

2018 IL App (1st) 161405-U

No. 1-16-1405

Order filed April 13, 2018

Sixth 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. 14 CR 10275
)	
BOBBY FLOYD,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's challenge to the sufficiency of the evidence is without merit where the identifications by two police officers were sufficient to prove him guilty beyond a reasonable doubt; mittimus amended to correct offense.

¶ 2 Following a bench trial, the trial court entered a conviction against defendant Bobby Floyd for aggravated unlawful use of a weapon (AUUW) and sentenced him to four and a half years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because the two police officers did not have the ability or opportunity

to sufficiently observe the offender to make a correct identification. We affirm and correct the offense on the mittimus.

¶ 3 Defendant was charged with two counts of unlawful use of a weapon by a felon (UUWF) and six counts of AUUW. At trial, Chicago police officer Jeff Havelka testified that shortly after midnight on May 27, 2014, he and his partner, Sergeant Russ Willingham, were standing on the porch of a residence on Bell Avenue near 66th Street. They were assisting other officers who were inside the home responding to a domestic disturbance call. Havelka observed two men walking together on the sidewalk, heading southbound on Bell. As the men passed them, Havelka observed that one of them, defendant, was wearing a black fisherman's hat and dark clothing. Havelka identified defendant in court.

¶ 4 Shortly thereafter, Havelka received a radio call regarding a person wearing a fisherman's hat with a gun. The clothing description in the radio call matched what defendant was wearing. Havelka and Willingham drove one block south on Bell to 66th Street, looking for defendant. Havelka observed defendant and the other man walking westbound on 66th Street towards Oakley Avenue. Havelka, who was driving, turned and drove westbound on 66th Street. Havelka estimated that less than a couple of minutes had passed from the time he initially saw defendant walking on Bell to the time he saw him on 66th Street.

¶ 5 Havelka pulled up next to the men as they were walking, and slowed his vehicle to come to a stop. Defendant looked in the direction of the officers and immediately ran. Havelka testified that when defendant looked at them, he could see defendant's face, including his eyes, and the front of his body.

¶ 6 Havelka exited his vehicle and chased defendant. He did not know what happened to the other man. Defendant ran west on 66th Street, then south on Oakley. Defendant ran through a gangway. As defendant ran towards the backyard, he reached into his waistband and threw a black gun over a fence. Defendant was still wearing the fisherman's hat, and Havelka had not lost sight of him. Although it was dark outside, there was artificial lighting from the streetlights.

¶ 7 Defendant continued running towards the alley. Havelka ran back to 66th Street. When he did so, he lost sight of defendant for a second. Havelka then saw defendant running east on 66th Street towards Bell. Defendant turned the corner and ran south on Bell. Havelka lost sight of defendant for a second time.

¶ 8 Havelka heard on his radio that additional officers were coming, and he waited for them to arrive at the scene to search for defendant. The police searched the backyards on Bell. Havelka found defendant sitting on a porch in the backyard at 6609 South Bell. Havelka recognized defendant as the same man he saw earlier. Defendant was wearing a T-shirt, and was no longer wearing the hat or dark clothing. Police recovered a black hoodie in the same yard where defendant was found. The hoodie appeared to be consistent with the dark clothing Havelka previously saw defendant wearing. Havelka estimated that three to five minutes had passed from the time he approached defendant on 66th Street to the time he found defendant in the yard.

¶ 9 After defendant was detained, Havelka, Willingham and Officer Butz went to 6607 South Oakley where Havelka had observed defendant throw the gun. In the backyard, Havelka found a black nine-millimeter handgun, loaded with 16 rounds. The fisherman's hat was never recovered.

¶ 10 The State presented a certified copy of defendant's prior conviction for delivery of a controlled substance. The State also presented a certification from the Illinois State Police

indicating that defendant had never been issued a firearm owner's identification card or a concealed carry license.

¶ 11 Defendant testified that at the time in question, he and his brother, Darius Floyd, were walking to defendant's girlfriend's house on Oakley. Defendant was wearing blue jeans and a burgundy thermal sweater. Darius was dressed in all black, including a black hoodie and a black fisherman's hat. A police vehicle pulled up next to them and the two officers told them to come to their vehicle. Defendant went to the police vehicle and put his hands on the hood. Darius ran away. Both of the officers, one of whom was Havelka, jumped out of their vehicle and chased after Darius. Defendant stood at the vehicle for three to five seconds. He then walked to 66th and Bell, which was the area towards which the others ran, to check on his brother.

¶ 12 Defendant walked to 6609 South Bell, where the mother of his son lived, and sat on the back porch. An officer ran into the yard, grabbed defendant off the porch, and immediately handcuffed him. Defendant testified that it was another officer, not Havelka, who arrested him. The officer grabbed defendant's chest, told him to be quiet, and that he "might never know what he got for me." The officer placed defendant in a police vehicle and immediately drove him to the station. The last time defendant saw Havelka was when he was chasing Darius.

¶ 13 Defendant denied possessing a gun, and denied throwing a gun. He also denied being chased by police, and denied that police recovered a black hoodie in the yard where he was arrested. Defendant testified that a property receipt from the Cook County Department of Corrections indicated that he was wearing a maroon sweatshirt when he was processed at the jail.

¶ 14 In rebuttal, Sergeant Willingham testified that at the time in question, he was a passenger in a police vehicle driven by Officer Havelka. They were responding to a call about a person

with a gun. Willingham observed defendant walking with another man in the area of 66th and Bell. Defendant was wearing a dark-colored fisherman's hat and a dark-colored hoodie, which matched the description of the person with a gun. The officers slowed their vehicle to conduct an investigatory stop, and defendant immediately fled. Havelka jumped out of the vehicle, and Willingham jumped into the driver's seat and drove away. The man who was with defendant stayed at that location. He did not approach the vehicle or place his hands on it. Willingham did not get the man's name and did not know what happened to him. Willingham identified defendant in court, and testified that it was not defendant who stayed near the police vehicle.

¶ 15 The State presented additional certified copies of defendant's two prior convictions for possession of a controlled substance.

¶ 16 The trial court found that defendant discarded one clothing item in the backyard where he was found. The court further found that defendant could have discarded the fisherman's hat during the minute or two between when the police lost sight of him on the street and found him in the yard. The trial court stated that it was entering the conviction on Count 5, which was one of the AUUW counts. The court commented that the other counts would "all merge anyway."

¶ 17 In his motion for a new trial, defendant argued that Havelka's identification was unreliable because he did not have a sufficient opportunity to observe the offender. The trial court rejected that argument and denied the motion. The court sentenced defendant to four and a half years' imprisonment on the AUUW conviction.

¶ 18 On appeal, defendant solely contends that the State failed to prove him guilty beyond a reasonable doubt because Officers Havelka and Willingham did not have the ability or opportunity to sufficiently observe the offender to make a reliable identification. Defendant

argues that the officers did not have enough time to observe the gunman and distinguish him from the other man where it was dark outside, the events happened quickly, and the gunman was running away from them for most of the encounter. He also argues that there was no physical evidence to corroborate the identification, such as fingerprints or DNA, and Havelka did not mention that defendant has tattoos on his face.

¶ 19 The State responds that the officers had an ample opportunity to observe defendant when he walked past them on Bell, and when he looked in their direction on 66th Street. The State argues that Willingham corroborated Havelka's description of defendant, and that their testimony was further corroborated by the fact that the black hoodie was found in the yard where defendant was arrested. The State asserts that the factors considered when evaluating identification testimony weigh in its favor, and thereby show that the identification of defendant was reliable.

¶ 20 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 21 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable

inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), nor simply because defendant claims that a witness was not credible or that the evidence was contradictory (*Siguenza-Brito*, 235 Ill. 2d at 228).

¶ 22 To prove defendant guilty of AUUW as charged in this case, the State was required to show that he knowingly carried a handgun on his person when he was not on his own land or in his own home or business, or that of another person as an invitee, and the gun was uncased, loaded and immediately accessible. 720 ILCS 5/24-1.6(a)(1) (West 2014). To prove defendant guilty of UUWF, the State was required to show that he knowingly possessed a firearm or ammunition on his person, after having been previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2014).

¶ 23 Identification of defendant by a single witness is sufficient to sustain a conviction where the witness viewed defendant under circumstances that permitted a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Such identification is sufficient even where defendant presents contradictory testimony, as long as the witness had an adequate opportunity to view the offender and provided a positive and credible identification in court. *Id.*

¶ 24 In assessing identification testimony, the court considers: (1) the witness' opportunity to view the offender at the time of the offense; (2) his degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the witness' level of certainty at the identification confrontation; and (5) the length of time between the offense and the identification confrontation. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).

¶ 25 Here, defendant concedes that the fourth and fifth factors weigh in favor of the State because Havelka immediately identified defendant as the offender when he found him on the porch. The parties agree that the third factor cannot be weighed because there was no prior description involved in this case. At issue here are the first and second factors – the officers’ opportunity to view the offender at the time of the offense, and their degree of attention.

¶ 26 The record reveals that the testimony from Havelka and Willingham was sufficient for the trial court to find that they had an ample opportunity to observe defendant to make a reliable identification. Havelka testified that he and Willingham were standing on a porch when he first observed defendant and another man walk past them on the sidewalk. Havelka observed that defendant was wearing a black fisherman’s hat and dark clothing. At this time, Havelka and Willingham were not actively engaged in any other activity. They were assisting other officers who were inside the home handling a domestic situation. Therefore, their attention at this moment was focused on defendant and the other man walking past them.

¶ 27 Shortly thereafter, Havelka received the radio call regarding a person wearing a fisherman’s hat with a gun. The clothing description matched what defendant was wearing. In less than a couple of minutes, Havelka spotted defendant and the other man walking on 66th Street and approached them in his vehicle. As he pulled up next to them, defendant looked in his direction. Havelka testified that he could see defendant’s face, including his eyes. He could also see the front of defendant’s body. Although it was dark outside, there was artificial lighting from the streetlights. Havelka’s degree of attention towards defendant at this time was high as he was specifically looking for defendant, and aware that defendant was possibly armed with a gun.

¶ 28 When defendant fled, Havelka chased after him and observed him remove a handgun from his waistband and throw it over a fence. Defendant was still wearing the fisherman's hat, and Havelka had not lost sight of him at this point. As defendant continued running, Havelka lost sight of him momentarily, but then saw him running on 66th Street. He observed defendant running south on Bell before losing sight of him again. The record thus shows that Havelka continuously observed defendant as he chased him, and his degree of attention was very high. Within minutes, Havelka found defendant sitting on a back porch. Although defendant was no longer wearing the hat or dark clothing, Havelka immediately recognized him with certainty as the same man he saw earlier.

¶ 29 Havelka's identification of defendant was corroborated by Willingham, who also testified that he observed defendant wearing the dark-colored fisherman's hat and hoodie. Willingham specifically testified that it was defendant who fled, and that the man who remained by the police vehicle was not defendant. The officers' identification of defendant was further corroborated by the fact that police recovered a black hoodie in the same yard where defendant was found, and that hoodie was consistent with the dark clothing the officers previously saw defendant wearing.

¶ 30 We find no merit in defendant's argument that the identification was unreliable because there was no corroborating physical evidence, such as fingerprints or DNA. Additional corroborating evidence was not needed where Havelka's positive identification alone was sufficient to sustain defendant's conviction. *Slim*, 127 Ill. 2d at 307.

¶ 31 Nor do we find Havelka's identification unreliable because he did not mention defendant's facial tattoos. Generally, discrepancies and omissions regarding facial and physical characteristics are not fatal, but rather, merely affect the weight given to the identification

testimony. *Id.* at 308. Sitting as the trier of fact, it was the trial court’s duty to weigh the evidence and resolve any conflicts therein. *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court found that the identification testimony from Havelka and Willingham was reliable, and we find no reason to disturb that determination. Accordingly, the evidence sufficiently established that defendant was proved guilty of AUUW beyond a reasonable doubt.

¶ 32 In a footnote in its brief, the State points out a discrepancy in the record regarding the count and offense of which defendant was convicted. In its oral pronouncement, the trial court clearly stated that it was entering the conviction on “Count 5,” noting that the other counts would “all merge anyway.” Count 5 charged defendant with AUUW under section 24-1.6(a)(1)(3)(C) of the Criminal Code (720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2014)). The mittimus, however, incorrectly indicates that defendant was convicted of Count 1, UUWF, under section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2014)).

¶ 33 The record shows that during sentencing, the court and the parties were aware that defendant was being sentenced on the AUUW offense, as the court and the State discussed the Class 2 sentencing range of three to seven years for that offense. See 720 ILCS 5/24-1.6(d)(3) (West 2014). For the offense of UUWF, the Class 2 sentencing range is 3 to 14 years. See 720 ILCS 5/24-1.1(e) (West 2014).

¶ 34 When there is a conflict between the oral pronouncement of the trial court and the written order, the oral pronouncement controls. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87. This court has the authority to order the mittimus to be corrected without remanding. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 46; Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967). Accordingly, we direct the circuit court to correct the mittimus to reflect that defendant was

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convicted of Count 5, aggravated unlawful use of a weapon, under 720 ILCS 5/24-1.6(a)(1)(3)(C). The sentence of four and a half years and the Class 2 indication are correct.

¶ 35 For these reasons, we correct the mittimus and affirm the trial court's judgment in all other respects.

¶ 36 Affirmed; mittimus corrected.