2012 IL App (3d) 100243-U

Order filed August 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0243
v.	)	Circuit No. 08-CF-1742
	)	
SEAN GALLAGHER	)	Honorable
	)	Carla Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's manifest weight of the evidence and ineffective assistance claims fail because the record reveals sufficient evidence to support the jury's verdict finding defendant guilty.

¶ 2 Defendant, Sean Gallagher, was convicted of two counts of armed robbery (720 ILCS 5/18-2(a)(1), (a)(2) (West 2008)). On appeal, defendant argues that the evidence was insufficient

to convict him. Alternatively, defendant argues he was deprived effective assistance of trial counsel. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with three counts of armed robbery. Count I charged that on December 17, 2007, while armed with a knife, defendant took currency from the presence of Yesika Selgado, an employee of the Speedway gas station (the Speedway). Count II charged that on June 18, 2008, while armed with a handgun, defendant took currency from the presence of William Stallings. Count III charged that on July 23, 2008, while armed with a handgun, defendant took currency from the presence of Maurice Vespo. The following evidence was adduced at trial.

¶ 5 Yesika Salgado was working alone at the Speedway on December 17, 2007. At approximately 3:45 a.m., a white male entered and acted "kind of suspicious." He headed toward the bathroom, keeping his head down and using his right hand to cover his face. He left without buying anything. He was wearing a black hoodie, light blue pants and gloves.

¶ 6 Less than an hour later, the man returned to the Speedway, wearing the same clothing plus a camouflage bandana covering his face. Salgado asked the man to take off his bandana, per company policy. He kept advancing toward the counter and told her to hand him the money. He displayed a knife with his left hand. While watching the Speedway surveillance tape from December 17 in open court, Salgado testified that he took the money with his right hand. He said thank you and exited the store. Salgado wrote down the man's description and pressed the emergency call button. She testified that the man was about five feet eight inches or six feet tall. Salgado identified defendant in open court as the man who robbed the Speedway on December

17, 2007. She testified that she was "100 percent sure" defendant robbed the Speedway. She identified State's Exhibit 36 as the knife defendant displayed. She identified State's Exhibit 34 as the camouflage bandana and State's Exhibit 3 as the black hoodie defendant was wearing. William Stallings worked at the Speedway on June 18, 2008. At approximately 1:45 a.m., a tall man came in wearing a red and white bandana covering his face. He walked up to the register, held out a gun with his right hand, and said open the drawer. The man repeated his request. Stallings opened the register and gave the man the money. The man said thank you and exited the store. The video surveillance system was not working on June 18.

¶ 7 Syed Quadri worked at the Speedway on June 29, 2008. Quadri went out for a smoke break with his friend, Rowena Mallorca. During his break, Quadri saw an individual sitting by the ice machine. Mallorca testified that the "guy" was wearing black pants, black gloves and a black hoodie. Quadri did not get a chance to see whether the individual was a male or a female. The individual fled and Quadri called the police. No robbery took place on this date.

¶ 8 Maurice Vespo and Wendi Dusk worked at Speedway on July 23, 2008. At about 3:30 a.m., a white male, approximately six feet tall, came in wearing a red bandana covering his face. The man was also wearing a black hoodie, gloves and blue pants. The man asked Dusk to open the drawer. Dusk called Vespo over to the register. Vespo noted that the man's eyes were very blue. The man followed Vespo to the register, showed Vespo a gun and said he did not want any trouble. The man was holding the gun in his left hand. Vespo put the money on the counter. The man took the money and exited the store. Vespo called the police and gave them a description of the man.

¶ 9 Vespo identified defendant in open court as the man who robbed the Speedway on July 23,

2008. In court, Vespo observed defendant's eyes to be blue, but not as bright as the eyes had appeared in the brighter lighting at the Speedway. Vespo and Dusk identified State's Exhibit 3 as the black hoodie and State's Exhibit 4 as the red bandana worn by defendant. Vespo identified State's Exhibit 2 as the revolver defendant had shown him.

¶ 10 Bolingbrook police officer Patrick Kinsella testified that on July 23, 2008, he received a police dispatch at approximately 3:30 a.m. notifying him of the Speedway robbery. He stated that, because he had worked the same location for the past four years, he was familiar with the other robberies at the Speedway, and on two previous occasions had tracked the robber to a subdivision in Bolingbrook.

¶ 11 Upon receiving the dispatch, Kinsella headed immediately toward the subdivision. Kinsella saw someone in a black hoodie running. The individual then went into a residential townhouse. Kinsella called for backup units, and while he waited for them to arrive, crouched down to conceal himself so that he could continue to observe the individual through a sliding glass door. The individual matched the description given of the robber's clothing: a black hoodie with the hood up, a blue baseball cap, and a red bandana covering the lower portion of the individual's face. As the individual began to remove the hoodie, Kinsella retreated into the bushes where he could still see whether anyone came or left the townhouse.

¶ 12 When backup arrived, Kinsella watched the back while other officers knocked on a front door and window. Immediately, Kinsella saw a man run out from a hallway toward the back. As the man began to open the sliding door, Kinsella announced his presence, causing the man to lunge back toward the house. Fearing he was reaching for a weapon, Kinsella ordered the man to

the ground, where he was secured by another officer. Kinsella identified this man in open court as defendant. Defendant was not wearing the previously described clothing.

¶ 13 The officers asked defendant who else was in the house. Defendant responded that a female was in one bedroom and a male with a large dog was in another bedroom. The female occupant stepped into the living room upon request. They then told the male occupant to secure the dog. "After a brief moment" the male in the bedroom advised that he had put the dog in a kennel and opened the door for the officers.

¶ 14 The male occupant was identified as Derek Malloy. Malloy and defendant shared the bedroom. The officers asked Malloy if there were any weapons in the room. Malloy directed them to a black BB gun underneath the television, which they could see from where they were standing. He said he did not know of any other guns. The officers searched the bedroom and found a pistol located inside a gym bag. The pistol was a five shot .44 pistol loaded with four live bullets and one spent casing. Other evidence found in the room included several bandannas, a large hunting knife, a sheath, about eight prescription bottles, and a package of latex gloves and discarded gloves.

¶ 15 On cross-examination, Kinsella admitted that, when seeking a search warrant later that morning, he initially identified Derek Malloy as the subject in the kitchen. Kinsella specifically wrote, “Derrick [*sic*] Malloy was positively identified by Officer Kinsella as the subject who was removing the hooded sweatshirt and red bandanna in the kitchen.” Kinsella explained that he identified Malloy because “as the subject was removing the sweatshirt I moved back to those bushes on Elkhorn Court and at that point I didn't observe the long hair on the defendant and that it was my opinion that it was most likely Derrick [*sic*] at that time.” He clarified that he had

retreated while the robber was removing his sweatshirt, and therefore he had not seen the face of the individual standing in the kitchen. On redirect, he stated that the search warrant was never executed due to the inaccuracies.

¶ 16 Both defendant and Malloy were taken to the police station and interviewed separately. Defendant was given his *Miranda* warnings and interviewed by Detective Jamie Marquez and Sergeant John Hild. Hild testified that defendant told them that he was a heroin addict and had a medical condition that resulted in his inability to sleep. He told them neither he nor Malloy could have committed the robbery, as he had been up all night and never left the house. Likewise, Malloy had been asleep all night and never left. The officers left the interview room to continue their investigation and gave defendant breakfast. During their break, they watched the surveillance video and determined that the robber appeared to be left-handed. They also reviewed the witness statements indicating that the robber had blue eyes. Malloy was right-handed and had brown eyes.

¶ 17 The officers returned to the interview room and confronted defendant with those facts. According to the officers, defendant stated: "I did it." When Marquez asked defendant to explain, he stated: "I'm a heroin addict, what do you expect." Hild added that defendant also stated: "I told you that Derek [Malloy] was sleeping and it wasn't Derek."

¶ 18 From this point forward, Marquez could not recall the specific things defendant stated, so he relied on a two-paragraph summary of the conversation he documented in a police report. Marquez testified that defendant stated he was dressed in a black hoodie, gloves and a red bandanna covering his face. He went into the Speedway armed with a .44 pistol and first

confronted the female clerk who called over the male clerk who gave him the money. Defendant said thank you then left and ran home.

¶ 19 Marquez testified that the officers then confronted defendant about other robberies. Marquez stated that defendant told them he had gone there once with a knife, another time with a gun, and a third time when he ran off without entry after an employee out for a smoke break noticed him hiding by the ice machine. Defendant also allegedly told him that he would always say thank you, upon being given the money. According to Marquez, defendant did not provide dates of the prior robberies.

¶ 20 Hild testified that Marquez's report of defendant's statement was only a synopsis and that defendant actually stated more facts regarding the robberies. According to Hild, defendant provided dates, specifically stating that he had robbed the Speedway with a gun approximately one month earlier and also seven months earlier with a knife. Defendant also allegedly explained that he kept an empty or spent casing in the chamber so if the .44 pistol fired accidently, no one would be hurt.

¶21 The officers did not videotape or audiotape defendant's interrogation. Defendant did not give a written statement. Marquez did not show defendant the two-paragraph summary he prepared. Initially, Marquez could not recall whether they asked defendant if he wanted to preserve his statement in any form. After reviewing his testimony, however, from a previous hearing, Marquez testified that he asked defendant if he wanted to preserve his statement. Defendant allegedly declined. Hild agreed that they asked defendant to document his statement, but he declined.

Derek Malloy testified that in July 2008 he had been living and sharing a bedroom with defendant. He and defendant used heroin and crack cocaine together in their bedroom daily. Malloy admitted that he had used a large amount of heroin on July 23, 2008. Malloy admitted that he had stolen his father's pain medication because his father had died four days prior to this incident.

¶ 22 Malloy testified that he had a conversation with defendant where defendant admitted robbing "somebody." Malloy did not remember when this conversation occurred. He remembered that defendant showed him some of the money he had taken. Malloy also had a second conversation with defendant where defendant said he was going to rob somebody, but "it got botched" because "somebody came outside and scared him away." Malloy identified defendant's eyes as gray hazel. Malloy is right-handed, and approximately six feet tall. Malloy's father, who had recently passed away, had been a Bolingbrook police officer for 20 years prior to his retirement. Malloy's father trained Hild. Hild had known Malloy since Malloy was approximately six or seven years old. Malloy agreed that he knew a lot of Bolingbrook police officers, including Marquez and Hild, but not Kinsella.

¶ 23 Ultimately, the jury returned verdicts of guilty on Counts I and III (December 17 and July 23 armed robberies) and not guilty on Count II (June 18 armed robbery). The court sentenced defendant to 22 years on each count, to be served concurrently. Defendant appeals.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant argues that his convictions should be reversed because the evidence was insufficient to convict him. In the alternative, he asks that the case be remanded for a new trial due to ineffective assistance of trial counsel. Both arguments fail because the record reveals

sufficient evidence to support the jury's verdict finding defendant guilty of the December 17 and July 23 armed robberies.

¶ 26 Sufficiency of the evidence

¶ 27 When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The *Collins* court further explained:

> "We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilty. [Citation.] In reviewing the evidence, it is not the function of the court to retry the defendant nor will we substitute our judgment for that of the trier of fact. [Citation.]" *Collins,* 214 Ill. 2d at 217.

¶ 28 In this case, defendant argues that no rational trier of fact could find beyond a reasonable doubt that defendant committed the offense of armed robbery on December 17, 2008, and July 23, 2008. Initially, we note that Salgado identified defendant in open court as the man who robbed the Speedway on December 17, 2007. Likewise, Vespo identified defendant in open court as the man who robbed the Speedway on July 23, 2008. Viewing this evidence in conjunction with Marquez's and Hild's testimony that defendant confessed to the charged crimes is sufficient alone, under *Collins*, to support the jury's verdict.

¶ 29 The record also reveals other evidence that supports the jury's verdict. The robber, on both occasions, was a white male, wore a black hoodie and a bandana, displayed a knife or gun, and was identified to be approximately between five feet eight inches and six feet tall. Kinsella, who was immediately responding to the June 23 robbery dispatch, saw an individual running who matched the description of the robber. He followed the individual into the townhouse where defendant lived. Defendant attempted to run out of the townhouse upon the police announcing their presence. The items worn and displayed in the robberies -- knife, sheath, pistol, camouflage bandana, red bandana and gloves -- were found in defendant's bedroom. Defendant is a white male. Defendant is listed as being six feet one inch tall on the Illinois Department of Correction website. See *People v. Peterson*, 372 Ill. App. 3d 1010, 1019 (2007) (stating that the court may take judicial notice of DOC records because they are public documents). Finally, we note that Malloy testified that defendant admitted, at some point in time, to robbing "somebody."

¶ 30 Even in light of this evidence, defendant maintains that the State failed to establish his guilt beyond a reasonable doubt because "Malloy cannot be eliminated as the actual offender." Defendant cites the fact that Kinsella originally identified Malloy as the individual he saw running and subsequently enter the townhouse. Defendant also attacks the credibility of Marquez, Hild, Malloy, Salgado and Vespo. Finally, defendant calls our attention to the fact that the jury acquitted defendant of the June 18 robbery.

¶ 31 In essence, defendant's argument is simply a request to reweigh the evidence, which we will not do. *Collins*, 214 Ill. 2d at 217. The jury was aware of Kinsella's initial identification. The jury was also aware of any alleged bias Marquez and Hild may have been laboring under. The jury was also aware of Malloy's drug use and any alleged bias. The jury also heard any

alleged inconsistencies in Salgado and Vespo's testimony. We find these contentions are not compelling in this case because defendant presented these theories and the jury rejected them.

¶ 32 We also will not speculate as to possible reasons why the jury acquitted defendant of the June 18 robbery. We believe the jury's verdicts are both logically and legally consistent. However, even if logically inconsistent, the verdict of acquittal for the June 18 robbery and the convictions for the December 17 and July 23 robberies are clearly not legally inconsistent. These three offenses are entirely separate, each consisting of different facts and evidence. A verdict will only be set aside if it is legally inconsistent, logical inconsistency does not provide a sufficient basis upon which to set aside a verdict. *People v. Wilson*, 257 Ill. App. 3d 670, 703 (1993).

¶ 33 Simply put, defendant seeks in his argument to segregate each piece of evidence and locate the doubt therein. That approach is improper. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). When the evidence is circumstantial, the jury need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. The evidence is sufficient if all of it, *taken together*, satisfies the jury that the defendant is guilty beyond a reasonable doubt of the crime charged. *Hall*, 194 Ill. 2d at 330.

¶ 34 Here, viewed in the light most favorable to the State, the evidence allowed the jury to find the following facts: (1) defendant entered the Speedway on December 17, while armed with a knife, (2) defendant brandished the knife and demanded money from Selgado, (3) Salgado gave defendant money and defendant fled, (4) defendant entered the Speedway on July 23 while armed with a pistol, (5) defendant brandished the pistol and demanded money from Vespo, (6) Vespo gave defendant money and defendant fled. Defendant submitted evidence or presented argument

in an attempt to establish that he was not the one who in fact robbed the Speedway. However, the question is not whether a rational jury could have acquitted defendant; the question is whether a rational jury could have convicted him. Clearly, the evidence was sufficient to allow the jury to find, beyond a reasonable doubt, that defendant robbed the Speedway on December 17 and July 23.

¶ 35 Ineffective assistance

¶ 36 Alternatively, defendant argues that he is entitled to a new trial because trial counsel was ineffective for: (1) failing to object to the admission of evidence concerning the June 29 incident, (2) failing to file a motion to sever Count II, (3) failing to object when the State allegedly bolstered the credibility of Hild, (4) failing to request the entire venire panel be dismissed after a potential juror stated that she discussed with a someone about how the same guy kept robbing the Speedway , and (5) failing to ensure compliance with Supreme Court Rule 431(b).

¶ 37 Ineffective assistance is evaluated by the familiar two-step analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on the claim, a defendant must demonstrate that "(1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Berrier*, 362 Ill. App. 3d 1153 (2006).

¶ 38 First, defendant contends that counsel was ineffective in failing to object to the admission of evidence regarding the June 29 incident, when Qadri and Mallorca saw an individual dressed in a black hoodie and black pants sitting by the ice machine outside the Speedway. We disagree. This evidence was admissible to corroborate Marquez's testimony that defendant admitted to him that he ran off without robbing the Speedway after an employee, who was on a smoke break,

noticed him hiding by the ice machine. The evidence also corroborates Malloy's testimony that defendant told him that he was going to rob somebody, but "it got botched" because "somebody came outside and scared him away." Moreover, the evidence was not prejudicial.

¶ 39 Second, defendant contends that counsel was ineffective in failing to move to sever Count II (June 18 robbery) from Count I and III. We disagree. A defense counsel's decision not to seek a severance, even if unwise in hindsight, is a matter of trial strategy. *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996). And, even if counsel's failure to file a motion to sever was not a matter of trial strategy, the failure to file the motion did not result in any prejudice to defendant. Given the circumstances, there was no reasonable probability that defendant would have been acquitted of the December 17 and July 23 robberies.

¶ 40 Third, defendant contends that counsel was ineffective for failing to object to two of the States's questions to Hild: (1) "[W]ould anything be worth risking your profession, your standing in the community to do something discuss honest as a police officer? [sic]," and (2) whether Hild would "swear to God" with regard to his testimony that defendant was offered but declined the opportunity to give his statement on videotape, audiotape, or in writing. Even if we were to assume that these questions were improper, these two isolated questions do not establish prejudice as the evidence of defendant's guilt was overwhelming, consisting of Salgado's and Vespo's eyewitness testimony, Malloy's testimony, the evidence found in defendant's bedroom and defendant's confession to the crimes.

¶ 41 Fourth, defendant contends that counsel was ineffective for failing to ask the trial court to take remedial action when a juror volunteered knowledge of the instant case during *voir dire*. Specifically, one prospective juror stated that she read something about the case and had

discussed with someone she worked with about how the same guy kept robbing the Speedway. The prospective juror was subsequently dismissed for cause on defendant's motion. Defendant now contends that counsel should have contemporaneously objected and asked that the entire venire be dismissed. "While our system of jurisprudence requires the participation of fair and impartial jurors, it is not necessary that they be totally ignorant of the facts of the case before they assume their roles as jurors." *People v. Del Vecchio*, 105 Ill. 2d 414, 429 (1985). Defendant has not presented any evidence of impartiality. We are unable to say that because of this single, isolated comment the jurors were unable to reach a verdict based solely on the evidence. *Del Vecchio*, 105 Ill. 2d at 429.

¶ 42 Finally, defendant contends that counsel was ineffective for failing to ensure compliance with Supreme Court Rule 431(b). The trial court in the instant case neglected to question the venire with regard to the fact that defendant's failure to testify cannot be held against him. Counsel's failure to ensure the court questioned the venire regarding this principle was unreasonable. We cannot say, however, that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. As we noted in our preceding discussion, evidence of defendant's guilt for the convicted offenses was overwhelming.

¶ 43 For the reasons stated herein, we affirm defendant's conviction and sentence.

¶ 44 Affirmed.