilling the area, standing in a nearby alley and using binoculars. Eventually, he observed two men who matched the citizen's description. These two men were later identified as the defendant and his brother, Charles Zachary. Officer Frye stated that the defendant and Zachary were walking from a parked gray Chevrolet Monte Carlo towards the mall. They peered around the corner of the building, and then walked back towards the vehicle, which was approximately 100 to 125 feet away from Officer Frye.

¶ 6 When the defendant and Zachary reached the vehicle, Officer Frye observed Zachary enter the passenger side and the defendant open the driver's side door. Officer Frye testified that the defendant then "withdrew from the back of his waistband a chrome over black semi-automatic handgun, passed that handgun into the vehicle, and then entered the vehicle himself." The assistant State's Attorney and Officer Frye engaged in the following colloquy regarding his view of the defendant holding the gun:

"Q Was there anything impeding your view?

A No.

Q Did you have a clear view of the [d]efendant *** with the weapon in his hand?

A Yes."

In addition, Officer Frye stated that, although it was dark outside, he had no difficulty viewing the vehicle because there was a streetlight nearby. Officer Frye acknowledged that there was moderate vehicular traffic and "a little bit" of foot traffic in the area, but maintained that his view of the defendant holding the gun was unobstructed.

¶ 7 Officer Frye stated that he observed the defendant for "roughly three to five minutes" before the defendant and Zachary entered the vehicle and drove away, travelling eastbound on 81st Street. Officer Frye called Officer Morgan and, within a minute, Officer Morgan arrived to pick him up. After driving east on 81st Street for one to two minutes, Officer Frye spotted the Monte Carlo parked in a motel parking lot. He also observed the defendant and Zachary walking southbound on Stony Island Avenue, 200 to 250 feet away from the vehicle. Officer Frye and Officer Morgan stopped both individuals, and performed protective pat downs; however, they did not recover any weapons. According to Officer Frye, Officer Morgan walked back to the Monte Carlo and searched the vehicle. There, he recovered a chrome-over-black nine-millimeter

semi-automatic handgun from the passenger-side floor. Officer Morgan presented the gun to Officer Frye, who confirmed that it was the gun he had seen the defendant holding at the mall. Subsequently, Officer Frye and Officer Morgan arrested the defendant and Zachary.

¶ 8 The State presented a certification from the Illinois State Police establishing that the defendant was never issued a FOID card. The State then rested.

¶ 9 The defense moved for a directed finding, which the trial court denied. The defense then called Zachary, who testified that he owned the gun and was carrying it when he entered the Monte Carlo on the day of the incident. He also stated that he placed the gun under the passenger seat. On cross-examination, Zachary denied that the defendant handed him the gun. The defense then rested.

¶ 10 The State called Officer Morgan as a rebuttal witness. He testified that, when he asked Zachary about the gun, Zachary stated that "we have the gun for protection" and "we bought it off the street."

¶ 11 The trial court found the defendant guilty of AUUW. In so holding, the court explained that it found the testimony of Officer Frye to be more credible than Zachary's testimony because Zachary had an interest in testifying in support of his brother. The trial court denied the defendant's motion for a new trial and sentenced him to two years' probation. This appeal followed.

¶ 12 On appeal, the defendant first contends that the State failed to prove him guilty of AUUW beyond a reasonable doubt. According to the defendant, Officer Frye's testimony was inadequate to prove his guilt because Officer Frye only caught a glimpse of him. The defendant also asserts that Officer Frye's vague description matched both himself and Zachary.

¶ 13 When considering the sufficiency of the evidence, the reviewing court will not overturn a conviction unless the evidence is so improbable or unsatisfactory that there remains a reasonable

doubt of the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving conflicts in the testimony, credibility of the witnesses, or the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2010). Instead, the reviewing court must view the evidence in the light most favorable to the prosecution and determine whether any rationale trier of fact could find that all of the elements of the crime were proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31.

¶ 14 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Identification testimony that is vague or doubtful does not satisfy the requisite burden of proof. *People v. Stanley*, 397 Ill. App. 3d 598, 610-11 (2009). However, a single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (2010). In assessing a witness's identification testimony, we consider the following five factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty at the subsequent identification; and (5) the length of time between the crime and the identification. *Slim*, 127 Ill. 2d at 307-08. For the following reasons, we find that Officer Frye's identification testimony satisfies these five factors.

¶ 15 With respect to the first *Slim-Biggers* factor, the defendant argues that Officer Frye did not have a good opportunity to view him because Officer Frye was standing in an alley while it was dark outside. We disagree. Officer Frye testified that, from his position, he had a clear and unimpeded view of the defendant holding the gun. See *People v. White*, 2017 IL App (1st)

142358 ¶ 16 (finding that the witness's identification was reliable where the witness testified that he had a clear and unobstructed view of the defendant). In addition, his vision was aided by the use of binoculars and, although it was dark outside, he had no problem observing the defendant because of a streetlight near the vehicle. Thus, a rational trier of fact could have found that Officer Frye had a sufficient opportunity to identify the defendant as the individual who was holding the gun.

¶ 16 We also disagree with the defendant's claim that Officer Frye did not have a good opportunity to view him because Officer Frye observed him for only a few moments. Officer Frye testified that he observed the defendant for "roughly three to five minutes." The defendant argues that the entire incident could not have taken that long because the distance between the Monte Carlo and the edge of the mall "must have been less than forty feet." In support of this assertion, the defendant includes a Google Earth screenshot in his brief on appeal. Although we can take judicial notice of the distance between two locations as shown on an Internet-based map (*People v. Deleon*, 227 Ill. 2d 322, 326 (2008)), there was no evidence presented at trial regarding the precise location of the Monte Carlo. The defendant's argument that the distance between the vehicle and the edge of the building was less than 40 feet is purely speculative, and we will not consider arguments based upon mere speculation.

¶ 17 Additionally, in making the argument regarding the distance between the vehicle and the mall, the defendant is essentially claiming that the Officer Frye's testimony is not credible. However, the trial court found Officer Frye's testimony credible and we will not reweigh the credibility of a witness on appeal. *Jackson*, 232 Ill. 2d at 280-81 (2009). Even if Officer Frye only saw the defendant for a few seconds, this would not automatically make his identification suspect. See, *e.g.*, *People v. Herrett*, 137 Ill. 2d 195, 200, 204 (1990) (finding a sufficient opportunity for a witness to view a defendant where the witness testified that he viewed the

defendant's face for only "several seconds" in a dimly lit store); *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998) (concluding that the witnesses' identification testimony was sufficient even though they "did not have more than several seconds to identify their attackers"). Officer Frye testified that he observed the defendant for *several minutes* and had a clear view of the defendant holding the gun. Accordingly, we find that the duration of Officer Frye's observation was sufficient to identify the defendant.

¶ 18 Regarding the second *Slim-Biggers* factor, the witness's degree of attention, the defendant argues that Officer Frye did not describe his level of attention at trial. We disagree. Officer Frye did not simply notice the defendant in passing; to the contrary, he was conducting surveillance in the area and was attentively focused on the defendant because he believed the defendant was a potential suspect. See *People v. Tomei*, 2013 IL App (1st) 112632 (2013) ¶¶ 8, 47 (finding the witness to have paid sufficient attention when a motion sensor went off and he observed over a live surveillance video feed the defendant looking through trucks and trailers stored on the property). Accordingly, a rational trier of fact could have found that Officer Frye's degree of attention was sufficient to make a positive identification of the defendant.

¶ 19 As to the third factor, the accuracy of the witness's prior description of the offender, the defendant argues that Officer Frye's description was generic and vague, and could have also described Zachary. We disagree. Our supreme court has held that "a witness' positive identification can be sufficient even though the witness gives only a general description based on the total impression that the accused's appearance made." *Slim*, 127 Ill. 2d at 308-09; see *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1990) (stating that the credibility of an identification does not rely upon the physical or facial characteristics of the defendant, but rather "whether the witness had a full and adequate opportunity to observe the defendant"). Although both the defendant and Zachary were described as black males who were 5 feet 10 inches tall and wearing

black hoodies, Officer Frye testified that he observed *the defendant*, not his brother, remove a gun from his waist band. Furthermore, he identified the defendant in court. The trial court found Officer Frye's testimony, including his description of the defendant, to be credible and we will not substitute our judgment for that of the trial court on such factual issues. *Jackson*, 232 Ill. 2d at 280-81. Accordingly, any rational tier of fact could have found that Officer Frye's prior description was sufficient to make a positive identification of the defendant.

¶ 20 With respect to the fourth factor, the witness's level of certainty, Officer Frye testified that he had a clear and unimpeded view of the defendant holding a gun. There is no evidence suggesting that he wavered in his degree of certainty. Moreover, as to the fifth factor, the length of time between the offense and the identification, the defendant concedes that the factor weighs in favor of the State. Officer Frye identified the defendant just a few minutes after observing him holding the gun.

¶ 21 In sum, weighing all of the *Slim-Biggers* factors, and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Officer Frye viewed the defendant under circumstances permitting a positive identification.

¶ 22 The defendant also claims that this court should consider Zachary's testimony that the gun was his and that the defendant did not pass the gun to him before entering the vehicle. However, we do not find this argument meritorious because issues of witness reliability are for the fact finder to determine, and the trial court in this case explicitly stated that it found Officer Frye's testimony more credible than Zachary's testimony. See *Jackson*, 232 Ill. 2d at 280-81. We will not substitute our judgment for that of the trial court in regard to the credibility of Zachary's testimony. *Id.* Accordingly, Officer Frye's identification testimony and the State's certification showing that the defendant had not been issued a valid FOID card was sufficient to prove the defendant guilty of AUUW beyond a reasonable doubt.

¶ 23 The defendant next argues that trial court erred in ordering the payment of a $250 DNA fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2014)). The State concedes that the $250 DNA fee was improperly assessed and we accept its concession. Accordingly, we vacate the $250 DNA fee.

¶ 24 The defendant also argues that the $190 felony-complaint-filed clerk fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)) is a fine subject to be offset by his presentence incarceration credit. We disagree. Presentence incarceration credit only offsets fines; not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006). This court has already considered challenges to the felony-complaint-filed clerk charge and has determined that it is a fee. *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) (finding the cost for the filing of the felony complaint is compensatory, and therefore, a fee); *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 42 (finding the $190 felony-complaint-filed clerk assessment to be a fee). Because the $190 felony-complaint-filed clerk assessment is a fee, presentence incarceration credit does not apply and its imposition against the defendant was proper.

¶ 25 For the foregoing reasons, we vacate the $250 DNA fee assessed against the defendant and affirm the judgment and sentence of the trial court in all other respects.

¶ 26 Affirmed as modified.