2018 IL App (1st) 152871-U

No. 1-15-2871

Order filed July 26, 2018

Fourth Division

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 3666
	)	
COOLIDGE SMITH,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence sufficient to convict defendant of aggravated battery and aggravated discharge. Counsel not ineffective for eliciting certain evidence on cross-examination. Counsel not required as a matter of effective assistance to present an expert witness on the reliability of eyewitness identifications.

¶ 2 Following a 2014 bench trial, defendant Coolidge Smith was convicted of aggravated battery with a firearm and aggravated discharge of a firearm and sentenced to consecutive prison terms of 15 and 10 years with the Illinois Department of Corrections. On appeal, he contends that

the evidence was insufficient to convict him beyond a reasonable doubt. He also contends that trial counsel was ineffective for eliciting certain testimony on cross-examination harmful to the defense, and for not presenting an expert witness on the reliability of eyewitness identifications. We affirm.

¶ 3 Defendant was charged with attempted first degree murder and aggravated battery for proximately causing Reginald Elston great bodily harm by personally discharging a firearm on or about January 13, 2012. Defendant was charged with attempted first degree murder and aggravated discharge of a firearm for shooting at Damazio Moore with a firearm on the same day.

¶ 4 At trial, police officer Mark Bugajski testified that he responded at about 11:52 p.m. on January 13 to a report of shots fired and found Moore and Elston at the scene. Elston had an apparent gunshot wound. After speaking with Moore, Bugajski had the name Marlon Johnson[1] and the nickname "Cool" as possible suspects. Moore was not shown a photographic array at the time but described the assailant and told Bugajski that he could recognize the assailant. Elston had been shot in the mouth and his speech was hard to understand, so Bugajski did not interview him at the time. Elston was taken by ambulance to a hospital.

¶ 5 Reginald Elston testified that he and his friend Moore were walking from a basketball game at school on the night in question when he observed "three boys and one girl" walking in front of them in the same direction. One of the four left, the remaining three turned around to face Elston and Moore, and "Marlon" [Jackson], one of the three, began an argument with Moore. Elston knew Marlon from school, and Moore was about 10 feet from Marlon with Elston

[1] Reginald Elston and police detective Robert Grossman later testified that Marlon's last name was Jackson.

about 10 feet from Moore. During the argument, Elston and Moore each directed a remark at "Cool." The three had begun to walk away when "Cool" whispered in Marlon's ear, turned back around, and again began arguing with Moore. At trial, Elston identified defendant as Cool. Defendant drew a small .22-caliber revolver from his pocket, pointed it at Elston, and exclaimed "What." Believing that defendant was about to fire, Elston turned to flee. Defendant fired, and Elston was struck in the mouth and jaw. He kept running and heard another gunshot in his direction as he fled. When he looked back, he observed defendant pointing the gun at Moore, who was also fleeing, and heard two more gunshots. Elston and Moore ran to the home of a friend who phoned the police. Elston was transported to a hospital and required surgery for his injuries, including broken teeth. On January 18, a police detective met with him in the hospital and showed him a group of photographs. Elston selected one of the photographs as depicting the shooter, who was defendant. The detective showed him another group of photographs from which he identified Marlon.

¶ 6 On cross-examination, Elston testified that he did not know defendant from school and had frequent but brief conversations with him before the night in question. They had a confrontation or argument about two months before the incident. Elston denied telling the detective that Moore began the argument with Marlon, or that defendant said nothing before drawing a gun, but admitted telling the detective that the assailant wore a face mask. The incident occurred at night but under a streetlamp. The shooter wore a hood, and wore his mask throughout the incident, so that Elston observed only his eyes. The shooter said only "what" to Elston but said more to Moore. Elston did not address the shooter as Cool. Elston told Moore, the friend who called the police, and Officer Bugajski who the assailant was. When asked if he had

"a good look at the gun" while it was pointed at him, Elston replied "Not a good look, but I got a look at it." The first gunshot followed the assailant saying "what" by about 30 seconds.

¶ 7 On redirect examination, Elston testified that he recognized defendant's eyes and nose, and his voice. While he had spoken with defendant only once or twice, he observed defendant in the neighborhood on an "[e]veryday basis *** for months."

¶ 8 Police detective Robert Grossman investigated the instant case. He could not speak with Elston at the hospital on the day after the shooting because the gunshot to Elston's jaw prevented Elston from speaking. After speaking with Moore and reviewing "an account by one of the responding officers," Grossman had the nickname Cool as a possible suspect. From that nickname, he prepared an array of six photographs. On January 18, he returned to the hospital and showed the array to Elston, who identified the photograph of defendant as depicting the shooter. He showed another array to Elston, from which he identified the photograph of Marlon Jackson as the man who argued with Moore. Grossman was present when defendant was arrested on the afternoon of January 18.

¶ 9 On cross-examination, Grossman clarified that he first heard the nickname Cool from Moore. Moore refused to view a photographic array containing defendant's photograph but viewed an array containing Jackson's photograph. Moore described Cool, though Grossman admitted that his report of the interview did not include the description. Moore told Grossman that he and Cool had not argued before Cool drew his gun. Grossman could not recall if Elston told him who started the argument between Moore and Jackson, nor could he recall if Elston told him about defendant saying anything before the shooting. On redirect examination, Grossman clarified that Elston did not mention defendant saying anything to Elston before the shooting.

¶ 10 The parties stipulated that defendant was on electronic home monitoring on the day in question and that his bracelet was out of range of his home from 8:09 p.m. on January 13 until 12:24 a.m. on January 14.

¶ 11 Shanice Hutchison testified for the defense that she observed defendant in his home at about 6 p.m. on the day in question, and he told her that he was going to go meet his girlfriend. Markeva Reeves testified that she was defendant's girlfriend in 2012 and he was at her home on January 13 from about 8 p.m. until about 10 p.m. They then went to his home, where they stood out front smoking. They walked up and down the street to stay warm but did not walk far. She stayed with defendant until after midnight, then returned to her home.

¶ 12 Following closing arguments, the court found defendant guilty of aggravated battery with a firearm and aggravated discharge of a firearm, finding him not guilty of the attempted first degree murder of Elston or Moore. The court found "[b]ased on the testimony of Mr. Elston as to the events that occurred" that the State proved that defendant "fired the weapon on that night."

¶ 13 After trial, defendant discharged trial counsel. New counsel filed his posttrial motion and amended it. It argued in detail the insufficiency of the trial evidence. It claimed that defendant "was denied due process of law" and "did not receive a fair and impartial trial" but with no specific factual allegations. It did not claim ineffective assistance of trial counsel. The court denied the posttrial motion and later sentenced defendant to consecutive prison terms of 15 and 10 years for aggravated battery and aggravated discharge, respectively.

¶ 14 On appeal, defendant first contends that the evidence was insufficient to convict him beyond a reasonable doubt. In particular, he argues that he was convicted based on the unreliable testimony of a single eyewitness, Elston, who did not observe the shooter's face.

¶ 15 On a claim of insufficient evidence, we must determine whether, taking 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. Gray*, 2017 IL 120958, ¶ 35. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and the trial court is better equipped than a reviewing court to do because it heard the evidence and viewed the demeanor of the witnesses. *Gray*, 2017 IL 120958, ¶ 35; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry a defendant; that is, we do not substitute our judgment for that of the trier of fact on witness credibility or the weight of evidence. *Gray*, 2017 IL 120958, ¶ 35. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness not credible merely because a defendant says so. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Gray*, 2017 IL 120958, ¶ 35.

¶ 16 The positive and credible testimony of a single witness is sufficient to convict, even if contradicted by the defendant. *Gray*, 2017 IL 120958, ¶ 36. Similarly, a conviction will not be reversed merely because there was contradictory evidence, because minor or collateral discrepancies in testimony need not render a witness's entire testimony incredible, and because the task of the trier of fact is determining if and when a witness testified truthfully. *Gray*, 2017

IL 120958, ¶¶ 36, 47. When a finding of guilt depends on eyewitness testimony, we must decide whether a trier of fact could reasonably accept the testimony as true beyond a reasonable doubt. *Gray*, 2017 IL 120958, ¶ 36. We find eyewitness testimony insufficient only when the evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Gray*, 2017 IL 120958, ¶ 36.

¶ 17 Our supreme court has repeatedly found that a valid conviction may be based on a positive identification by a single eyewitness who had ample opportunity to observe. *In re M.W.*, 232 Ill. 2d 408, 435 (2009). A trier of fact assesses the reliability of identification testimony in light of all the facts and circumstances including (1) the witness's opportunity to view the offender at the time of the offense, (2) the witness's degree of attention at the time of the offense, (3) the accuracy of any previous description of the offender by the witness, (4) the degree of certainty shown by the witness in identifying the defendant, and (5) the length of time between the offense and the identification. *In re M.W.*, 232 Ill. 2d at 435; *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 47. These are often referred to as the *Biggers* factors. *Joiner*, 2018 IL App (1st) 150343, ¶ 47 (citing *Neil v. Biggers*, 409 U.S. 188 (1972)). No single *Biggers* factor by itself conclusively establishes the reliability of identification testimony; instead, the trier of fact must consider all the factors. *Joiner*, 2018 IL App (1st) 150343, ¶ 47.

¶ 18 Here, taking the evidence in the light most favorable to the State as we must, we find the evidence sufficient to convict defendant of aggravated battery with a firearm and aggravated discharge of a firearm. First and foremost, defendant was not someone unknown to Elston before the night of the incident. See *In re J.J.*, 2016 IL App (1st) 160379, ¶ 38 (considering a witness's prior acquaintance with the defendant as an additional *Biggers* factor). Elston also observed

defendant on an "[e]veryday basis *** for months" before the shooting and, while he did not often speak with him, they had a confrontation or argument about two months before the shooting. Secondly, while there was some inconsistency on the point, a trier of fact could reasonably conclude from the evidence that Elston heard the assailant speak more than the single word "what" before he drew his gun and fired. Under such circumstances, we do not find it unreasonable, improbable, or unsatisfactory that the trial court found that Elston recognized defendant from his voice and eyes despite having much of his face covered.

¶ 19 Applying the *Biggers* factors to Elston's testimony, we do not find his identification testimony unreliable. Regarding his opportunity to view the offender at the time of the offense, he stood a few feet away from the shooter as Marlon Jackson, who was with the shooter, argued with Elston's friend Moore. The incident unfolded at night but under a streetlamp. This was not a brief or fleeting glimpse. As to Elston's degree of attention at the time of the offense, while he was for much of the incident a bystander to the argument between Jackson and Moore, a reasonable trier of fact could conclude that the assailant exchanged words with Moore, and that Elston directed a remark at the assailant, before the assailant drew a gun. Thus, Elston had sufficient reason to pay attention to the assailant before the gun appeared and arguably became the focus of his attention. There was no testimony as to any description of the assailant by Elston, nor any particular testimony as to his degree of certainty, so neither factor is of much weight for or against reliability. Lastly, as to the length of time between the offense and the identification, Elston testified to telling Moore, a friend, and Officer Bugajski who the shooter was on the night of the shooting. A few days later, Elston also identified defendant from a

photographic array and testified that he recognized his voice and eyes. We conclude that the trial evidence was sufficient to convict defendant beyond a reasonable doubt.

¶ 20 Defendant also contends that trial counsel was ineffective for (1) eliciting testimony harmful to the defense; to wit, that Elston named Cool as the shooter to Moore, a friend, and Officer Bugajski on the night of the shooting, and (2) not presenting an expert witness on the reliability of eyewitness identifications.

¶ 21 A defendant's claim that trial counsel failed to render effective assistance is governed by a two-pronged test: the defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced by that performance. *People v. Brown*, 2017 IL 121681, ¶ 25. Prejudice is a reasonable probability that the result of the proceeding would have been different absent counsel's error, and a reasonable probability is in turn a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Peterson*, 2017 IL 120331, ¶ 79, *petition for cert. pending*, No. 17-9464. The decision whether to call a particular witness for the defense is a matter of trial strategy, left to the discretion of counsel and thus generally not a proper basis for an ineffectiveness claim. *Peterson*, 2017 IL 120331, ¶ 80. Representation is not constitutionally defective due to a mistake in trial strategy alone, but only if the strategy was so unsound that counsel entirely failed to conduct meaningful adversarial testing of the State's case. *Peterson*, 2017 IL 120331, ¶ 80. Stated another way, we shall not conclude that a strategy was unreasonable merely because it proved unsuccessful. *Peterson*, 2017 IL 120331, ¶ 88.

¶ 22 Here, we see no ineffectiveness in trial counsel asking Elston if he named Cool as the shooter before he identified defendant in the photographic array. Counsel was clearly trying to

impeach Elston's testimony in general and his identifications of defendant in particular. Had Elston replied that he did *not* identify Cool before he saw the photographic array, it would have bolstered the defense. We note as an illustrative example that counsel also asked Elston on cross-examination if he had been drinking or using drugs on the night in question, but Elston denied it. We will not find counsel unreasonable merely for not foreseeing that a witness would give an answer on cross-examination other that the answer favorable to the defense. Stated another way, we find the questions that counsel asked Elston were part of a reasonable trial strategy, and the fact that the strategy did not work does not render the questions objectively unreasonable.

¶ 23 Moreover, we find no prejudice from counsel asking Elston the questions at issue. Defendant argues that the fifth *Biggers* factor supports Elston's credibility due to trial counsel eliciting that Elston named Cool as the shooter on the night of the shooting. However, we find that Elston's identification of defendant from a photographic array a few days after the shooting, especially when he was medically indisposed in the interim, was also reasonably close to the shooting for purposes of the fifth *Biggers* factor.

¶ 24 Regarding trial counsel not employing and calling an expert witness on the reliability of eyewitness identification, defendant places great weight on our supreme court's decision in *People v. Lerma*, 2016 IL 118496. However, that decision and the appellate opinion it affirmed (*People v. Lerma*, 2014 IL App (1st) 121880) found that the *trial court* abused its discretion in excluding a defense expert witness on the reliability of eyewitness identification where the only evidence against the defendant was identification by two witnesses. Whether *counsel* was ineffective for not presenting such an expert witness is a different issue. The supreme court noted in *Lerma* that:

> "The last time this court addressed the admission of such testimony was in *Enis*, which was decided more than 25 years ago when the relevant research was in its relative infancy. Even then, this court recognized that 'in the past decade a number of courts have held that expert testimony concerning eyewitness identification should be admissible in certain circumstances.' [Citation.] Nevertheless, this court also expressed skepticism and caution against the overuse of such testimony [citation], such that the exclusion of such testimony remains the common practice in Illinois to this day." *Lerma*, 2016 IL 118496, ¶ 24 (quoting *People v. Enis*, 139 Ill. 2d 264, 286-87 (1990)).

The supreme court's 2016 ruling in *Lerma* did not exist when the instant case went to trial in 2014, when expert witnesses on the reliability of eyewitness testimony were commonly excluded as the *Lerma* court acknowledged. Representation based on the law prevailing at the time of trial is adequate, and counsel is not incompetent for failing to correctly predict that the law would change. *People v. English*, 2013 IL 112890, ¶ 34. We will not conclude that, at the time of this trial, counsel not calling such an expert witness was so unsound a decision that counsel failed to conduct meaningful adversarial testing of the State's case.

¶ 25 Furthermore, *Lerma* concerned a jury trial while this case involved a bench trial. In *Lerma*, our supreme court noted that it "has held that expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the *average juror*'s, and when it will aid the *jury* in reaching its conclusion." (Emphases added.) *Lerma*, 2016 IL 118496, ¶ 23. We do not find a reasonable probability that trial counsel seeking to call an expert witness on the reliability of eyewitness testimony in this bench trial could have changed the outcome of the proceedings.

¶ 26 Accordingly, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.