2016 IL App (1st) 160378-U

No. 1-16-0378

Fifth Division
July 22, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re J.J., a Minor (The People of the State of Illinois, Petitioner-Appellee, v. J.J., a Minor, Respondent-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 15 JD 2457 The Honorable Terrence V. Sharkey, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The evidence was sufficient to support defendant's adjudication of delinquency based on aggravated robbery, where the victim made a positive identification of defendant less than half a mile from the crime scene and only 30 minutes after the robbery, as well as an in-court identification; where defendant was arrested near the crime scene a half-hour after the offense occurred; and where defendant was in possession of unique items stolen from the victim, such as her cell phone, debit card, and Ventra card. (2) However, we reduce defendant's probation, as both the State and the defense ask us to do, so that it terminates when defendant turns 21 years of age, as the Juvenile Court Act requires.

¶ 2 Following a delinquency hearing, defendant J.J., age 17, was adjudicated delinquent on one count of aggravated robbery, and was sentenced to five years' probation. On this direct appeal, defendant claims, first, that the State failed to prove him guilty of aggravated robbery beyond a reasonable doubt because the victim's two identifications of defendant were unreliable. Second, both defendant and the State ask us to terminate his probation on July 13, 2019, which is the date of his twenty-first birthday, as required by section 5-755 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-755 (West 2014)). For the following reasons, we affirm defendant's adjudication of delinquency for aggravated robbery, and we correct his mittimus to terminate his probation on his twenty-first birthday by directing the clerk of the circuit court to do so.

¶ 3 BACKGROUND

¶ 4 The State filed a petition for adjudication of wardship on July 28, 2015. It alleged that J.J., a minor, committed the aggravated robbery of Gina Giovanni on July 26, 2015, in violation of section 18-1(b) of the Criminal Code of 2012. 720 ILCS 5/18-1(b) (West 2014). Specifically, the petition alleged: "[W]hile indicating verbally or by actions to [the victim] that he had a dangerous weapon, [defendant] knowingly took property, her cellphone and credit card from the person or presence of [the victim], by the use of force or threatening the imminent use of force." After a bench trial on July 28, 2015, the trial court adjudicated defendant delinquent based on the aggravated robbery, and sentenced him, on February 9, 2016, to five years' probation.

¶ 5 I. Gina Giovanni's Testimony

¶ 6 At trial, the victim testified that, after finishing bartending on the night of July 26, 2015, she took a taxi back to her apartment building near Potomac Avenue and Rockwell Street in

Chicago. She arrived at around 11 p.m. Her building was surrounded by a fence with a locked gate, which opened to a walkway that led to the building's front door. She testified that there were several sources of illumination at that time: (1) streetlights, although none directly in front of her building; and (2) an overhead light in her building's walkway, which lit both sides of the doorway, and a path to the edge of the sidewalk.

¶ 7 The victim explained that, as she went to unlock the gate, she felt an arm go around her from behind, and a gun press to her throat. In court, the victim demonstrated the way in which she was held by the offender. She testified that she could not view the offender at the time of the robbery because he was behind her, but she knew the object to be a gun because she was familiar with the look and feel of firearms. She testified that she had a black "Jansport" backpack on her back; her $600 iPhone 5S and her debit card were in her front left pants pocket, and a container of leftovers was in her left hand. She heard the offender behind her say, "give me everything you've got." The victim attempted to hand over the leftovers, but the offender took her backpack, cell phone, and debit card, and said, "give me the code." After the victim recited her debit card PIN, the offender turned and walked away. He did not run. As the victim began to unlock the gate, she looked over her shoulder and observed the offender, with another person, heading in a westerly direction. The offender and the other person were of similar stature, wore dark sweatshirts with their hoods up, and wore baggy jeans. The victim testified that the offender with her backpack and the gun, at a distance of less than five feet from where she was standing, turned slightly to the right. The building's light illuminated the area where he was located, which enabled her to observe a partial profile of the right side of his face.

¶ 8 The victim testified that she ran to her apartment to call the police, and they arrived in less than five minutes. After relaying to them what had happened, the police drove her to a different location, where she waited inside a patrol vehicle. She testified that two officers brought a man over to the vehicle, and from inside the vehicle with the window rolled down, she identified him as the offender. At the time of the identification, defendant stood three feet from her wearing a hooded sweatshirt, illuminated by streetlights, with his hands behind his back. The police officers showed the victim her backpack, cell phone, and debit card, which she confirmed as her belongings. However, the victim testified that she could not recall if she made the positive identification of defendant before or after being shown her belongings. In addition to the field identification, the victim made an in-court identification of defendant as her attacker.

¶ 9 II. Police Officer Tim Ziemba's Testimony

¶ 10 Next, Officer Tim Ziemba testified that he has been employed with the Chicago police department (CPD) for 19 years. Around 11:30 p.m. on July 26, 2015, he and his partner, Officer Noel Lopez, received a call regarding a robbery and transported to the intersection of Division and Mozart Streets. Officer Ziemba testified that, as he arrived, three males standing near a Pontiac Bonneville on Division Street looked up and started walking away. Officers Ziemba and Lopez joined the other responders, Officers Sargretti and Colon, in conducting field interviews. Officer Ziemba made an in-court identification of defendant as one of the men who stood four feet from the Bonneville on July 26, 2015.

¶ 11 Officer Ziemba testified that, from three feet away, he observed Officer Sargretti conduct a protective pat-down of defendant, and remove an iPhone "and a number of cards, which

were credit cards and Ventr[a] cards,"[1] from defendant's "back jean pocket." Officer Sargretti placed the items on the hood of the vehicle, and Officer Ziemba read the name "Gina Giovanni" off both a Bank of America debit card and a Ventra card. Officer Ziemba then watched the other officers search the Bonneville and recover a black backpack and a BB gun. The officers then arrested defendant and processed him as a minor at the 12th District police station. Officer Ziemba testified that he remembered that defendant was wearing a hooded sweatshirt at the time of the arrest because the other two males wore only t-shirts. However, neither his arrest report nor defendant's arrest photo indicate a hooded sweatshirt.

¶ 12 III. Defendant's Testimony

¶ 13 Defendant testified at trial that he was arrested around 11:30 p.m. on the night of July 26, 2015, with only the victim's debit card in his possession. He was wearing jeans and a black t-shirt, but not a hooded sweatshirt. A couple of minutes prior to the police's arrival, a man named Jeffrey Carter had shown him the victim's debit card, and defendant said, "let me see" it. Defendant asked how Carter came to possess the card, but he did not tell how it came into his possession. As defendant was holding the card, the police drove up, so he placed the card in his pocket. Defendant later testified that he had spent approximately four consecutive hours with Carter that night, but had left him around 11 p.m. to head home because of the curfew.

¶ 14 IV. Disposition

¶ 15 The trial court found defendant guilty of aggravated robbery, and adjudicated him a delinquent minor. The court stated: "I'm convinced beyond a reasonable doubt, based on the totality of the circumstances, the credibility of the witnesses that have testified for the State;

[1] Officer Ziemba testified to observing credit cards and Ventra cards, in the plural, but only one of each belonged to the victim.

the lack of credibility for the defense [*sic*] that testified, that the minor is guilty." In response to the defense's argument that the victim's identification was unreliable based on the reliability factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), the trial court applied these factors and found that they weighed in favor of reliability. At the disposition hearing on February 9, 2016, the State asked for intensive probation, while the defense requested traditional probation. The trial court sentenced defendant to five years' traditional probation for the forcible felony of aggravated robbery. Defendant filed a notice of appeal on the same day, and this appeal follows.

¶ 16 ANALYSIS

¶ 17 On this direct appeal, defendant claims, first, that the State failed to prove him guilty of aggravated robbery beyond a reasonable doubt because the victim's identifications of defendant were unreliable. Second, both defendant and the State ask us to terminate his probation on July 13, 2019, which is the date of his twenty-first birthday, as required by the Act. 705 ILCS 405/5-755 (West 2014). For the following reasons, we affirm defendant's adjudication of delinquency for aggravated robbery, and we correct his mittimus to terminate his probation on his twenty-first birthday.

¶ 18 I. Sufficiency of the Evidence

¶ 19 First, defendant contests the sufficiency of the evidence and argues that the victim's identification of him was not sufficiently reliable, thereby rendering the State unable to prove him guilty of aggravated robbery beyond a reasonable doubt. For the following reasons, we find the victim's identification reliable, and affirm defendant's adjudication of delinquency.

¶ 20 A. Standard of Review

¶ 21 When reviewing a claim of insufficient evidence, the court must view the evidence in the light most favorable to the State, and determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If the court answers this inquiry in the negative, the defendant's conviction is reversed. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). The same standard applies in delinquency proceedings: the State must prove the essential elements of the offense alleged in the delinquency petition beyond a reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47 (citing *In re W.C.*, 167 Ill. 2d 307, 336 (1995)). The reasonable doubt standard applies whether the evidence is direct or circumstantial. *In re Jonathon C.B.*, 2011 IL 10775, ¶ 47 (citing *People v. Campbell*, 146 Ill. 2d 363, 374 (1992)). However, we will not reverse a finding of guilt "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In a bench trial, it is the trial judge who resolves any credibility conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009); *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 22 B. Witness Identification

¶ 23 Defendant claims that the victim's identification was insufficient to prove defendant guilty beyond a reasonable doubt given that she briefly observed only a partial view of her offender's face in the dark.

¶ 24 First, this is not a case where the guilty finding is supported by only the identification of a single eyewitness. In addition to the victim's identification, there are also the facts (1) that defendant was arrested a half-hour after the robbery less than a half-mile from the crime scene; and (2) that he was there in possession of three unique items stolen from the victim: her cell phone, her debit card, and her Ventra card. In addition, her backpack was recovered from a vehicle next to which defendant was standing. Nonetheless, we consider defendant's claim that the identification was unreliable and find it sufficiently reliable, as we explain below.

¶ 25 Defendant lists the five factors set forth by the United States Supreme Court for assessing the reliability of an identification: (1) the witness' opportunity to view the suspect during the offense; (2) the witness' degree of attention; (3) the accuracy of any prior descriptions provided; (4) the witness' level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification. *Biggers*, 409 U.S. at 199. These "*Biggers* factors" are also used by Illinois courts for analyzing an identification's reliability. *Jackson*, 348 Ill. App. 3d at 739–40.

¶ 26 With respect to the first and most important *Biggers* factor (see *People v. Wehrwein*, 190 Ill. App. 3d 35, 39 (1989)), the State argues that the victim had sufficient opportunity to view her offender, while defendant argues that her opportunity to view was poor because she observed only a partial profile of a man wearing a hood for a few seconds in the dark. Moreover, defendant emphasizes the fallibility of identifications—particularly stranger-identifications in the midst of stressful situations. See *United States v. Wade*, 388 U.S. 218, 228 (1967); *People v. Tisdel*, 338 Ill. App. 3d 465, 467 (2003) (noting the "significant *** potential for eyewitness error" and the "effects of stress and weapon focus on the accuracy of

identifications"). The State argues that we should not consider this general point because defendant failed to raise it in the court below. However, defendant challenged the reliability of the identification at the hearing, and a minor is not required to file a posthearing motion. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009). Thus, this issue is preserved for our review.

¶ 27 When considering whether a witness had an opportunity to view the offender, courts analyze "whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979). In the case at bar, the victim testified that, after robbing her, the offender, illuminated by her building's lights, turned slightly in her direction when he was less than five feet away. Her line of vision was unobstructed; the weather was clear; and his face was not covered by his hood. As the trial court noted, she "could have testified that she saw his face altogether but she didn't." Instead, she admitted that the circumstances afforded her a view of only the right side of his face. In support of her reliability, the trial court also noted that the victim's line of work was as a bartender, which suggested a certain familiarity with faces. Overall, the trial court found the victim's testimony reliable, and "the sufficiency of the opportunity to observe is for the trier of fact to determine." *Wehrwein,* 190 Ill. App. 3d at 39-40. Based on this testimony, we find that a rational trier of fact could have found that the witness had a sufficient opportunity to view her offender.

¶ 28 With respect to the second *Biggers* factor, the State argues that the victim's degree of attention was high and focused on her attacker, while defendant argues that her attention was necessarily and entirely dedicated to unlocking her gate to reach safety, and it was also compromised by the stress induced by the robbery. Defendant cites cases from Oregon and New Jersey for the proposition that stressful situations undermine the accuracy of witness

identifications. *State v. Lawson*, 291 P.3d 673, 700 (Or. 2012); *State v. Henderson*, 208 N.J. 209, 263 (2011). While these cases are not binding on this court, Illinois courts have also noted the "flaws inherent" in eyewitness identifications. *People v. Starks*, 2014 IL App (1st) 121169, ¶ 91; *People v. Lerma*, 2016 IL 118496, ¶ 28 (recognizing stress of the crime as a contributing factor to the unreliability of some eyewitness testimony). Nevertheless, after listening to the victim's testimony that her focus was not on her key, but on her offender, the trial court characterized her attention as "quite astute." The trial court's finding of the victim's high degree of attention at the time of the crime is corroborated by the victim's ability to testify as to: (1) the exact manner in which the offender held her, (2) the very words that he spoke, and (3) the direction in which he walked after the robbery. Issues of witness reliability are for the finder of fact to determine. *Jackson*, 232 Ill. 2d at 281. Based on this testimony, a rational trier of fact could have found the victim's degree of attention sufficient as to make a positive identification of defendant.

¶ 29 With respect to the third *Biggers* factor, the State and defendant agree that, because the victim provided only a loose description of her offender's clothes as baggy jeans and a hooded sweatshirt, this factor is neutral at best. As a result, the trial court did not assess this factor in its analysis. See *Carlton*, 78 Ill. App. 3d at 1105 (finding that when a victim does not proffer a description of the offender, the court must view the third *Biggers* factor as neutral).

¶ 30 With respect to the fourth *Biggers* factor, the State argues that the victim was absolutely certain in her identification, while defendant argues, first, that the victim did not testify as to her level of confidence in her identification; and second, that the show-up identification was unduly suggestive, thus undermining the reliability of the victim's identification. In regard to

defendant's first argument, the trial court concluded, after considering the totality of the evidence, that the victim was "clearly *** one hundred percent positive." We will not substitute our judgment for that of the trial court concerning the reliability or weight of the witness' identification. *Jackson,* 232 Ill. 2d at 281. In regard to defendant's second argument, the Illinois Supreme Court has found that a prompt show-up identification near the crime scene is proper police procedure. *People v. Lippert,* 89 Ill. 2d 171, 188 (1982) (citing *People v. Ramos,* 339 Ill. App. 3d 891, 897 (2003)). Show-up identifications can be reliable under all of the circumstances and justified by the need for the police to determine (1) whether a suspect is innocent and should be released immediately; and (2) whether the police should continue searching for a fleeing culprit while the trail is still fresh. *Ramos,* 339 Ill. App. 3d at 897 (quoting *People v. Hicks,* 134 Ill. App. 3d 1031, 1036 (1985)); *Lippert,* 89 Ill. 2d at 188.

¶ 31 Moreover, even if the show-up identification was unduly suggestive, the court must still consider whether, under the totality of the circumstances, the identification was reliable. *Biggers,* 409 U.S. at 199. Overall, the trial court did not find defendant credible because his "answers changed *** from question to question" and "flip [flopped] back and forth" with respect to Carter's presence at the scene of the arrest. By contrast, the trial court found the victim, from the "sureness" with which she testified, to be a "very—very strong witness." Additionally, the trial court found Officer Ziemba to be "a professional witness and very credible." In closing, the trial court stated: "I'm convinced beyond a reasonable doubt, based on the totality of the circumstances, the credibility of the witnesses that have testified for the State; the lack of credibility for the defense that testified, that the minor is guilty." Thus, under the totality of the circumstances, a rational trier of fact could have reasonably found the show-up identification to be reliable.

¶ 32 With respect to the fifth *Biggers* factor, both the defense and the State find the timeline of events favorable to the identification's reliability, as merely 30 minutes elapsed between the time of the robbery and the time of the victim's identification. This short interim period, which the trial court characterized as "miniscule at best," weighs in favor of reliability.

¶ 33 In sum, the trial court weighed the evidence and found the victim's identification reliable. We cannot say, when viewed in the light most favorable to the State, that the totality of the circumstances undermined the reliability of the witness' identification. Thus, we will not substitute our judgment for that of the trial court in regard to the reliability or weight of the witness' identification.

¶ 34 II. Sentencing

¶ 35 Defendant's second claim on appeal is that his sentence of five years' probation—from February 9, 2016, to February 9, 2021—should instead terminate when he turns 21 years old on July 13, 2019, as required by the Juvenile Court Act. 705 ILCS 405/5-755 (West 2014). The State joins in this request, and we agree.

¶ 36 Whether a sentence complies with the Act is an issue of statutory interpretation, which is a question of law that we review *de novo. People v. Taylor,* 221 Ill. 2d 157, 162 (2006). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP,* 408 Ill. App. 3d 564, 578 (2011). In reviewing the statute at issue, we analyze its exact language while keeping in mind the "legislature's apparent objective in enacting it." *Taylor,* 221 Ill. 2d at 162.

¶ 37 Section 5-715 of the Act clearly states: "The period of probation for a minor who is found to be guilty for an offense which is *** a forcible felony shall be at least 5 years." 705 ILCS 405/5-715(1) (West 2014). In the case at bar, defendant committed an aggravated robbery, a

Class 1 forcible felony; thus, a probationary term of five years applies. 720 ILCS 5/18-1(c) (West 2014). However, the Act also states that all juvenile proceedings "automatically terminate upon [the juvenile] attaining the age of 21 years." 705 ILCS 405/5-755 (West 2014). Resolving this conflict, our supreme court found that "the jurisdictional cap of 21 years" takes precedence over the requirement of a five-year probationary term. *In re Jaime P.*, 223 Ill. 2d 526, 534 (2006). Our supreme court held "that minors found guilty of those enumerated offenses [in section 5-715(1)] shall be sentenced to 'at least 5 years' of probation, subject only to the jurisdictional cap of 21 years." *In re Jaime P.*, 223 Ill. 2d at 534 (quoting 705 ILCS 405/5-715(1) (West 1998)).

¶ 38 Therefore, we reduce defendant's probation so that it terminates when defendant turns 21 years of age (Ill. S. Ct. R. 615(b)(4) (the powers of the reviewing court on appeal include the power to "reduce the punishment imposed by the trial court")) and we correct the mittimus to reflect this change. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 68 (the appellate court has "the authority to correct a mittimus without remand"); *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008) ("[w]e need not remand this cause, as this court has the authority to order the clerk of the circuit court to make the necessary change to the mittimus").

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, we affirm defendant's adjudication of delinquency for aggravated robbery, and we correct his mittimus by directing the clerk of the circuit court to terminate defendant's probation on his twenty-first birthday. First, after viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found beyond a reasonable doubt that defendant committed aggravated robbery. The evidence was sufficient to support defendant's conviction, where the victim made a positive identification

of defendant less than a half-mile from the crime scene and only a half-hour after the robbery, as well as an in-court identification; where defendant was arrested near the crime scene a half-hour after the offense occurred; and where defendant was in possession of unique items stolen from the victim, such as her cell phone, debit card, and Ventra card. Second, we reduce defendant's sentence of probation, as both the State and the defense ask us to do, so that it terminates when defendant turns 21 years of age, as the Juvenile Court Act requires. We "order the clerk of the circuit court to make [this] necessary change to the mittimus." *Rivera*, 378 Ill. App. 3d at 900.

¶ 41 Affirmed. Mittimus corrected.