2016 IL App (1st) 160019-U

THIRD DIVISION
May 25, 2016

No. 1-16-0019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re: JOHN L., a Minor	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County, Illinois.
	)	
Petitioner-Appellee,	)	
	)	No. 15 JD 1465
v.	)	
	)	
JOHN L., a Minor,	)	Honorable
	)	Stuart P. Katz,
Respondent-Appellant).	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Minor's adjudication of delinquency for robbery and aggravated robbery affirmed where court did not err in giving unmodified Illinois Pattern Jury Instruction on eyewitness identification. Further, the mandatory sentence for a violent juvenile offender or habitual juvenile offender does not constitute cruel and unusual punishment or violate the Illinois Constitution's proportionate penalties clause. Nor do the habitual juvenile offender and violent juvenile offender statutes violate constitutional guarantees of due process or equal protection.

¶ 2 Following a jury trial, 15-year-old respondent minor, John L., was adjudicated delinquent on two counts of robbery and aggravated robbery. Because of John L.'s criminal history, the

State prosecuted him as a habitual juvenile offender (705 ILCS 405/5-815 (West 2014)), and a violent juvenile offender (705 ILCS 405/5-820 (West 2014)), and pursuant to the statutory requirements, the court committed him to the Department of Juvenile Justice until his 21st birthday. On appeal, John L. contends that the jury instruction on eyewitness identification was erroneous and that the habitual juvenile offender and violent juvenile offender statutes are unconstitutional. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 4, 2015, the State filed a petition for adjudication of wardship against John L., alleging that he committed the offenses of aggravated robbery, robbery, and theft from person against Chakeem Johnson and Robert Wells. In addition, the State announced its intention to prosecute John L. as a habitual juvenile offender since he had twice been adjudicated a delinquent minor for robbery, which would have been a felony if he had been prosecuted as an adult. See 705 ILCS 405/5-815(a) (West 2014). The State also sought to prosecute John L. as a violent juvenile offender, given that he had previously been adjudicated delinquent for robbery, which would have been a Class 2 or greater felony if he had been prosecuted as an adult. See 705 ILCS 405/5-820(a) (West 2014).

¶ 5 The events precipitating the State's petition occurred on May 1, 2015. On that day, Johnson and Wells left school at approximately 12:45 p.m., and were walking to Johnson's grandmother's house accompanied by their friend Anthony Gates. As they walked south on Halsted Street approaching 68th Street, Johnson saw three males across the street, one of whom he identified in court as John L. According to Johnson, John L. was wearing a gray hat, black hoodie, a Gucci belt, and brown pants. Wells testified more generally that one of the boys was wearing a gray "hood," one black, and the third red. Johnson observed the trio pull up their

hoods and start to cross the street. Johnson took out his headphones and cautioned Gates and Wells to watch out.

¶ 6 John L. yelled to Gates, "Hey, you in the middle," and Gates began running away. Wells started to follow him, but Johnson froze when he heard John L. say that if he ran they would shoot him in the back. Noticing that Johnson was not running, Wells took two steps back and stood by him. John L. had his hand in the back of his pants and told Wells and Johnson to give him everything they had. Johnson pleaded with John L. not to "do this," and John L. replied that if Johnson did not comply, he would "shoot [him] out in the open." Johnson then gave John L. his phone, whereupon John L. put his hands in Johnson's pockets and removed headphones and coins. Throughout this seconds-long encounter, nothing blocked Johnson's view of John L.'s face.

¶ 7 The boy with the gray hoodie robbed Wells. Although the hood did not cover the boy's face, Wells could not describe the boy's features because he was studying what the boys were wearing as well as watching the boy who was robbing Johnson five feet away. But Wells could not see the face of the boy robbing Johnson because the boy's hood was up and Wells had a sidelong view of him. Wells gave the boy in the gray hoodie coins from one pocket, and the boy put his hands in Wells' other pocket and took out $20. The boy in the black hoodie robbing Johnson said he would shoot Wells if he didn't give them everything. The boy wearing the red hoodie served as a look-out. The three boys ran away after robbing Johnson and Wells.

¶ 8 Johnson and Wells then approached a security guard, Valentin Rivera, who was standing outside the nearby Beloved Community Family Wellness Center. Rivera was on duty at 1:15 p.m. monitoring the cameras located outside the Center, one of which faced Halsted Street. He noticed a group of five boys, one of whom went into another's pocket. Because he was

concerned about a robbery, he stepped outside to see three boys run from the scene, at which point Johnson and Wells approached him and told him that they had been robbed. Rivera then called 911.

¶ 9 As Johnson and Wells waited for police to arrive, they spoke about the robbery. When police arrived, Johnson gave them a description of the offenders, including John L.'s black hoodie, Gucci belt, and brown pants. Wells offered that one of the offenders had been wearing a black hood, one gray, and one red, and further noted that one offender had camouflage pants while the other two were wearing khakis.

¶ 10 An officer took Johnson and Wells to Johnson's grandmother's house, but before the officer left the house, he received a radio call saying that suspects had been apprehended. Johnson and Wells went with the officer to the suspects' location. While Johnson and Wells were still seated in the back of the squad car, another officer brought John L., who was handcuffed, to the rear passenger side window of the car and asked if that was the person who had robbed them. The officer held up a black sweatshirt to John L.'s chest before asking Johnson and Wells to make the identification. Johnson responded affirmatively, because he looked at John L. "dead in his eyes" when he was being robbed. Johnson also recognized the pants John L. was wearing, although he admitted that all Chicago Public School students wore tan pants as part of their uniform. Wells, too, identified John L., but based his identification on John L.'s clothing because he did not get a good look at John L.'s face during the robbery. Wells, in contrast to Johnson, could not make a positive in-court identification of John L. The officers then brought the two other suspects (one at a time) to the window of the car. Johnson was unable to identify either of them, but Wells identified the boy who robbed him as well as the boy serving as the lookout based on their clothing.

¶ 11 After the identifications were made, an officer approached the car with a gray cap containing three phones and a set of earbuds. Johnson identified one of the phones and the earbuds as his.

¶ 12 Responding Officer Michael Basile was on duty on May 1 in the vicinity of 63rd Street and Halsted Street in an unmarked car with his partner, Officer Barton. They received a radio call of a robbery at 6800 South Halsted Street, and while on their way to that location, a flash message informed them that the three suspects were traveling northbound. The suspects were described as wearing camouflage pants, a gray shirt, and a red shirt. The message further conveyed that the suspects had taken the victims' cell phone, headphones, and money. Officer Basile saw three boys matching the given description on Marquette Street, one and a half blocks away from the location of the robbery. Office Basile ordered the boys to stand by a fence and performed a protective pat down on John L., finding a cell phone and headphones in his pocket. Officer Basile and other officers who arrived at the scene handcuffed the three offenders and placed them in three separate squad cars.

¶ 13 The officers then waited approximately five to ten minutes for the victims to arrive to perform a show-up identification. When the victims arrived, Officer Mark Hernandez, who had joined Officer Basile on the scene, went to the squad car where John L. was being held. Officer Hernandez observed that John L. had removed the black shirt he was wearing (to reveal another shirt underneath) and was placing it under the passenger seat in front of him. Officer Hernandez had John L. exit the car and took him to the victims, holding the black shirt in front of him. The officer with the victims gave Officer Hernandez a thumbs-up sign, indicating that the victims had made a positive identification, at which point Officer Hernandez took John L. back to the car.

¶ 14 At the conclusion of testimony, the court held a jury instructions conference, where John L. requested a six-page instruction used by New Jersey on the issue of eyewitness identification in lieu of Illinois Pattern Jury Instruction (IPI) 3.15. The IPI instruction reads:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:
>
> The opportunity the witness had to view the offender at the time of the offense.
>
> The witness's degree of attention at the time of the offense.
>
> The witness's earlier description of the offender.
>
> The level of certainty shown by the witness when confronting the minor respondent.
>
> The length of time between the offense and the identification confrontation."
>
> Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000).

The New Jersey instruction, on the other hand, outlines the problems with identification testimony and the risk of mistaken identification, and specifically states that a "witness's level of confidence, standing alone, may not be an indication of the reliability of the identification." John L. argued that the New Jersey instruction better reflects the current state of the law on eyewitness identification and that IPI 3.15 was outdated and should not be given. In the alternative, John L. asked the court to modify IPI 3.15 to reflect that a witness's certainty in identifying the perpetrator does not necessarily correlate with the reliability of the witness's identification. The court declined to modify IPI 3.15, and the instruction was given over John L.'s objection.

¶ 15 The jury adjudicated John L. delinquent of two counts of robbery and aggravated robbery. The court noted that pursuant to the Violent Juvenile Offender and Habitual Juvenile

Offender statutes, John L. was subject to a mandatory commitment to the Department of Juvenile Justice until he reached the age of 21 and sentenced him accordingly.

¶ 16 ANALYSIS

¶ 17 Initially, John L. argues that the trial court erred in failing to modify IPI 3.15 to reflect that a witness's degree of certainty in making an identification does not necessarily correlate with the reliability of that identification. The parties disagree as to the standard of review on this issue. The State contends that we should review for an abuse of discretion, while John L. urges us to apply a *de novo* standard. While a trial court's decision regarding the jury instructions to tender is generally within its discretion (*People v. Sito*, 2013 IL App (1st) 110707, ¶ 26), here, John L. argues that the instruction given was an inaccurate statement of law. The question of whether a jury instruction correctly states the law is one we review *de novo*. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007); *People v. Ingram*, 382 Ill. App. 3d 997, 1007 (2008) ("While the giving of jury instructions is generally within the discretion of the trial court, we review *de novo* the question of whether the jury instructions accurately conveyed to the jury the applicable law.").

¶ 18 A circuit court is required to use IPI instructions where they are (1) applicable to the "facts and law of the case," and (2) correct statements of law. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013); *People v. Polk*, 407 Ill. App. 3d 80, 108 (2010). IPI 3.15 sets forth five factors the jury should consider in evaluating an eyewitness identification. Given that the State's case relied heavily on Johnson and Wells' identification of John L., it is indisputable that the instruction was applicable; however, John L. contends that the instruction misstates the law where it asks jurors to consider the witness's certainty in making the identification.

¶ 19 The five factors listed in IPI 3.15, including witness certainty, are taken from *Neil v. Biggers*, 409 U. S. 188, 199-200 (1972). *Polk*, 407 Ill. App. 3d at 109. John L. characterizes these factors as "incorrect and under-inclusive." To be sure, Illinois courts, as well as those in other jurisdictions, have generally noted the potential for error in eyewitness identification and the overreliance by jurors on such testimony. See, *e.g.*, *People v. Allen*, 376 Ill. App. 3d 511, 523 (2007); *People v. Tisdel*, 338 Ill. App. 3d 465, 467 (2003); *Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014); *State v. Henderson*, 27 A. 3d 872, 885-88 (N.J. 2011); *State v. Copeland*, 226 S.W.3d 287, 299-300 (Tenn. 2007) (collecting studies). And some jurisdictions, as John L. points out, have specifically rejected the notion that the degree of a witness's certainty in identifying the perpetrator correlates to the reliability of that identification. See, *e.g.*, *Brodes v. State*, 614 S.E.2d 766 (Ga. 2005); *State v. Long*, 721 P.2d 483, 490 (Utah 1986). But not all states have reached the same conclusion on this issue. For example, at the same time that *Brodes* was decided in Georgia, the Connecticut Supreme Court determined that studies on whether witness certainty corresponded to reliability were "not definitive," and declined to abandon the *Biggers* test. *State v. Ledbetter*, 881 A.2d 290, 313 (Conn. 2005); *cf. State v. Mitchell*, 275 P.3d 905, 912-13 (Kan. 2012) (agreeing with Connecticut Supreme Court that available studies on witness certainty and identification accuracy were mixed, but holding that instructing jury on "degree of certainty factor" was erroneous).

¶ 20 For our part, we have acknowledged that expert testimony on the issue of eyewitness identification (and specifically as it relates to witness confidence) may be admissible (*Allen*, 376 Ill. App. 3d at 524-26), but have not departed from the *Biggers* test. Indeed, as recently as 2007, the Illinois Supreme Court affirmed the use of the five-factor test to evaluate eyewitness testimony. *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007), and this court has done the same

even more recently (*People v. Donahue*, 2014 IL App (1st) 120163, ¶ 94). In other words, despite the changing landscape of the law on the reliability of eyewitness identifications, the *Biggers* test remains the law in Illinois, and as such, the trial court was required to tender IPI 3.15. Ill. S. Ct. R. 451(a). Furthermore, under the circumstances here, where the crime occurred in the daylight, Johnson had an adequate opportunity to observe John L., John L. was identified by both victims shortly after the robbery, and John L. was in possession of Johnson's phone, the reliability of the victims' identification cannot seriously be questioned. This is simply not a case where any departure from IPI 3.15 was warranted.

¶ 21 The Illinois Supreme Court's decision in *People v. Lerma*, 2016 IL 118496, does not compel a different result. There, the court considered whether the trial court abused its discretion in excluding expert testimony on the issue of the reliability of eyewitness identifications. *Id.* at ¶ 1. The court noted that recent expert findings on this issue, while widely accepted, were counterintuitive. *Id.* at ¶ 24. Therefore, the court concluded that eyewitness identification was a "perfectly proper" subject for expert testimony. *Id.* The court did *not* hold that in light of recent expert findings, the five-factor *Biggers* test is no longer accurate. Nor do we. While the Illinois Supreme Court may eventually modify the IPI instruction on eyewitness identification, in the meantime, we decline to reverse a criminal adjudication based on error in giving the (still accurate) IPI instruction.

¶ 22 Turning then to John L.'s constitutional challenges to the habitual juvenile offender and violent juvenile offender statutes, these, too, are without merit. John L. begins by contending that because the statutes impose a mandatory sentence of commitment until a minor's 21st birthday (705 ILCS 405/5-820(f); 705 ILCS 405/5-815(f)), they violate the eighth amendment's prohibition on cruel and unusual punishment as well as the Illinois Constitution's proportionate

penalties clause. As a starting proposition, we note that statutes are presumed constitutional and the burden of rebutting that presumption rests on the party challenging the statute's constitutionality. *People v. Aguilar*, 2013 IL 112116, ¶ 15. John L. has not met this burden here.

¶ 23 Significantly, our supreme court has explicitly upheld the constitutionality of the mandatory minimum sentence of the habitual juvenile offender statute against an eighth amendment challenge. *People ex rel. Carey v. Chrastka*, 83 Ill. 2d 67, 78-80 (1980). John L. acknowledges this holding, but argues that the recent United States Supreme Court cases circumscribing the punishments that may be constitutionally imposed on juveniles alter the analysis. See *Miller v. Alabama*, 567 U.S. ---, 132 S.Ct. 2455 (2012) (prohibiting mandatory life imprisonment for those under 18 at time of crime), *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life without parole for juvenile non-homicide offender); and *Roper v. Simmons*, 543 U.S. 551 (2005) (banning death penalty for juveniles). The premise underlying these holdings is that "children are constitutional different from adults for purposes of sentencing." *Miller*, 567 U.S. at ---, 132 S.Ct. at 2464. Specifically, the "fluidity of a child's character" renders their juvenile criminal activity less predictive of future adult criminality, justifying sentences of lesser duration. *Id.*; see also *Roper*, 543 U.S. at 569-70.

¶ 24 In the first place, our supreme court has declined to expand these cases beyond their facts. For example, in *People v. Patterson*, 2014 IL 115102, addressing the constitutionality of the mandatory transfer provision of the Juvenile Court Act of 1987, the court noted that it had "closely limited the application of the rationale expressed in *Roper*, *Graham*, and *Miller*, invoking it only in the context of the most severe of all criminal penalties." *Id.* at ¶ 110. In *Patterson*, the court rejected the juvenile defendant's attempt to place his 36-year sentence for

three counts of aggravated criminal sexual assault in that category. *Id.* It follows that a term of confinement of six years with day-for-day good conduct credit (705 ILCS 405/5-815(f); 705 ILCS 405/5-820(f)), for two counts of aggravated robbery likewise is not among "the most severe of all criminal penalties."

¶ 25 More significantly, this court has repeatedly rejected other attempts to rely on *Miller*, *Graham* and *Roper* to challenge the validity of *Chrastka*. See *In re Isaiah D.*, 2015 IL App (1st) 143507; *In re Shermaine S.*, 2015 IL App (1st) 142421; *In re A.P.*, 2014 IL App (1st) 140327. We see no reason to depart from these soundly reasoned decisions. As we noted in *Shermaine S.*, *Miller*, *Roper*, and *Graham* involved defendants under the age of 18 who were tried as adults in the adult criminal system (*Shermaine S.*, 2015 IL App (1st) 142421 at ¶ 25), whereas here, John L. was sentenced as a juvenile under the Juvenile Court Act (Act) (705 ILCS 405/1-1 *et seq.* (West 2014)). Moreover, *Miller* prohibited only mandatory life sentences for juveniles, not mandatory penalties altogether. *Shermaine S.*, 2015 IL App (1st) 142421 at ¶ 25. Thus, the line of cases culminating in *Miller* is sufficiently distinguishable from *Chrastka*, which remains the law in Illinois and is binding on this court. See *People v. Millsap*, 374 Ill. App. 3d 857, 868 (2007) ("Illinois Supreme Court decisions are binding on all Illinois courts, including on questions of federal law in the absence of conflicting United States Supreme Court precedent answering the precise legal issue.").

¶ 26 Having found that neither the habitual juvenile offender nor the violent juvenile offender provisions of the Act are constitutionally infirm under the eighth amendment, we turn to evaluate them under the Illinois Constitution's proportionate penalties clause.

¶ 27 Initially, the State, relying on *Patterson*, contends that the eighth amendment offers no greater protection than the proportionate penalties clause, such that an unsuccessful challenge on

the former ground forecloses a challenge on the latter. We disagree. While the supreme court in *Patterson* stated that the "Illinois proportionate penalties clause is co-extensive with the eighth amendment's cruel and unusual punishment clause" (*Patterson*, 2014 IL 115102 at ¶ 106), the court previously noted that the framers of the Illinois constitution had intended, through the proportionate penalties clause, "to provide a limit on penalties beyond those afforded by the eighth amendment" (*People v. Clemons*, 2012 IL 107821, ¶ 39). We recently determined that that the *Patterson* court did not intend to "depart from its prior statement in *Clemons*; rather, it appears the court meant only that like the eighth amendment, the proportionate penalties clause does not apply unless a penalty has been imposed." *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 70. Thus, because the relationship between the eighth amendment and the proportionate penalties clause remains "unclear" (*id.* at ¶ 69 (citing *Clemons*, 2012 IL 107821 at ¶¶ 36-37)), we analyze each separately.

¶ 28 A proportionate penalties challenge requires a defendant to demonstrate that the punishment is "'cruel, degrading or so wholly disproportionate to the offense committed so as to shock the moral sense of the community.'" *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005) (quoting *People v. Moss*, 202 Ill. 2d 503, 522 (2003)). John L. argues that because the mandatory penalty to which he was subject did not allow the court consider his rehabilitative potential, it violated this standard. Not so.

¶ 29 As we noted in *A.P.*, a juvenile who is subject to confinement until the age of 21 as a habitual juvenile offender has already committed two offenses that would have been felonies if committed as an adult, as well as a violent third offense. *A.P.*, 2014 IL App (1st) 140327 at ¶ 23 (citing 705 ILCS 405/5-815(a)). Given that John L. is a "recidivist, violent offender," "[t]he legislature is entitled to find that *** there are no mitigating circumstances to allow for a lesser

penalty." *Id.* (citing *People v. Taylor*, 102 Ill. 2d 201, 206 (1984) for proposition that "[t]he rehabilitative objective of [the proportionate penalties clause] should not and does not prevent the legislature from fixing mandatory minimum penalties where it has been determined that no set of mitigating circumstances" would justify a lesser sentence); see also *Isaiah D.*, 2015 IL App (1st) 143507 at ¶ 59. Thus, John L.'s proportionate penalties challenge to his sentence fails.

¶ 30 John L.'s argument of unconstitutionality based on due process and equal protection fares no better. With regard to due process, John L. contends that designating offenders as violent or habitual offenders and subjecting them to a mandatory sentence neither protects the public nor allows an "individualized assessment" of the offender, both stated purposes of the Act (705 ILCS 405/5-101(a), (c) (West 2014)). See *People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010) (statute violates substantive due process if it bears no rational relationship to legitimate legislative purpose). And with regard to equal protection, John L. points out that mandatory commitment until the age of 21 punishes younger offenders more harshly than those who are older for no legitimate reason. See *People v. Masterson*, 2011 IL 110072, ¶ 24 (equal protection requires similar treatment for similarly situated individuals).

¶ 31 But our supreme court rejected these identical arguments in *Chrastka* with regard to the habitual juvenile offender provision of the Act, stating first that it comports with due process notwithstanding the lack of discretion given to the judiciary in imposing sentence:

> "The legislature could legitimately conclude that an individual who has committed three [offenses which would have been felonies if the individual were prosecuted as an adult] has benefitted little from the rehabilitative measures of the juvenile court system and exhibits little prospect for restoration to meaningful citizenship within that system as it had heretofore existed. The rehabilitative purposes of the system are not completely forsaken, but after the commission by an individual of a third serious offense, the interest of society in being protected from criminal conduct is given additional consideration." *Chrastka*, 83 Ill. 2d at 80.

The court likewise rejected the respondent's equal protection challenge, holding that "we do not believe that the fortuitous disparity of the terms of confinement of habitual juvenile offenders which results from the variance in age of such individuals serves to invalidate the means chosen to effectuate the purposes of the Act." *Id.* at 81.

¶ 32 This court found that *Chrastka*'s reasoning with regard to the habitual juvenile offender statute was equally applicable to a constitutional challenge to the violent juvenile offender statute, noting that there is no basis to evaluate the two statutes differently, notwithstanding the fact that the violent juvenile offender statute imposes punishment after two as opposed to three offenses. *In re M.G.*, 301 Ill. App. 3d 401, 407-08 (1998).

¶ 33 For the reasons discussed *supra*, we do not believe that *Miller*, *Graham*, or *Roper* alter the supreme court's analysis in *Chrastka*. These cases have been narrowly construed in Illinois, and we decline to extend application of their principles to the sentencing scheme of the habitual juvenile offender or violent juvenile offender statutes.

¶ 34 CONCLUSION

¶ 35 For the reasons stated, we affirm John L.'s adjudication of delinquency.

¶ 36 Affirmed.