

2018 IL App (1st) 153162-U

No. 1-15-3162

June 6, 2018

Third Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 3888
	)	
KELVIN WILSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for aggravated robbery is affirmed over his contention that the State failed to prove beyond a reasonable doubt that he was the offender because the victim's identification testimony was unreliable. Defendant's conviction for aggravated battery is reversed because the State failed to prove the aggravating factor beyond a reasonable doubt, but the finding of guilt as to the lesser-included offense of battery is affirmed. Defendant is resentenced to 364 days imprisonment for misdemeanor battery to run concurrently with his sentence for aggravated robbery and the mittimus is amended accordingly.

¶ 2 Following a bench trial, defendant Kelvin Wilson was convicted of aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)) and aggravated battery (720 ILCS 5/12-3.05(d)(6) (West 2014)), and sentenced to concurrent terms of eight years' imprisonment. On appeal, defendant contends that: (1) the State failed to prove beyond a reasonable doubt that he committed an aggravated robbery because the victim's identification of him as the offender was not reliable; (2) his conviction for aggravated battery should be reduced to misdemeanor battery because the State failed to prove the aggravating element of the offense *i.e.* that the victim was an employee of the State of Illinois; and (3) the trial court erred in imposing an extended-term sentence for aggravated battery because the offense was not within the class of the most serious offense for which he was convicted. We affirm defendant's conviction for aggravated robbery; reverse his conviction for aggravated battery, but affirm the finding of guilt as to the lesser-included offense of battery; resentence him to 364 days imprisonment for battery to run concurrent with his sentence of eight years' imprisonment for aggravated robbery; and amend the mittimus accordingly.

¶ 3 Defendant was charged by information with one count of aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)); one count of aggravated battery (720 ILCS 5/12-3.05(d)(6) (West 2014)); and one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2014)). The aggravated robbery charge (count 1) alleged that defendant, knowingly took property, to wit: a cell phone, from the person or presence of Rekia Carothers, by the use of force, or by threatening the imminent use of force while indicating verbally or by his actions that he was presently armed with a firearm or other dangerous weapon, to wit: threatened to shoot Carothers. The aggravated battery charge (count 2) alleged that defendant, in committing a battery, other than by the

discharge of a firearm, knowingly caused bodily harm to Carothers, by striking her about the face, and he knew her to be an employee of an agency partially funded by the State of Illinois, to wit: mail carrier for the United States Postal Service, while she was performing her official duties. The unlawful restraint charge (count 3) alleged the defendant knowingly and without legal authority detained Carothers.

¶ 4 At trial, the victim, Rekia Carothers testified that she was employed as a postal carrier for the United States Postal Service. On January 17, 2015, she was delivering mail on the 3200 block of West Douglas Boulevard. The route was one of her regular routes and she was very familiar with the area. Carothers was wearing her postal uniform and coat identifying her as a postal employee. At approximately 3:15 p.m., Carothers parked her postal truck and began delivering mail on the north side of Douglas. Carothers testified that she could not recall how many people she saw in the area that day, but she did remember “just one.” As she began delivering mail, she saw defendant walk past her then turn, and continue walking. Carothers continued delivering mail. When Carothers was finished with the north side of the block, she returned to her truck to retrieve the mail for the south side of the block. She saw defendant walking out of a courtyard and stop about 20 to 30 feet in front of her. Carothers testified she was able to see defendant’s face.

¶ 5 Carothers then went into one of the buildings on the south side of 3200 W. Douglas. She described this building as having three entrances. She proceeded to the door furthest from the street and walked into a vestibule that had an entry door and a second door leading to a flight of stairs. Carothers began placing the mail in one of the three mailboxes. As she did so, she saw defendant enter into the vestibule and proceed toward the stairs. As Carothers was completing

her mail delivery for the building, defendant walked down the stairs and appeared to be heading out of the vestibule door. Defendant then grabbed her from behind in a “headlock” and pushed her toward a wall. Defendant demanded money from Carothers, who told him that she did not have any money. Defendant punched Carothers in the mouth and “busted [her] lip.” He punched her four or five more times in the head with a “closed fist.” Carothers fell onto the floor of the vestibule area because defendant “kind of like knocked [her] out.” Carothers testified she was pleading and crying telling defendant that she did not have any money and to let her go. Defendant told her to get up. When she did not move, defendant told her that he was going to get his gun out and shoot her. Defendant took Carothers’s cell phone from her pocket and ran out of the building, heading north. Carothers ran after defendant but stopped. She then summoned the police and was transported to the hospital. Carothers suffered a concussion and a “fat lip” as a result of the battery.

¶ 6 On February 18, 2015, Carothers went to the 10th police district where she viewed a photo array and positively identified defendant from the array. On February 24, 2015, Carothers viewed a lineup and identified defendant from the lineup. During her testimony, Carothers identified a surveillance video that depicted her running after defendant.

¶ 7 On cross-examination, Carothers acknowledged that she initially viewed defendant from behind. She admitted that, during the encounter, she realized that defendant did not have a gun. She acknowledged that on January 23, 2015, she viewed a photo array and tentatively identified a person, who was not defendant, from the array. On redirect examination, Carothers explained that she was “50 percent” sure of her January 23 identification of the person from the array

because this person and defendant had a similar looking beard. Carothers testified that she was “100 percent” sure that defendant was the person that robbed her.

¶ 8 United States Postal Inspector Michael O’Connor testified that he was assigned to investigate the robbery. On February 17, 2015, O’Connor went to South Troy Street after receiving a tip from a reward flyer. There, he stopped defendant and asked for his identification, but did not arrest him. During the stop, O’Connor observed that defendant was wearing turquoise shoes. He testified that the shoes were the same color as the shoes he saw in a video still taken from the surveillance video shortly after the robbery.

¶ 9 On cross-examination, O’Connor admitted that defendant’s face was not visible in the video still and that he spoke to defendant about three or four weeks after the robbery.

¶ 10 Chicago police detective Philip Brown testified that defendant was arrested on February 24, 2015, wearing turquoise shoes. Defendant’s shoes were inventoried. When defendant appeared in a lineup, he was not wearing the turquoise shoes because Brown thought it would “taint the lineup.” Brown testified that defendant’s girlfriend Khadijah Robinson brought defendant a different pair of shoes to wear in the lineup. The State rested.

¶ 11 Khadijah Robinson testified that she did not bring a pair of shoes for defendant to wear in the lineup and that the turquoise shoes belonged to her. On cross-examination, Robinson acknowledged that although the turquoise shoes belonged to her, defendant would wear them on occasion.

¶ 12 The trial court found defendant guilty of the charged offenses. In announcing its ruling, the court noted that “Carothers absolutely identified [defendant] in court and was absolutely positive about her identification of him, and she was vigorously examined and cross-examined

about everything, all the circumstances about her identification.” The court concluded “that when Ms. Carothers identified [defendant] not by his shoes but by everything else about his person and about his face. She was there. She had ample opportunity to experience and view the offender that did these things to her. The shoes that were inventoried, and the detective made care not to taint the lineup with, are corroborative of that. He’s not being identified because of his shoes. He’s being identified because of who he is and the shoes corroborate that identification.” The court merged the unlawful restraint count into the aggravated robbery and aggravated battery counts.

¶ 13 At sentencing, the State informed the court that, based on his background, defendant was eligible to be sentenced as a Class X offender. After listening to arguments in aggravation and mitigation, the court sentenced defendant to eight years’ imprisonment. The mittimus reflects that defendant was sentenced to concurrent terms of eight years imprisonment for aggravated robbery and an extended-term of eight years imprisonment for the aggravated battery.

¶ 14 On appeal, defendant first challenges the sufficiency of the evidence to sustain his convictions. Specifically, he argues that Carothers’s identification of him as the offender was unreliable.

¶ 15 The standard of review on a challenge to the sufficiency of the evidence 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. Wheeler*, 226 Ill. 2d 92, 114 (2007). This standard is applicable in all criminal cases regardless whether the evidence is direct or circumstantial. *People v. Herring*, 324 Ill.App.3d 458, 460 (2001); *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). The trier of fact is responsible for

assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Hutchinson*, 2013 IL App (1st) 102332 ¶ 27; *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). When considering the sufficiency of the evidence, it is not the reviewing court's duty to retry the defendant. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A reviewing court will only reverse a criminal conviction when the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8; *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 16 Defendant was found guilty of aggravated robbery (720 ILCS 5/18-1 (b)(1) (West 2014)) and aggravated battery (720 ILCS 5/12-3.05(d)(6) (West 2014)). Defendant does not dispute that the State failed to prove the elements of each offense beyond a reasonable doubt. Rather, he contends that the State failed to prove beyond a reasonable doubt that he committed these offenses because Carothers's identification was unreliable.

¶ 17 After reviewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant was the offender. It has been well-established that the testimony of a single witness, if positive and credible, is sufficient to convict "if the witness was able to view the defendant under conditions permitting a positive identification." *People v. Thompson*, 2016 IL App (1st) 133648 ¶ 34; *People v. Petermon*, 2014 IL App (1st) 113536 ¶ 30. When assessing identification testimony, this court relies on the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). These factors include (1) the opportunity the witness had to view the offender at the time of the offense; (2) the witness's

degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *People v. White*, 2017 IL App (1st) 142358, ¶ 15.

¶ 18 In considering the *Biggers* factors in relation to Carothers's identification of defendant, we conclude that they weigh in the State's favor. First, the record demonstrates that Carothers had sufficient opportunity to view defendant. The record shows that the robbery occurred about 3:15 p.m. and that it was not dark outside. Carothers testified that she could not recall anyone else being in the area that afternoon, but did remember defendant. She initially observed defendant when he walked by her as she began delivering mail. Carothers saw defendant again when he left a courtyard as she began her delivery on the opposite side of the street. Carothers's third observation of defendant occurred when she entered the vestibule of a building and defendant followed her inside and walked up the stairs. As she was finishing placing the mail in the mailboxes, Carothers saw defendant for the fourth time. This time, defendant walked down the stairs, placed her in a headlock, punched her in the face and head, threw her to the floor, threatened to shoot her, and then took her cell phone. Carothers testified that during the robbery she told defendant that she did not have any money and pleaded with him to let her go. When defendant ran out of the vestibule, Carothers followed him for a short distance.

¶ 19 This court has found that "an encounter as abbreviated as five to ten seconds" is sufficient to support a conviction. *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006); *People v. Parks*, 50 Ill. App. 3d 929, 933 (1977); see also *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (sufficient opportunity to view the defendant found where witness testified he observed "the



assailant's face for several seconds when the robber reached down to cover his eyes with duct tape"). Here, Carothers had several opportunities to observe defendant before he committed the robbery as well as during and after the robbery. Thus, the first *Biggers* factor weighs in favor of the reliability of Carothers's identification of defendant.

¶ 20 The second factor, Carothers's degree of attention, also weighs in favor of a reliable identification. Carothers was working as a mail carrier in a familiar area. Throughout her delivery, Carothers repeatedly saw defendant and described what he was doing each time she saw him *i.e.* walking passed her, walking out of a courtyard, following her into the building and walking up the stairs. Moreover, the robbery occurred in a small vestibule and there is every indication from the record that Carothers's focus was on defendant, who demanded money and threatened to shoot her if she did not cooperate. Carothers testified that during the robbery she told defendant that she did not have any money and pleaded with him to let her go. Accordingly, Carothers' degree of attention weighs in favor of the reliability of her identification.

¶ 21 Although the record is absent regarding the third factor, Carothers's prior description of defendant, the last two *Biggers* factors—the level of certainty demonstrated by the witness at the identification confrontation and the length of time between the crime and the identification confrontation—further support the reliability of her identification. The record shows that Carothers identified defendant within several weeks after the robbery. Carothers viewed a photo array within a few weeks after the robbery and tentatively identified someone from that array. However, when shown a different photo array a few weeks later, Carothers positively identified defendant. She also identified him from a physical lineup. We note that significantly longer lengths of time have not rendered identifications unreliable. See *People v. Malone*, 2012 IL.

App. (1st) 110517, ¶ 36 (one year and four month delay between crime and positive identification). Carothers testified that she was 100 percent sure that defendant was the person who robbed her. See *People v. Magee*, 374 Ill. App. 3d 1024, 1032-33 (2007) (“[t]he presence of discrepancies or omissions in a witness’ description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made.”).

¶ 22 The *Biggers* factors also weigh in the State’s favor where circumstantial evidence corroborates Carothers’ identification of defendant. See *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 24 (“In addition to the *Biggers* factors, courts also consider the totality of the circumstances when reviewing the reliability of an identification”). The photos captured from the surveillance video show defendant wearing turquoise shoes. O’Connor testified that, when interviewed defendant on February 17, 2015, he was wearing turquoise shoes. When defendant was arrested on February 24, 2015, he was wearing turquoise shoes that were inventoried by the police.

¶ 23 In sum, after reviewing the *Biggers* factors, we cannot say that Carothers’s identification of defendant was so unreliable that there exists a reasonable doubt as to defendant’s guilt. Therefore, we will not disturb the trial court’s finding that defendant was guilty of aggravated robbery.

¶ 24 Defendant nevertheless argues that the *Biggers* factors do not weigh in favor of a reliable identification. He maintains that: Carothers did not have sufficient opportunity to view the offender given the brief and limited nature of the robbery; her degree of attention was insufficient to yield a reliable identification given the highly stressful encounter; and, a few weeks after the robbery, she tentatively identified another person from a photo array, but a month

later, identified defendant from a second photo array and lineup. Defendant also points out that, aside from Carothers's identification testimony, there was no other evidence connecting him to the robbery.

¶ 25 We note that defendant's arguments are, essentially, asking us to reweigh the evidence in his favor and substitute our judgment for that of the trier of fact. This we cannot do. It was the responsibility of the trier-of-fact to determine Carothers's credibility, the weight to be given to her testimony, and to resolve any inconsistencies and conflicts in the evidence. See *Hutchinson*, 2013 IL App (1st) 102332 ¶ 27; *Ortiz*, 196 Ill. 2d 236, 259 (2001). Moreover, as noted by the trial court in announcing its ruling, the reliability of Carothers's testimony and the circumstances impacting her opportunity to view defendant were fully explored at trial during cross-examination. The court found Carothers's identification credible and reliable. In doing so, the trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt (*People v. Brown*, 2013 IL 114196, ¶ 71 (citing *Wheeler*, 226 Ill. 2d at 117)). We will not reverse a conviction simply because defendant claims that a witness was not credible. *People v. Evans*, 209 Ill. 2d 194, 211-12 (2004).

¶ 26 Defendant next contends that his conviction for aggravated battery should be reduced to misdemeanor battery because the State failed to prove the aggravating element that Carothers was an employee of the State of Illinois.

¶ 27 Defendant was charged with aggravated battery (720 ILCS 5/12-3.05(d)(6) (West 2014)). In order sustain his conviction for this offense, the State was required to prove both the commission of a battery and the presence of an additional factor aggravating that battery. *People*

*v. Cherry*, 2016 IL 118728, ¶ 16. “A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.” 720 ILCS 5/12-3(a) (West 2014). As relevant here, to establish that defendant committed aggravated battery under the charged count, the State had to prove that defendant knew the victim was an officer or employee of the State of Illinois, a unit of local government, or a school district, while performing his or her official duties. (720 ILCS 5/12-3.05(d)(6) (West 2014)).

¶ 28 Although the evidence presented established that Carothers was an employee of the United States Postal Service engaged in her official duties, there was no evidence that Carothers was an employee of the State of Illinois. The State concedes, and we agree, that it failed to prove that Carothers was an employee of the State of Illinois and that defendant’s conviction for aggravated battery should be reduced to misdemeanor battery. Therefore, we agree that the State did not prove beyond a reasonable doubt all the elements of the aggravated battery statute and reverse his conviction for that offense.

¶ 29 However, battery is a lesser-included offense of aggravated battery. Defendant does not dispute, and the record shows, that the State proved him guilty of battery beyond a reasonable doubt. Accordingly, we affirm the finding of guilt as to the battery offense.

¶ 30 Defendant requests that he be sentenced to the maximum sentence of 364 days imprisonment for battery. See 720 ILCS 5/12-3 (West 2014) (Battery is a Class A misdemeanor); 725 ILCS 5/5-4.5-55(a) (West 2014) (The sentence for a Class A misdemeanor shall be determinate sentence of less than one year). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(4), we reduce defendant’s sentence for aggravated battery to 364 days

imprisonment to run concurrent with his sentence for aggravated robbery. 720 ILCS 5/12-3 (West 2014); 725 ILCS 5/5-4.5-55(a) (West 2014); *People v. Lashley*, 2016 IL App (1st) 133401, ¶ 74.

¶ 31 Given our finding that the State failed to prove defendant guilty of aggravated battery, we need not address his final argument that the trial court erred in imposing an extended-term sentence for aggravated battery because the offense was not within the class of the most serious offense of which he was convicted.

¶ 32 For the reasons stated, we affirm defendant's conviction for aggravated robbery; reverse his conviction for aggravated battery, but affirm the finding of guilt as to battery; resentence him to 364 days imprisonment for battery to run concurrent with his eight-year sentence for aggravated robbery; and direct the clerk of the circuit court to amend the mittimus in accordance with this order.

¶ 33 Affirmed in part; reversed in part; mittimus amended.