2013 IL App (2d) 121277-U
No. 2-12-1277
Order filed November 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re DEVONTE L., a Minor	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
	)	No. 11-JD-754
	)	
(The People of the State of Illinois,	)	Honorable
Petitioner-Appellee, v. Devonte L.,	)	Anthony V. Coco,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved respondent guilty beyond a reasonable doubt of aggravated battery: the identifying witness's testimony presented only minor discrepancies with the victim's testimony, we could not take judicial notice that the identification was tainted by "unconscious transference," and the identification was not otherwise tainted by the distinctive features of respondent's photograph; (2) the trial court committed no error, and thus no plain error, in failing to appoint a guardian *ad litem*: although respondent's parent was implicated in the same attack, the record did not evince an actual conflict of interest that compromised the parent's advocacy of respondent's interests; (3) we modified the sentencing order to reflect the merger of respondent's adjudication of battery into his adjudication of aggravated battery.

¶ 2 The State filed a petition to adjudicate respondent, Devonte L., a delinquent minor. As amended, the petition alleged that respondent committed the offenses of battery (720 ILCS 5/12-

3(a)(1) (West 2010)) and aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)). According to the petition, respondent punched Kevin Detloff in the head while Detloff was on public property. The trial court found respondent guilty of both offenses, made him a ward of the court, and sentenced him to a 12-month term of probation. Defendant argues on appeal that (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial court erred in failing to appoint a guardian *ad litem*; and (3) the sentencing order should be corrected to reflect that the offense of battery merged into the offense of aggravated battery. We agree with the third point and modify the sentencing order accordingly. In all other respects, we affirm.

¶ 3 Detloff testified that on September 25, 2011, he was attending his oldest son's youth league football game in Bloomingdale. His wife and youngest son were also present. At the end of the game, the players started fighting and some of the parents walked onto the field to break up the fight. While Detloff's wife was on the field, Detloff observed someone pick her up and throw her to the ground. When Detloff went to help her, he was punched in his right cheek. The punch knocked Detloff down. As he was getting up, he observed someone approaching him and he was punched in the mouth. Detloff did not see who threw either punch.

¶ 4 Vincent Bruett, a detective with the Bloomingdale police department, testified that Detloff told him that he observed his wife being pulled from behind by an adult male. Detloff indicated that, after he told that individual to let his wife go, the individual turned and punched Detloff in the mouth. (Detloff admitted on cross-examination that he might have made this statement.) Bruett further testified that on October 5, 2012, he showed two photo arrays to Lorenzo Zepeda, a purported witness to the attack on Detloff. Both photo arrays were admitted into evidence. One of the photo arrays consisted of photographs of six adult males, including respondent's father. The other photo

array consisted of photographs of six juvenile males, including respondent. The photograph of respondent was obtained from the Secretary of State and was of a lower resolution than the other photographs, such that some "pixellation" was discernible. All of the subjects except respondent were photographed against what appears to be the same cinder-block wall. Moreover, respondent was shown with a wide smile, whereas most of the other subjects were not smiling. From the photo arrays, Zepeda identified respondent and his father as Detloff's assailants.

¶ 5 Zepeda testified that he was acquainted with Detloff, whose son was on the same team as Zepeda's. Zepeda was present at the game and was helping to measure yardage with the "chain gang." When the teams started fighting near the end of the game, the situation became chaotic. Zepeda testified that, while he was "pulling kids apart," he saw Detloff's wife fall over. Zepeda testified that she was pushed down to the ground. As Detloff approached his wife, he was punched twice in the face. The punches, which were thrown in rapid succession, knocked Detloff over. Zepeda identified respondent and his father in open court as the individuals who struck Detloff. Respondent's father walked away, but one of the coaches physically restrained respondent, and Zepeda heard respondent "[s]creaming for his dad." Zepeda testified that he had an opportunity to observe both respondent and his father throughout the game—a period of about an hour and a half—because they were all on the same side of the field and "were all walking back and forth up and down the field."

¶ 6 On cross-examination, Zepeda indicated that, when Detloff's wife was pushed over, he observed respondent and his father in front of her. Asked if he saw who pushed Detloff's wife, Zepeda testified that he "would assume" that respondent and his father did. Zepeda testified that,

when Detloff approached, Detloff was facing respondent and his father and asking who had pushed his wife. Respondent struck Detloff first and then respondent's father struck Detloff.

¶ 7 We first consider respondent's argument that the State failed to prove his guilt beyond a reasonable doubt. Our supreme court has recently observed as follows:

> "In delinquency proceedings, as in criminal cases, when evaluating a challenge to the sufficiency of 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.' [Citations.] Generally, the trier of fact has had the opportunity to hear and see the witnesses and, for that reason, is in the best position to judge credibility. [Citation.] Thus, it is not the function of a reviewing court to retry the defendant. [Citation.] Rather, a reviewing court 'must allow all reasonable inferences from the record in favor of the prosecution' [citation] and reverse a conviction only if the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt [citation]." *In re Austin M.*, 2012 IL 111194, ¶ 107.

¶ 8 Zepeda was the only witness who identified respondent and his father as Detloff's attackers. Respondent argues that Zepeda's testimony was insufficient to prove his guilt because it conflicted with Detloff's testimony. Respondent notes that Zepeda's testimony differed from Detloff's with respect to how many individuals pushed or threw Detloff's wife to the ground and the length of the interval between the two blows to Detloff's face. The discrepancies are minor and immaterial. Moreover, "we may not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence, the credibility of the witnesses, or the resolution of conflicting testimony." *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 22.

¶ 9 Respondent also argues that the State's evidence was insufficient to prove the identity of Detloff's assailant because the police used suggestive procedures to obtain Zepeda's pretrial identification of respondent and there was no witness other than Zepeda—and no physical evidence—linking respondent to the attack. It is well established that "[a] positive identification by a single witness who had a sufficient opportunity to observe the defendant is enough to support a conviction." *Id.* In cases where identification is challenged on the basis that it resulted from unduly suggestive procedures, an identification that is reliable enough to survive a pretrial motion to suppress is sufficient to prove the identity of the offender beyond a reasonable doubt. *People v. Young*, 97 Ill. App. 3d 319, 324-25 (1981). In either case, the relevant question is whether the identification procedure was " ' "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process ***." ' [Citations.]" *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). Circumstances bearing on the reliability of the identification include "(1) the witness' opportunity to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty demonstrated at the time of the lineup; (5) the length of time between the crime and the lineup; and (6) any acquaintance with the suspect prior to the crime." *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)). These circumstances are to be weighed against the alleged corrupting circumstances of the identification procedure. *Id.*

¶ 10 According to respondent, the pretrial identification procedure was unduly suggestive inasmuch as the photograph of him in the photo array shown to Zepeda stood apart from the other five photographs. As noted, the image quality of respondent's photograph differed from the other photographs, respondent was photographed against a different background, and respondent's facial

expression was notably different from the other subjects'. However, according to respondent, the most suggestive feature of the photo array was that respondent was the only subject who attended the game at which Detloff was punched. Respondent cites research by psychologists into "unconscious transference" (otherwise known as the "bystander effect"), by which an eyewitness to a crime can confuse or combine different memory images, leading the witness to misidentify as the perpetrator a bystander or someone observed in an entirely different context. John C. Brigham, Adina W. Wasserman, & Christian A. Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, Court Review, Summer 1999, at 12, 14.

¶ 11 No evidence was presented in the trial court to support the theory that Zepeda's identification of respondent's photograph might have resulted from unconscious transference. Thus, respondent's argument on this point essentially asks us to take judicial notice both that the research in question is valid and that the conditions of this case were conducive to misidentification as a result of unconscious transference. This we will not do. "Judicial notice may be taken of scientific principles and authoritative treatises that are generally known and accepted or 'readily verifiable from sources of indisputable accuracy.' " *People v. Lee*, 256 Ill. App. 3d 856, 863 (1993) (quoting *Murdy v. Edgar*, 103 Ill. 2d 384, 394 (1984)). Respondent has not provided any authority establishing that the principle of unconscious transference meets these criteria. Indeed, we find authority, roughly contemporaneous with that cited by respondent, suggesting that the opposite might be true. See Francis A. Gilligan, Edward J. Imwinkelreid, & Elizabeth F. Loftus, *The Theory of "Unconscious Transference": The Latest Threat to the Shield Laws Protecting the Privacy of Victims of Sex Offenses*, 38 B.C. L. Rev. 107, 123 (1996) (quoting David F. Ross, Stephen J. Ceci, David Dunning, & Michael P. Toglia, *Unconscious Transference and Mistaken Identity: When a Witness*

Misidentifies a Familiar but Innocent Person, 79 J. Appl. Psychol. 918, 919 (1994)) ("while a number of studies *** point to the validity of the theory, other studies reach a contrary conclusion; 'the findings are mixed, providing [only] weak and inconsistent support for the existence of unconscious transference.' "); *id.* at 123-24 ("A sober, but intellectually honest, assessment would be that there is a great deal more to learn about the phenomenon, especially the factors which maximize the probability of its occurrence.").

¶ 12 For the reasons stated above, we are not in a position to consider whether the possibility of unconscious transference would contribute to a reasonable doubt. Accordingly, we limit our inquiry to whether the distinctive features of respondent's photograph rendered Zepeda's identification so unreliable as to create a reasonable doubt.[1] Upon consideration of the relevant circumstances, we conclude that the identification was sufficiently reliable to sustain a finding of guilt. We note that two factors—Zepeda's level of certainty when identifying respondent from the photo array and the accuracy of a prior description of the suspect—do not apply. There is no evidence of how certain Zepeda was in his pretrial identification. Nor is there any evidence that Zepeda provided a description of a suspect before viewing the photo array. However, although Zepeda had never seen the suspect before the day of the crime, Zepeda had an ample opportunity to observe respondent before, during, and in the immediate aftermath of the attack on Detloff. Also, Zepeda described the incident in sufficient detail to permit an inference that he was paying reasonable attention.

[1] The State claims the issue is forfeited. The State incorrectly confuses admissibility with the sufficiency of the evidence. "[W]hen a defendant makes a challenge to the sufficiency of the evidence, his or her claim is not subject to the waiver rule and may be raised for the first time on direct appeal." *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

Moreover, the 10-day interval between the crime and the photo-array identification of respondent was short enough to foster a reliable identification. *Cf. People v. Slim*, 127 Ill. 2d 302, 313-14 (1989) (11-day interval did not undermine reliability of lineup identification).

¶ 13 Respondent next argues that there was a conflict of interest between him and his father and that the trial court was therefore obligated to appoint a guardian *ad litem* (GAL) pursuant to section 5-610(1) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-610(1) (West 2010)), which provides that, in delinquency proceedings, "[t]he court may appoint a guardian ad litem for the minor whenever it finds that there may be a conflict of interest between the minor and his or her parent, guardian or legal custodian or that it is otherwise in the minor's interest to do so." Respondent concedes that he forfeited the issue by failing to raise it in the trial court. See *In re C.L.*, 392 Ill. App. 3d 1106, 1111-12 (2009). However, respondent contends that the trial court's failure to appoint a GAL is reviewable under the plain-error rule. The plain-error rule provides an exception to the forfeiture principle when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *In re Jonathon C.B.*, 2011 IL107750, ¶ 70. "[I]n addressing a plain-error argument, this court first considers whether error occurred at all." *Id.* We find no error in this case, let alone an error that is sufficiently clear and obvious to warrant plain-error review.

¶ 14 Our supreme court has noted that "there is no requirement that a guardian *ad litem* be appointed in delinquency cases." *Austin M.*, 2012 IL 111194, ¶ 85. Accordingly, "when a guardian *ad litem* is appointed in a delinquency case, it is generally because there is no interested parent or

legal guardian to represent the child's best interests. In these situations, the GAL must act in the role of a concerned parent." *Id.* Respondent argues that his father had a conflict of interest, inasmuch as he, like respondent, was implicated in the attack on Detloff. As discussed, Zepeda identified respondent and his father as the two individuals who punched Detloff. Respondent argues that "[t]o have a parent act as both guardian and as a party to the alleged criminality is akin to having a lawyer who represents clients with competing interests—in both circumstances self-interest can influence outcomes, even if it is only exercised self-consciously."

¶ 15 By dint of respondent's reasoning, one would suppose that an attorney may never represent codefendants in criminal proceedings. It is clear, however, that that is not the case:

> "Illinois courts have found that an attorney's simultaneous representation of two or more codefendants does not create a *per se* violation of the right to effective assistance of counsel. [Citations.] In that regard, '[j]oint representation is permitted because "[a] common defense often gives strength against a common attack." ' [Citation.]" *People v. Johnson*, 334 Ill. App. 3d 666, 675 (2002).

¶ 16 The mere possibility of a conflict of interest is insufficient to establish a violation of the right to counsel. *Huynh v. Bowen*, 374 F.3d 546, 548 (7th Cir. 2004). Moreover, in cases of joint representation, reversal of a conviction will not be predicated on a potential conflict of interest unless it has been brought to the attention of the trial court at an early stage of the proceedings. *Johnson*, 334 Ill. App. 3d at 675-76. Otherwise, a conviction will be reversed only if counsel's performance was adversely affected by an actual conflict of interest. *Id.* at 676. Thus, even assuming that the analogy proposed by respondent is sound—*i.e.*, that a parent who is "a party to the alleged criminality" is akin to an attorney representing codefendants—a minor who argues for the first time

on appeal that a GAL should have been appointed pursuant to section 5-610(1) of the Act must show that an actual conflict of interest compromised a parent's advocacy of the minor's interests. Here, the record offers no basis for anything more than speculation that respondent's father had anything to gain or lose from respondent's strategic choices in defending against the delinquency petition or that there is anything respondent's father did or did not do that adversely affected respondent's interests in the delinquency proceedings. Such speculation is insufficient to establish a conflict of interest that would require appointment of a GAL.

¶ 17 Finally, respondent argues that the sentencing order should be corrected to reflect that, because the offenses of battery and aggravated battery were based on the same act, the former merged into the latter. See generally *People v. King*, 66 Ill. 2d 551, 560-66 (1977). Although the trial court stated that the offenses merged, the sentencing order indicates that respondent was sentenced for both offenses. The State agrees with respondent, as do we, that the offenses merged.

¶ 18 For the foregoing reasons, we modify the sentencing order to reflect that respondent was adjudicated a delinquent minor and sentenced solely for the offense of aggravated battery. In all other respects, the judgment of the circuit court of Du Page County is affirmed.

¶ 19 Affirmed as modified.