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2017 IL App (3d) 140857-U

Order filed January 17, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0857
DEMARCO T. COMER,)	Circuit No. 14-CF-145
Defendant-Appellant.)	Honorable Kevin Lyons, Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Wright specially concurred.

ORDER

- ¶ 1 *Held:* The State presented sufficient evidence of defendant's guilt beyond a reasonable doubt. Defendant did not receive ineffective assistance of counsel.
- ¶ 2 Following a jury trial, defendant, Demarco T. Comer, was found guilty of residential burglary based on his alleged entry into a residence with the intent to commit aggravated criminal sexual abuse (720 ILCS 5/19-3(a) (West 2014)), aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)), and criminal trespass to residence (720 ILCS 5/19-4(a)(2)

(West 2014)). Defendant was sentenced to consecutive terms of imprisonment of 15 years for residential burglary and 7 years for aggravated criminal sexual abuse. Defendant appeals, arguing: (1) the State failed to prove him guilty beyond a reasonable doubt where the State’s case was based upon the unreliable eyewitness testimony of one person; and (2) his trial counsel rendered ineffective assistance of counsel by failing to call or request the appointment of an expert witness regarding the unreliability of eyewitness identification testimony. We affirm.

¶ 3

FACTS

¶ 4

Defendant was charged with residential burglary based on entry with the intent to commit theft, residential burglary based on entry with the intent to commit aggravated criminal sexual abuse, two counts of aggravated criminal sexual abuse, and criminal trespass. The case proceeded to a jury trial.

¶ 5

Tiffany Howard testified that on March 9, 2014, she was at the home of her sister, Kedsha, with Kedsha, Kedsha’s boyfriend, and the father of her niece. Five children were sleeping on a mattress in an upstairs bedroom. At 6:30 a.m., Tiffany checked on the children and noticed “a black body” in the closet that was located next to the children’s bed. She looked at the kids, and they would not move. Tiffany asked, “What the fuck is that in the closet?” She initially thought it was “Boog”—the father of her niece, E.E.—because he stayed in a room down the hall. Tiffany said, “Boog, what you doing in the room with these kids?” E.E. said, “That’s not Boog, Tiffany. That is a stranger.”

¶ 6

Tiffany turned on the lights and a man wearing a black hat and a black “fat coat like a puff coat” jumped out of the closet, pushed Tiffany on the bed, and ran out of the room. Kedsha chased the man down the stairs and outside. Kedsha started knocking on her neighbors’ doors

asking about the man. Detectives arrived at Kedsha's home. Detective Drew Flinn concluded the perpetrator had entered the home through an unsecured bathroom window.

¶ 7 Detective Flinn took Tiffany around the local area to look for the intruder, but Tiffany did not identify anyone as being the perpetrator. Tiffany also went out on her own to look for the man. She described the man to various people as a man with "a gap in his mouth," a black coat, black pants, black shoes, black hat, and a black "buff coat." Tiffany testified, "If you see a buff coat, you know—I know what I seen, yes, I did." After describing the man to various people, one person showed her where the man "stayed at." At 12:35 p.m., Detective Flinn was dispatched to the man's house based on a call that the suspect was at that address. Police officers took a man out of the residence. Detective Flinn collected a leather coat and a puffy winter coat found in the vicinity of defendant. When defendant was brought out of the home, Tiffany pointed at defendant and told Detective Matt Rogers that she was 100 percent certain that defendant was the perpetrator in her sister's home.

¶ 8 Tiffany testified that she could identify the intruder "to the day I die." Tiffany identified defendant in court as the man who was the perpetrator in the kids' bedroom of her sister's home.

¶ 9 Y.W. testified that she was five years old. Y.W. was at her aunt's home and was sleeping with other children in a bed when a strange man entered the room. The man was wearing black shoes, a black coat, and a black baseball hat. The man pulled down Y.W.'s pants and touched her "butt." The stranger went into the closet. Tiffany came into the room, and the man pushed Tiffany down and ran away.

¶ 10 E.E. testified she was seven years old. E.E. was in her home in a bed with Y.W. and other friends when a "bad man" came into the room. The man was "rubbing on" two other girls. When Tiffany came into the room, the man jumped into the closet and then he left. The man was

wearing a black t-shirt, a little jacket, and a black hat with a bill. Kedsha testified that she did not know defendant and had not allowed defendant into her home.

¶ 11 The jury found defendant guilty of residential burglary based on the underlying offense of aggravated criminal sexual abuse as charged in Count II, aggravated criminal sexual abuse as charged in Count III, and criminal trespass. Defendant filed a motion for new trial, arguing the evidence as to burglary and aggravated criminal sexual abuse was insufficient to prove him guilty beyond a reasonable doubt. The trial court denied the motion and sentenced defendant to consecutive terms of imprisonment of 15 years of imprisonment for burglary and 7 years for aggravated criminal sexual abuse. Defendant filed a motion for the trial court to reconsider the sentence, which the trial court denied. Defendant appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues the State failed to prove him guilty beyond a reasonable doubt where the State's case was based Tiffany's unreliable identification of him, which defendant contends resulted from a flawed identification procedure; and (2) his trial counsel provided ineffective assistance by failing to call or request the appointment of an expert witness to rebut Tiffany's unreliable eyewitness identification testimony. We affirm.

¶ 14 I. Sufficiency of the Evidence

¶ 15 Defendant argues that the State failed to prove him guilty beyond a reasonable doubt. In determining whether a defendant's conviction was proven beyond a reasonable doubt, the reviewing court views the evidence in the light most favorable to the prosecution and asks whether any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 16 It is the responsibility of the trier of fact to determine the credibility of witnesses, weigh their testimony, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). The prosecution has the burden of proving the identity of the person who committed the crime beyond a reasonable doubt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). While vague or doubtful identifications are insufficient to support a conviction, identification of the accused by just one eyewitness can support a conviction where the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Circumstances to be considered in assessing the reliability of an identification include: (1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty shown by the witness at the identification confrontation; and (5) the length of time between the crime and identification. *Slim*, 127 Ill. 2d at 307 (stating the factors for evaluating identification testimony set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972) ("*Biggers* factors")).

¶ 17 In this case, just hours before identifying defendant as the intruder, Tiffany had a surprise encounter with the intruder in the bedroom of her sister's home. She had the opportunity to view the intruder during a close encounter with him. Tiffany gave a physical description of the intruder as a man with "a gap in his mouth" who was wearing a black hat, a black buff coat, and a black puffy coat. Both a leather "buff" coat and a puffy coat were found near defendant when he was taken into police custody. When police brought defendant out of the home, Tiffany immediately identified him as the intruder.

¶ 18 Defendant argues that the identification procedure was "flawed" because such a showup identification procedure "outright tells the eyewitness who the suspect is." However, police did

not bring Tiffany to one of their suspects. Rather, defendant was Tiffany's suspect. He was the only man Tiffany had identified as being the intruder after she searched for him with police and searched for him on her own. Through Tiffany's own investigation, based on her own description of the intruder to people in the area, Tiffany located defendant's residence. After defendant was removed from the residence, Tiffany identified him as the intruder. Tiffany testified that she was 100 percent certain about her identification of defendant as the intruder. In viewing the evidence in the light most favorable to the prosecution, we conclude a rational trier of fact could have found Tiffany to be a credible witness and could have found defendant was guilty beyond a reasonable doubt.

¶ 19

II.

¶ 20

Defendant also contends that his trial counsel rendered ineffective assistance of counsel by failing to request the appointment of an expert witness to testify about the unreliability of eyewitness identification testimony where his conviction was based on the identification of him as the intruder by only one witness—Tiffany. Defendant argues his counsel should have challenged Tiffany's identification of him as the intruder by calling an expert to explain the fallibility of eyewitness identification testimony. The State contends that defendant's trial counsel did not render ineffective assistance to defendant.

¶ 21

A defendant has a constitutional right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Ill. Const. of 1970, Art. I, § 8. A defendant receives ineffective assistance of counsel where: (1) counsel's representation falls below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors the results in the trial court would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984).

¶ 22 Here, trial counsel’s performance was not deficient where he did not call an expert witness regarding the reliability of eyewitness identification testimony where Tiffany’s testimony did not appear unreliable. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997); *People v. Faulkner*, 292 Ill. App. 3d 291, 394 (1997) (to overcome the presumption that counsel’s trial strategy is sound, the strategy must appear irrational and unreasonable in light of the circumstances defendant is facing and that no reasonable criminal defense attorney facing such circumstances would pursue such strategies). We acknowledge that eyewitness identification is an appropriate subject for expert testimony. See *People v. Lerma*, 2016 IL 118496, ¶ 28. However, in this case, where Tiffany’s identification testimony was neither vague nor doubtful, defense counsel’s performance was not deficient for failing to present expert testimony regarding the unreliability of eyewitness identifications. Additionally, we cannot say that there is a reasonable probability the results in the trial court would have been different if counsel had presented such expert testimony. Therefore, defendant did not receive ineffective assistance of counsel.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Peoria County is affirmed.

¶ 25 Affirmed.

¶ 26 JUSTICE WRIGHT, specially concurring.

¶ 27 I write separately to express my concerns about the apparent “vigilante justice” present in this case. The frenzied nature of the civilian-driven canvass of the neighborhood for a person matching the physical description of the intruder is troubling. It is undisputed that Tiffany summoned the police *before* she observed defendant. After receiving Tiffany’s unsubstantiated report that the intruder had been found, the police responded and removed defendant from a

home. I note this was not a citizen's arrest and should have been carried out with due deference to probable cause and other relevant considerations.

¶ 28 Yet, the issues on appeal focus on issues unrelated to the circumstances of defendant's arrest. As the majority points out, this jury had an opportunity to consider all the circumstances surrounding the credibility of Tiffany's testimony and identification. I realize one eyewitness account can support a conviction. Consequently, viewing the evidence in the light most favorable to the prosecution, I must concur with the majority's analysis of the issues presented in this appeal.