2017 IL App (1st) 151964-U
No. 1-15-1964
Order filed November 14, 2017
Second Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 9135
	)	
IAN ROY,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Conviction for armed robbery affirmed where there was sufficient identification evidence to prove defendant guilty beyond a reasonable doubt. Conviction for aggravated unlawful use of a weapon (AUUW) vacated as unconstitutional and void.

¶ 2 Following a bench trial, defendant Ian Roy was found guilty of two counts of armed robbery and one count of aggravated unlawful use of a weapon, and sentenced to concurrent terms of 23 years and 7 years' imprisonment, respectively. Roy appeals, contending that the State failed to prove him guilty of armed robbery beyond a reasonable doubt. Roy argues that the

victims' identification testimony failed to prove his identity as one of the armed robbers beyond a reasonable doubt. Roy also contends that his conviction for AUUW must be vacated as the AUUW statute is unconstitutional.

¶ 3 We affirm in part and vacate in part. After reviewing all the evidence and the five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972, we cannot say that the eyewitness testimony of Coleman or Cabrera was so deficient that no rational trier of fact could accept their identification of Roy as the person who robbed Cabrera. As to the AUUW conviction, the State concedes, and we agree, that it must be vacated as it violates his right to keep and bear arms under the second amendment of the United States Constitution.

¶ 4 Background

¶ 5 Roy was tried jointly with Kory Maxfield. See *People v. Maxfield*, 2017 IL App (1st) 151965-U. We recite the testimony and evidence pertinent to Roy.

¶ 6 At trial, Jason Coleman testified that, at about 9 p.m. on May 2, 2012, he was driving south near 70th Street and Indiana Avenue, Chicago. He picked up Nelly Cabrera at 71st Street, drove to a liquor store, and then continued on to a friend's house. Coleman parked at 85th Street and Wabash Avenue "in front of [his friend's house]." Coleman called his friend and told him to come down to the car. He and Cabrera waited. Cabrera sat in the front passenger's seat and Coleman was in the driver's seat. Two men walked up to the car, one on the driver's side and one on the passenger's side. Neither man wore a mask. The man on Coleman's side, identified in court as Maxfield, held a semiautomatic handgun to Coleman's head and said, "Give me all your f*** money." Coleman's seat was reclined and he was "paying attention to both people." Maxfield "kept repeating, don't look at me." The man on the passenger's side, identified in court

as Roy, held his hand, as Coleman demonstrated for the court, to his right hip like he had a gun in his "hoodie right pocket."

¶ 7 Coleman told Maxfield that he did not have money, so Maxfield told him to take off his jewelry. Coleman had earrings, a watch, and "a long chain with a cross on it." Coleman gave Maxfield his earrings and chain, and Maxfield ripped Coleman's watch off. Maxfield went through Coleman's pockets and took $190. Maxfield also took Coleman's cell phone and his "red, white and blue Phillies hat." In the meantime, Coleman had been "looking out [his] peripheral [*sic*] and hearing" the exchange between Roy and Cabrera. Roy told Cabrera to "give up everything she got" and took her "little pocket book" and cell phone. Roy and Maxfield left and walked around the corner of 85th Street and Wabash Avenue. Coleman started his car and followed them around the corner. Coleman stated, "that is when I saw [two men] getting into a white van." Nobody else was in the vicinity.

¶ 8 Coleman followed the van southbound on Indiana Avenue and then westbound on 89th Street, where he saw a police car driving towards him. He got the police officers' attention and stopped, driver's side window to driver's side window. Coleman told the officers that he and Cabrera were "robbed at gunpoint." Coleman continued to follow the van while the police made a "U-turn."

¶ 9 Coleman caught up with the van at a red light on 87th and State Streets. The police pulled up alongside the van "trying to box them in." But the van turned right. When the van began to move, "the passenger door had opened a little." An officer got out of the police car, approached the van, and told him not to move. That is when the officer opened fire on the van. The van hit other cars as it drove to its right and "cut through a gas station." Coleman followed as the van

turned north onto Wabash Avenue and then eventually stopped "halfway down the block of 87th and Wabash."

¶ 10 Roy and another person got out of the van. Coleman drove after Roy as he ran through an alleyway to State Street. Roy stopped at 87th and State Streets. Coleman drove up beside him. Roy approached the passenger's side and said, "I give you all the money right now, I give you all your stuff back, man. Just let me in the car." Coleman refused. Roy then ran west on 87th Street. Coleman stopped chasing Roy as officers arrived. He drove back to the location of the van.

¶ 11 The police brought Roy and Maxfield to the van where Coleman and Cabrera identified them as the individuals who robbed them. Prosecutors showed Coleman photographs of a chain necklace, a phone, and a Phillies baseball cap, which Coleman identified as his property. Coleman also identified a photograph of a White Sox cap in the van and testified he had seen Maxfield wearing a White Sox cap during the robbery. The police returned to Coleman his phone and chain on the night of the robbery.

¶ 12 Nelly Cabrera testified that Coleman picked her up near 71st Street and Indiana Avenue. Cabrera sat in the passenger's seat. Coleman picked up liquor, drove to a friend's house, and parked. Coleman called his friend, and Coleman and Cabrera remained in the car to wait for him. Cabrera looked over and saw a gun pointed to Coleman's head. The person holding the gun said, "give me everything you have." Coleman took off his chain and earrings. The robber was getting "impatient" and "snatched" Coleman's watch and took money out of Coleman's pockets.

¶ 13 On Cabrera's side of the car, there was a second man, identified in court as Roy, who told her, "don't look my way." Cabrera could see his face, but his hands were "inside of his pocket," "like if he had, sort of, like a gun in his hand or something, but [she] couldn't see the gun." Roy

reached in the car and took Cabrera's "pouch" and phone. When asked to identify the man who robbed her in court, Cabrera first identified Maxfield. The prosecutor then presented Cabrera with her prior statement to police on May 2, 2017, and the photo of the man she had identified to police as the man who had robbed her. After reviewing her statement, Cabrera testified that the photo was of Roy and identified Roy in court as the individual who robbed her.

¶ 14 The two robbers left, but Coleman "pulled up a little bit to see *** where they ran to." There was "a white minivan driving off," so Coleman and Cabrera followed it. Coleman and Cabrera drove westbound on 87th Street, saw a police car going in the opposite direction, and got the police officers' attention. Coleman and Cabrera told the officer's that they were robbed and that they "knew where the van was heading." They continued pursuing the van and the police followed them. The van stopped in traffic at a red light near 87th and State Streets. The police car stopped and one officer got out and approached the van. The officer said, "police, stop, freeze," but the van began driving across the sidewalk and into a gas station, "so the police officer started shooting" at the van.

¶ 15 Coleman and Cabrera continued following the van until it stopped at 86th Street and Wabash Avenue. Four people got out. Coleman drove through an alley to near 86th and State Streets. There they saw Roy, who approached Cabrera's side of the car, and stated that, "if he could get in the car, then he'll give us all of our money back." Cabrera and Coleman refused to let him in; Roy ran off. Police began arriving "from all different types of areas." Cabrera next saw Roy later that evening at 86th Street and Wabash Avenue when the police pulled him out of a car to ask if Cabrera could identify him. Cabrera identified Roy as the individual who robbed her. She recovered her cell phone that Roy had taken.

¶ 16 Zatara Young testified that she was in a relationship with Roy, whom she identified in court. She drove her minivan to work at McDonald's, where she had a shift from 5 p.m. to midnight. Young and Roy were communicating via "call and text." Young agreed to allow Roy to borrow her van. Roy said he was going to be with two men, one of whom she identified as Maxfield in court. Roy and another man arrived at McDonald's at about 7 p.m. and retrieved the van's keys from Young. At about 10:30 p.m., Young received a call from Roy, stating the police "got him." Young could hear Roy "breathing hard" before his phone disconnected.

¶ 17 Chicago police officer Philip Strazzante testified that, at about 10 p.m., he was in the passenger's seat and his partner was driving "eastbound on 87th, just east of State" when they were flagged down by a car driving the opposite direction. The car pulled up next to the police car, driver-to-driver, and the two people in the car, later identified as Coleman and Cabrera, stated that they had been "robbed at gunpoint by at least two male blacks who then proceeded to get to get in a white minivan." Coleman described the gun the robber had pointed at him as "a silver *** large semi-automatic weapon." Strazzante and his partner followed Coleman and Cabrera's car toward State Street. The officers drove north on State Street and pulled alongside Coleman and Cabrera, who were pointing them to a "white van in front of them, yelling that that was the person—or the people that robbed them." The police officers activated their lights; Strazzante approached the van.

¶ 18 Strazzante drew his weapon, and began "yelling commands to let me see their hands, and Chicago Police." While Strazzante approached the van, it turned to the right and began "ramming" its way through other vehicles. Strazzante saw a male black in the front passenger's seat pointing a "silver semiautomatic weapon" at him, so Strazzante fired. He could not make out

the man's facial features. He reported "shots fired by police at 87th and State," got back into the car with his partner, and continued to follow the van on 87th Street. Turning north onto Wabash Avenue, the officers saw the van halfway down the block "with multiple doors open." The van was empty with "miscellaneous items inside and outside" of it. The officers searched for the occupants on foot and discovered a "Smith and Wesson silver semi-automatic handgun" nearby, which they left for the evidence technicians to collect.

¶ 19 Chicago police officer Flaherty testified that, at about 10:25 p.m, he and his partner responded to reports of "shots fired by the police." Flaherty saw a man, identified in court as Roy, running westbound on 87th Street and "sprinting across the traffic against the light" on Lafayette Avenue. Flaherty got out of his car and announced his office. Roy "peeked over his shoulder" at Flaherty but kept running. Flaherty chased Roy, circling around a bank and ending up back on Lafayette Avenue. Roy ran up to an older model blue car and threw money through the passenger's side window. The driver of the car drew a handgun and yelled "police." Roy put his hands up and Flaherty caught up to him and detained him. Roy was transported to 86th Street and Wabash Avenue, where the victims, Coleman and Cabrera, were located.

¶ 20 At 86th Street and Wabash Avenue, "a showup was conducted." Roy, in handcuffs, stood outside. The police shined a light on him so that Coleman and Cabrera could see him. Coleman and Cabrera identified Roy as one of the men involved in the robbery. Coleman identified Roy as being there when he was robbed. Cabrera said Roy "was the one that held the gun to me, came up on the passenger's side." Flaherty searched Roy, but did not find any items that were allegedly stolen.

¶ 21 Roy's motion for a directed finding was denied.

¶ 22 The trial court found Roy guilty of two counts of armed robbery (720 ILCS 5/18-2(a) (2) (West 2012)) and one count of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a) (1), (3) (A) (West 2012)). It denied Roy's motion for a new trial and sentenced him to concurrent terms of 23 years' imprisonment for armed robbery and 7 years' imprisonment for AUUW.

¶ 23 Analysis

¶ 24 Challenge to Sufficiency of Evidence

¶ 25 Roy first contends that the State failed to prove him guilty beyond a reasonable doubt. Roy concedes that two men robbed the victims at gunpoint. Roy also concedes that he was one of the four men (including the two robbers) in a van that fled the scene. Roy argues, however, that the victims' testimony was inadequate to prove his identity as one of the two armed robbers.

¶ 26 When reviewing a challenge to the sufficiency of the evidence, the relevant inquiry 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. *People v. Washington*, 2012 IL 107993, ¶ 33. The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these issues. *People v. Jackson*, 232 Ill. 2d 246, 280-281 (2009). We will not reverse a conviction unless "the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt." (Internal quotation marks omitted.) *Washington*, 2012 IL 107993, ¶ 33.

¶ 27 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).

Identification evidence which is vague or doubtful is insufficient to support a conviction. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). But, a single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *Id.* In assessing identification testimony, we consider the following five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972): (i) the witness's opportunity to view the defendant during the offense; (ii) the witness's degree of attention at the time of the offense; (iii) the accuracy of the witness's prior description of the defendant; (iv) the witness's level of certainty at the subsequent identification; and (v) the length of time between the crime and the identification. *Slim*, 127 Ill. 2d at 307-08. The trier of fact takes all of the factors into consideration; none, standing alone, conclusively establishes the reliability of identification testimony. *Biggers*, 409 U.S. at 199-200.

¶ 28 Coleman and Cabrera identified Roy in a showup at the scene and at trial as the man who approached the passenger's side of the car and robbed Cabrera. With respect to the first *Biggers* factor, Roy argues that Coleman and Cabrera did not have a good opportunity to view the shooter**.** He argues Coleman's opportunity to see Cabrera's robber was limited because "[Coleman] was sitting on the other side of the car and was focused on Maxfield, who was robbing him with a gun pointed to his head." Cabrera, Roy argues, had a limited view of the person robbing her "in light of the robber's instruction not to look at him." Yet, this court has previously held that a positive identification need not be based on perfect conditions for observation, nor does the observation have to be of a prolonged nature. *People v. Williams*, 143 Ill. App. 3d 658, 662 (1986). Coleman was in the driver's seat and had his seatback reclined, allowing him to see the men on both sides. Cabrera saw Roy's face, despite his order not to look

at him. Based on these facts, a rational trier of fact could have found that Coleman and Cabrera had an opportunity to view and recognize Roy at the time of the shooting.

¶ 29 With respect to the second *Biggers* factor—the witness's degree of attention at the time of the offense—Roy claims that there was no evidence that Coleman and Cabrera "paid close attention to the robbers' faces." Roy does not explain the basis for his challenge to Cabrera's degree of attention to the man robbing her, but he contends that Coleman would have been wholly focused on the handgun pointed at his head and Maxfield's "actions robbing him of his money, phone, and jewelry." We disagree. Although Coleman was paying attention to codefendant Maxfield robbing him at gunpoint, no evidence suggests that the stress of the situation affected Coleman's attention to the events happening on both sides of the car. Coleman testified that he was "paying attention to both people" during the robbery. Cabrera saw Roy's face while he robbed her of her "pouch" and cell phone. So a rational trier of fact could have found that Coleman and Cabrera's degree of attention was sufficient to make a positive identification of Roy.

¶ 30 In regard to the third factor—the accuracy of the witness's prior description of the offender—Roy claims that "there is no evidence that Roy matched the initial description of the robber beyond the extremely general description of 'male blacks.' " But, discrepancies or omissions in a description do not by themselves generate a reasonable doubt regarding a positive identification. *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 50. " '[A] witness'[s] positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made.' " *Id.* ¶ 52 (quoting *Slim*, 127 Ill. 2d at 308-09). The trial court, as trier of fact, occupies the best position to determine the victim's

credibility and the weight to be given testimony. *Jackson*, 232 Ill. 2d at 281. While Coleman's description was general, it was accurate. Thus, we cannot say that the lack of specificity in Coleman's initial description undermined the reliability of his identification of Roy.

¶ 31 Turning to the fourth *Biggers* factor—the witness's level of certainty at the subsequent identification—Roy first argues this factor does not support Coleman and Cabrera's identification because Cabrera "wavered in her identification at trial." Both Coleman and Cabrera identified Roy on the night of the robbery. At trial, Coleman again identified Roy as the man who robbed Cabrera, but Cabrera initially identified Maxfield. Notwithstanding, once the State presented her with a prior statement and a photograph of the man she had previously identified as the man who had robbed her, she identified Roy. In this case, the trier of fact heard the circumstances of Coleman and Cabrera's identification of Roy and observed their demeanor when identifying him in court and testifying as to their prior identifications. The weight to be given Coleman and Cabrera's testimony based on their level of certainty was for the trier of fact to determine and we will not substitute our judgment for the trial court's.

¶ 32 To the extent Roy contends that the fourth *Biggers* factor should be given little weight as social science research suggests that there is a low correlation between a witness's confidence and the accuracy of his or her identification, we note that all five *Biggers* factors are the law in Illinois for the purpose of assessing the reliability of a witness. *People v. Polk*, 407 Ill. App. 3d 80, 109 (2010). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the fourth *Biggers* factor weighs in favor of finding Coleman and Cabrera's identification of Roy reliable.

¶ 33 As to the final factor—the length of time between the occurrence and the identification—Roy concedes that a rational trier of fact could have found that the short period of time between the robbery and the Coleman and Cabrera's showup identification supports the reliability of their identification. Instead, Roy argues that the identification should be discounted because it was made during a highly suggestive showup procedure. Our supreme court has long held that a prompt showup identification near the crime scene is proper police procedure. *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003) (citing *People v. Lippert*, 89 Ill. 2d 171, 188 (1982)). Even if the showup 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. The trial court was the trier of fact and had the opportunity to determine the credibility of the witnesses and the weight to be given to their testimony. *Jackson*, 232 Ill. 2d at 280-81. The trial court weighed the evidence and found that Coleman and Cabrera's identification of Roy was reliable. We cannot say, when viewed in the light most favorable to the State, that the showup procedure undermined the reliability of the witness's identification. We will not substitute our judgment for that of the trial court on the reliability or weight of the witness's identification. Thus, a rational trier of fact could have found that the fifth *Biggers* factor weighs in favor of finding Coleman and Cabrera's identification of Roy reliable.

¶ 34 After reviewing the *Biggers* factors, we cannot say that Coleman or Cabrera's eyewitness testimony was so deficient that no rational trier of fact could accept their identification of Roy as the man who robbed Cabrera.

¶ 35 Additionally, Coleman and Cabrera's identification of Roy was corroborated by other evidence. Officer Strazzante testified that Coleman and Cabrera stopped him and his partner in

their police car and told the officers that they had been robbed by two men, one of whom had a silver handgun. They indicated that the men were in a van and led the officers to it. When Strazzante attempted to approach the van on foot, he saw a black male pointing a "silver semiautomatic weapon" in his direction. The van escaped and Strazzante and his partner drove after it until they found it abandoned on 87th Street and Wabash Avenue. A silver semiautomatic handgun was nearby. Officer Flaherty testified he saw Roy running west on 87th Street and, once Flaherty gave chase, Roy threw $168 into a nearby car. And Roy's girlfriend, Young, testified that she lent Roy her van and Roy called her at about 10:30 p.m. and said, "they got me." Finally, Coleman and Cabrera saw Roy again after the robbery when he offered to return the money he took if they would let him in the car.

¶ 36 In sum, after viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to establish that Roy committed armed robbery.

¶ 37 Conviction of AUUW

¶ 38 Roy also argues, and the State agrees, that his conviction of AUUW under section 24-1.6(a) (1), (3) (A) of the Criminal Code of 2012 (720 ILCS 5/24-1.6(a) (1), 3(A) (West 2012)) violated his right to keep and bear arms under the second amendment of the United States Constitution and must be vacated. We agree with Roy and accept the State's concession.

¶ 39 Our supreme court considered a constitutional challenge to section 24-1.6(a) (1), (a) (3) (A) of the AUUW statute in *People v. Burns*, 2015 IL 117387, ¶ 19. The supreme court noted that, in *People v. Aguilar*, 2013 IL 112116, it held that the provision was facially unconstitutional as it impermissibly infringed on the rights granted by the second amendment to the United States constitution. *Burns*, 2015 IL 117387, ¶ 15. The court stated that, regardless of

whether a defendant is sentenced as a Class 4 offender or a Class 2 offender, the law was facially invalid and that it was "not enforceable against anyone." *Id.* ¶¶ 24, 32. We vacate Roy's conviction and sentence for AUUW under section 24-1.6(a) (1), (3) (A).

¶ 40 We affirm Roy's conviction for armed robbery but vacate his conviction and sentence for AUUW.

¶ 41 Affirmed in part and vacated in part.