

2016 IL App (1st) 13-2005-U and  
13-2982-U (Consolidated)

SIXTH DIVISION  
SEPTEMBER 30, 2016

Nos. 1-13-2005 and 1-13-2982 (Consolidated)

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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

## ORDER

¶ 1 *Held:* The defendant's conviction and sentence for armed robbery is affirmed, where this court rejected his challenges to the sufficiency of the evidence, and the trial court's judgment is modified to reflect a pre-sentence incarceration credit of \$765 to be applied against the \$80 in fines that were assessed against the defendant; the defendant's conviction of attempted armed robbery is reduced to attempted robbery as the State failed to prove that the defendant was armed when he committed the offense, and the matter is remanded to the circuit court for resentencing on the reduced attempted robbery conviction.

¶ 2 Following a consolidated jury trial, the defendant, Jerome Hicks, was found guilty of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and attempted armed robbery (720 ILCS 5/8-4(a) (West 2012)), and was sentenced to concurrent terms of 22 and 5 years' imprisonment, respectively. He now appeals from both convictions, arguing that the State failed to prove him guilty of armed robbery or attempted armed robbery beyond a reasonable doubt. In the alternative, he argues that his convictions for armed robbery and attempted armed robbery should be reduced to robbery and attempted robbery, respectively, as the evidence was insufficient to prove that a firearm was used in the commission of either offense. In addition, the defendant argues that the trial court failed to apply a pre-trial incarceration credit against his eligible fines. For the reasons that follow, we affirm the defendant's conviction and sentence for armed robbery with a firearm and modify the *mittimus* to reflect a \$765 pre-trial incarceration credit applied against the \$80 in eligible fines assessed against him; and reduce his conviction for attempted armed robbery to a conviction for attempted robbery and remand the matter to the circuit court for resentencing on the reduced conviction.

¶ 3 Following successive incidents that occurred on November 27, 2012, the defendant was charged by separate indictments with the armed robbery of Diona Love (case No. 13 CR 2696) and the attempted armed robbery of Trenyada Kittler (case No. 13 CR 2697). On motion by the State, the cases were tried jointly before a single jury. Martin Smith was also indicted for his part in both occurrences, but was tried separately and is not a party to this appeal.

¶ 4 Because Kittler would only be 13 years of age at the time of trial, the defendant filed a pre-trial motion, questioning her competency to testify. The trial court rejected the defendant's argument and found Kittler competent to testify.

¶ 5 At trial, Love testified that, at approximately 8:15 a.m. on November 27, 2012, she arrived at her home at 711 East 50th Street and parked her car on the south side of the street. As Love got out of her car, she noticed two men and two women walking nearby, headed eastbound on 50<sup>th</sup> Street. Love testified that she opened the trunk of her vehicle and was retrieving a laptop computer and other electronics when she saw one of the men, whom she later identified as the defendant, start running westbound on the north side of 50th Street. She stated that when she turned forward, she saw the other man, later identified as Smith, standing directly in front of her, holding a black gun at his right side. She started screaming and held her hands up. According to Love, Smith demanded that she "give [him] everything." He then grabbed her purse and computer from her hands and began running westbound on 50th Street. Love testified that she was able to clearly see both Smith and the gun at his side. She stated that, after the defendant and Smith fled, she went to a neighbor's house and called the police. When the officers arrived, Love provided them with a description of Smith and informed the officers that Smith had taken a laptop computer and her purse which contained her wallet and a GPS device. Love testified that she was unable to give the police a description of the defendant, because he was running and she could not see him clearly; however, she did notice that he was wearing tan clothing. Love identified Smith in a lineup which was conducted on November 30, 2012.

¶ 6 Kittler testified that, on the morning of the occurrence, she was walking eastbound on East 50th Street on her way to school. As she walked, she was holding her cellular phone and was "on the internet." She stated that, when she reached the 700 block of East 50th Street, she observed a woman across the street standing near the trunk of a car "getting robbed by two men." Kittler testified that one of the men, whom she identified as Smith, was in front of the woman

holding a gun while the defendant stood a few steps behind the woman. Kittler described the defendant as dressed in "[a]ll tan." According to Kittler, Smith took the woman's computer bag and purse, at which point the defendant began running towards her and attempted to grab her cell phone. Kittler stated that the defendant was unsuccessful, however, because he was moving too fast, and she was gripping the phone with two hands. She testified that she was able to "yank [the phone] back;" at which point, Smith ran towards her, pointed the gun "close to" her face, and continued running. Kittler immediately proceeded to school where she sought help from a crossing guard who called the police.

¶ 7 On November 30, 2012, Kittler went to the police station accompanied by her older sister. Kittler testified that she spoke to an investigating officer, Beth Svec, and gave her a description of both perpetrators. She also identified Smith from a lineup as the man who had possessed the gun. According to Kittler, when Officer Svec questioned her about the man who had attempted to snatch her phone, she described him as a black male, 18 to 20 years old, with a medium-brown complexion and a light moustache, 5' 4" to 5' 6" in height, and weighing 120-130 pounds. Kittler testified that she also told Officer Svec that the man wore a maroon knit cap, a tan jacket and black shoes. Kittler admitted that she never described the defendant as having dreadlocks.

¶ 8 On January 11, 2013, the defendant was taken into custody. Kittler testified that, on that day, she returned to the police station and gave the police essentially the same description of the defendant that she had given to Officer Svec previously. She also identified the defendant in a lineup. Kittler identified the defendant in court and testified that he was the man whom she saw standing behind Love during the robbery just before he had tried to steal her phone.

¶ 9 Officer Svec corroborated the testimony of Love and Kittler regarding their identifications of the defendant and Smith. According to Officer Svec, Love also provided the serial numbers of her stolen computer and GPS device. Officer Svec testified that, using the serial numbers provided by Love, she was able to trace both items to the Cash For Gold pawn shop through the use of the police department's database system. She stated that, on December 4, 2012, she went to the Cash For Gold pawn shop and met with the owner, Klay Salem, who informed her that the defendant had come into the shop on November 27, 2012, along with another individual, and sold him Love's computer and GPS device.

¶ 10 Salem testified that, on the evening of November 27, 2012, the defendant and another man came into the Cash For Gold pawn shop seeking to sell a laptop computer, a GPS device, and camera. Salem agreed to purchase the items for \$120, and the defendant provided his photo identification in order to complete the transaction. Salem confirmed that, following the purchase, he stored the serial numbers from the items in a shared database system.

¶ 11 The State rested its case, and the defendant moved for a directed verdict. The trial court denied the motion, and the defendant rested without calling any witnesses. After closing arguments, the jury found the defendant guilty of the armed robbery of Love and the attempted armed robbery of Kittler, based upon his accountability for Smith's use of a firearm.

¶ 12 The defendant filed motions for a new trial on both convictions, which were denied. Thereafter, the trial court sentenced the defendant to 22 years' imprisonment for the armed robbery which included the statutory firearm enhancement. On his conviction for the attempted armed robbery of Kittler, the court sentenced the defendant to 5 years' imprisonment to run

concurrently with his 22-year sentence. The defendant filed timely notices of appeal from both convictions, and we consolidated those appeals. Accordingly, we have jurisdiction.

¶ 13 The defendant raises several challenges to the sufficiency of the State's evidence that he participated in either the armed robbery of Love or the attempted armed robbery of Kittler. He first contends that the only proof of his presence at the scene of the occurrence came from the identification provided by Kittler, which he describes as "weak" and inherently unreliable. The defendant points out that Kittler was only 12 years of age at the time of the crime and argues that she was distracted because she was looking at her cell phone and was "on the internet" when she claims to have seen the robbery of Love. He also contends that Kittler offered only a vague and generic description of him.

¶ 14 When a defendant seeks the reversal of his conviction on the basis of insufficient evidence, the relevant inquiry for this court is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not our function to retry the defendant, and a conviction will not be set aside on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt as to his guilt. *Givens*, 237 Ill. 2d at 334.

¶ 15 Although the State has the burden of proving each of the elements of a criminal offense beyond a reasonable doubt, including the identity of the individual who committed the offense, the identification of a defendant by a single eyewitness is sufficient evidence to sustain a conviction. *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 36. In evaluating the reliability of a witness's identification, there are five factors to be considered, namely: (1) the witness's

opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions provided; (4) the witness's level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification.

*People v. Slim*, 127 Ill. 2d 302, 307-08 (1989) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

These five factors have come to be known as the *Biggers* factors.

¶ 16 When considering whether a witness had a sufficient opportunity to observe a defendant during the course of an offense, courts look to "whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." *Tomei*, 2013 IL App (1st) 112632, ¶ 40 (citing *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979)). In this case, the events leading up to the defendant's indictment took place on a clear morning. Kittler witnessed the robbery of Love from across the street and was able to see that the man who took Love's belongings was holding a gun and that the defendant was standing behind Love. Kittler testified that she continued to observe the defendant as he crossed the street and ran directly towards her, attempting to grab the cell phone from her hand. Kittler not only had an opportunity to observe the defendant from across a street during the course of the armed robbery of Love, but also at close range as he approached her and grabbed the cell phone she was holding. See *People v. Negron*, 297 Ill. App. 3d 519, 531 (1998).

¶ 17 On the issue of Kittler's degree of attention, she testified that she saw the defendant standing behind Love at the time that Smith took Love's belongings, and she was able to describe the belongings taken as a computer bag and a purse. Kittler was looking at the defendant as he crossed the street and ran towards her. Although Kittler was looking down at her phone when she approached the scene, it is apparent that her attention quickly became focused

upon the armed robbery of Love, as she was able to clearly and concisely recount details of the event which were consistent with the events testified to by Love. In addition, Kittler struggled with the defendant when he attempted to take the cell phone from her hands.

¶ 18 We also disagree with the defendant's characterization of Kittler's identification as "vague" or "generic." Three days after the crimes, Kittler provided investigating officers with a detailed description of the defendant as a black male, 18 to 20 years old, with a medium-brown complexion and a light moustache, 5' 4" to 5' 6" in height and 120-130 pounds. She also told Officer Svec that the defendant wore a maroon knit cap, a tan jacket and black shoes. When Kittler returned to the police station on January 11, 2013, 45 days after the robbery, she reiterated essentially the same description to Officer Svec and was able to identify the defendant in a lineup. She was also able to identify the defendant when she testified at trial.

¶ 19 We recognize that Kittler was only 12 years old at the time of the occurrence, but find no basis to conclude that this fact alone compromised her ability to identify the defendant. Despite the stress inherent in witnessing the armed robbery of Love and the defendant's subsequent attempt to take the cell phone from her hands, Kittler gave unequivocal testimony regarding the events and a detailed, unwavering identification of the defendant.

¶ 20 The evidence in this case supports our conclusion that Kittler had an opportunity to observe the defendant during the course of both offenses; her attention was focused upon the events as they occurred; her description of the defendant was detailed, accurate, and unwavering; and she was able to identify the defendant in a lineup within 45 days. Our consideration of all five of the *Biggers* factors supports the reliability of Kittler's identification testimony.

¶ 21 The defendant also argues that his convictions for armed robbery with a firearm and attempted armed robbery must be reduced to simple robbery and attempted robbery, respectively, because there was no proof that Smith displayed an actual firearm during the crimes rather than a replica or toy gun. We disagree.

¶ 22 In determining whether the evidence supports a conviction for armed robbery, we look to the victim's in-court testimony and the circumstances under which she was able to see the firearm. See *People v. Washington*, 2012 IL 107993, ¶ 36; *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 51, 52. An armed robbery conviction may be sustained based upon the testimony of a single witness unequivocally stating that a gun was used during the commission of the offense. *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992). Recovery of the alleged firearm or its introduction into evidence is not a prerequisite for an armed robbery conviction. See *Washington*, 2012 IL 107993, ¶¶ 24, 37 (affirming trial court's finding of guilt despite the fact that no weapon was ever recovered or introduced into evidence).

¶ 23 Love testified that Smith stood in front of her during the robbery, holding a black gun at his side. Her testimony was consistent with that of Kittler, who also described Smith as standing near Love during the robbery holding a gun "on the side of him." In addition, Kittler testified that Smith pointed the gun at her face as he ran by. The testimony of these two witnesses positively identifying a gun was accepted by the jury.

¶ 24 In order for a defendant to be convicted of the offense of armed robbery with a firearm, the State must prove, beyond a reasonable doubt, that (1) the defendant has taken property from a person by the use of force or the threat of the imminent use of force, (2) while carrying a firearm on or about his person, or otherwise being armed with a firearm. 720 ILCS 5/18-2(a)(2) (West

2012). Section 5-2 of the Criminal Code of 2012 (Code) provides that, “[w]hen 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts.” 720 ILCS 5/5-2 (West 2012). Accountability for the acts of another is not in and of itself a crime. Individuals, such as the defendant in this case, are not charged with the offense of accountability; rather, they may be charged, and their guilt established, through proof of the behavior of another with whom they engaged in a common criminal design. See *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992).

¶ 25 The evidence of record in this case is more than sufficient to support the defendant's conviction for the armed robbery of Love committed while his accomplice, Smith, was armed with a gun. We, therefore, affirm the defendant's conviction and sentence for armed robbery with a firearm.

¶ 26 Next, the defendant seeks a reversal of his conviction for the attempted armed robbery of Kittler, on the basis that (1) there was no evidence that he possessed a firearm when he attempted to take Kittler's cell phone from her hands, and (2) the State failed to prove that his attempt to take the phone was accompanied by force. We address these arguments separately.

¶ 27 The defendant is correct in his assertion that there is no evidence that he possessed a firearm when he attempted to take Kittler's cell phone. However, the jury convicted the defendant of attempted armed robbery under a theory of accountability based upon Smith having pointed a gun at Kittler following the defendant's attempt to take her cell phone. The defendant argues that he should not be held accountable for Smith's act of pointing a gun at Kittler, because

it occurred after he had given up on his effort to take Kittler's phone and was fleeing from the scene. On this point, we agree with the defendant.

¶ 28 A person is accountable for another's criminal conduct when, either before or during the offense, and with the intent to promote or facilitate its commission, he aids or abets that person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2012). Under the plain language of section 5-2(c) of the Code, "accountability for the crimes of another attaches only *before or during* the commission of the crime." (Emphasis added.) *People v. Shaw*, 186 Ill. 2d 301, 321 (1998).

¶ 29 Nothing in the record before us supports the inference that the defendant and Smith conspired to rob Kittler. In fact, the evidence undermines any such inference. Kittler testified that, after Smith took Love's purse and laptop, the defendant began running in her direction and attempted to grab her cell phone as he fled. Failing to wrestle control of the phone from Kittler, the defendant continued running. It was not until the defendant had abandoned his attempt to take Kittler's cell phone and continued fleeing that Smith approached and pointed a gun at Kittler. In addition, there is no evidence that Smith ever attempted to take Kittler's phone.

¶ 30 As noted earlier, when two or more persons engage in a common criminal design, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties. However, in this case, there is no evidence that Smith's act of pointing a gun at Kittler was part of any common criminal design with the defendant. Nevertheless, the State argues that the defendant should be held accountable for Smith's act of pointing a gun in Kittler's face because the attempted armed robbery was part of a larger "criminal spree." We disagree with the State.

¶ 31 In *People v. Dennis*, 181 Ill. 2d 87, 103-04 (1998), the supreme court held that, for purposes of accountability, the duration of an offense is determined based upon the elements of that offense. *Shaw*, 186 Ill. 2d at 321. "Once the elements of the crime are fulfilled, no guilt by accountability may occur." *Id.* (citing *Dennis*, 181 Ill. 2d at 101). The *Dennis* court concluded that the offense of armed robbery is complete for purposes of accountability when force or the threat of force has caused the victim to surrender her property. *Dennis*, 181 Ill. 2d at 102-103. "When force and taking, the essential elements animating the offense, have ended, so has the crime of armed robbery." *Shaw*, 186 Ill. 2d at 321. Flight is not an element of the offense of armed robbery. *Dennis*, 181 Ill. 2d at 103.

¶ 32 After Smith had taken Love's belongings, the defendant and Smith began to flee from the scene. At this point in time, the armed robbery of Love was complete. As a consequence, Smith's possession of a gun during the robbery of Love cannot support a finding that the defendant is accountable for Smith's subsequent act of pointing the gun at Kittler or that Smith's act in that regard can satisfy any element necessary to prove the defendant guilty of the attempted armed robbery of Kittler.

¶ 33 The defendant also argues that he was not proven guilty of the attempted robbery of Kittler, because the State failed to show that he used contemporaneous force when he attempted to take her phone. We disagree.

¶ 34 Robbery is the taking of property from the person or presence of another with the use of force or a threat of the imminent use of force. 720 ILCS 5/18-1(a) (West 2012). "[T]he degree of force necessary to constitute robbery must be such that the power of the owner to retain his

property is overcome, either by actual violence physically applied, or by putting him in such fear as to overpower his will." *People v. Bowel*, 111 Ill. 2d 58, 63 (1986).

¶ 35 The evidence in this cases established that, when the defendant grabbed Kittler's phone, she met his efforts with resistance, holding on to the phone with both hands and ultimately "yank[ing] it back." The defendant clearly attempted to overcome Kittler's ability to retain her phone and, thus, attempted the take the phone from her through the use of force.

¶ 36 Robbery is a lesser-included offense of armed robbery (*People v. Barnett*, 2011 IL App (3d) 090721, ¶ 39), and the evidence in this case established the defendant's commission of each of the elements of that offense. Consequently, we exercise our discretionary authority under Illinois Supreme Court Rule 615(b)(3) (eff. January 1, 1967) and reduce the defendant's conviction for attempted armed robbery to a conviction for attempted robbery under section 18-1(a) of the Code (720 ILCS 5/18-1(a) (West 2012)). We therefore find it appropriate to remand the matter to the circuit court for resentencing on the reduced conviction.

¶ 37 Finally, the defendant argues, and the State concedes, that he earned 153 days of pre-sentence incarceration credit at the rate of \$5 per day, for a total of \$765, which should have been applied against the \$80 in creditable fines which were assessed against him. The *mittimus* is, therefore, modified to reflect the pre-sentence incarceration credit to which the defendant is entitled, reducing his total fines and fees from \$654 to \$574.

¶ 38 For the foregoing reasons, we affirm the defendant's conviction and sentence for armed robbery and modify the *mittimus* to reflect a credit of \$80 to be applied against the fines assessed against the defendant, reducing his total fines and fees from \$654 to \$574. We reduce his

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conviction for attempted armed robbery to attempted robbery, and remand this cause for resentencing on the conviction for attempted robbery.

¶ 39 No. 1-13-2005 – Affirmed and *mittimus* modified.

No. 1-13-2982 – Conviction affirmed on reduced offense and remanded for resentencing.