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SIXTH DIVISION
Order filed March 9, 2018
Modified upon denial of rehearing April 13, 2018

No. 1-16-2331
2018 IL App (1st) 162331-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 15384
)	
MELVIN HILL,)	Honorable
)	James B. Linn,
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:* The trial court's finding that the victim's in-court identification of defendant was sufficiently attenuated from his unlawful arrest was not manifestly erroneous.

¶ 2 This is the second time this case is before this court. Following a bench trial, defendant Melvin Hill was convicted of vehicular hijacking, robbery, and unlawful restraint. On direct appeal, this court held that defendant was unlawfully arrested without probable cause and that the victim's lineup identification must be suppressed as fruit of the unlawful arrest. However, we concluded that the record was not sufficient to determine whether the victim's in-court identification was attenuated from the unlawful arrest. Accordingly, we vacated defendant's

convictions and remanded the case for an attenuation hearing to determine whether the victim's in-court identification was admissible as sufficiently attenuated from the unlawful arrest. We also ruled that the State failed to prove robbery beyond a reasonable doubt and that the unlawful restraint conviction was based on the same physical act as the vehicular hijacking, in violation of the one act one crime rule. We stated on direct appeal, "If the trial court finds that the victim's in-court identification of defendant was sufficiently attenuated from his illegal arrest to render it admissible, the court is directed to enter a judgment of conviction for vehicular hijacking and to conduct a new sentencing hearing to determine the appropriate sentence." Upon remand, an attenuation hearing was conducted, and the trial court found that the in-court identification was sufficiently attenuated from the illegal arrest, such that it was admissible. Defendant filed a motion to reconsider, claiming that there were inconsistencies in the victim's testimony at the attenuation hearing. His motion was denied, and a judgment for vehicular hijacking was entered against defendant. Defendant was sentenced to six years in the department of corrections. Defendant now appeals, arguing that the in-court identification was not sufficiently attenuated from the illegal arrest. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on August 23, 2011, and charged with aggravated vehicular hijacking, armed robbery, and aggravated unlawful restraint following an incident that occurred on August 11, 2011. The facts of this case were discussed in detail on direct appeal in *People v. Hill*, 1-13-1555 (2015) (unpublished under Supreme Court Rule 23). We will only discuss those facts necessary to this appeal.

¶ 5 Prior to trial, defense counsel filed a motion to quash arrest and suppress evidence, arguing that police had arrested defendant without probable cause, and that all evidence flowing

from the arrest should be suppressed. Following argument, the trial court denied defendant's motion to quash and suppress.

¶ 6 At defendant's bench trial, which began on October 31, 2012, Carey Jones (the victim), testified that at about 4:30 p.m. on August 11, 2011, he was driving his daughter's purple van when he saw some men he knew from the neighborhood. One of them, whom he knew only as Dwayne, asked the victim for a ride to a particular destination. When the victim agreed, Dwayne asked whether his friend could also get a ride because he was going in the same direction. In court, the victim identified the friend as defendant, and stated that he had not seen defendant before the date in question, and did not know his name. Dwayne, defendant, and two other men the victim did not know got into the victim's van. Dwayne promised the victim \$4 per person for the ride.

¶ 7 When the victim stopped at a gas station, defendant got out of the van, stating that he was going inside the station to cash in a lottery ticket. The victim testified that after defendant returned to the van, someone directed him to park the car, and one of the men in the backseat passed defendant a bag. The victim testified that defendant pulled a gun from the bag, pointed it at the victim, and ordered him to get out. After the victim got out, he saw defendant slide over to the driver's seat and drive away.

¶ 8 About two weeks later, the victim identified defendant in a lineup.

¶ 9 Chicago police detective Jeffrey Ignowski testified that he first became involved in the case on August 24, 2011, when he interviewed the victim and had him view a lineup, during which the victim identified defendant. Detective Ignowski testified that he learned from the victim that he and defendant had stopped at a particular gas station, so he retrieved surveillance videos from the day of the hijacking, as well as still images that were captured from the videos.

Detective Ignowski testified that the purple van was depicted in the videos. One video, which was shown to the trial court, depicted a dark-colored van pulling up to a pump and a number of men getting out of the van, including a man in a white shirt. Still images from the second video taken of the counter inside the station show defendant, in a white shirt, standing in the checkout line.

¶ 10 Detective Ignowski testified that when he interviewed the victim, he was already investigating defendant as a suspect in an unrelated robbery at a convenience store. He had viewed a surveillance video from the convenience store robbery that depicted the suspects and had received an anonymous tip naming two people allegedly involved in some recent robberies. Detective Ignowski compared the surveillance video from the convenience store with a photo of defendant contained in the police database and determined defendant was in the video. Based on the convenience store surveillance video and the anonymous tip, Detective Ignowski decided to place defendant in the lineup for the victim to view in this case.

¶ 11 At the close of evidence, the trial court found defendant guilty of the lesser-included offense of vehicular hijacking, robbery, and unlawful restraint. The court found the victim to be “credible and compelling,” and determined that defendant “carjacked [the victim] and took his money too.” However, the trial court found that there was reasonable doubt as to whether an actual firearm was used during the offense, and thus defendant was not convicted of aggravated offenses. The trial court sentenced defendant to concurrent terms of six, four, and two years’ imprisonment on the respective charges.

¶ 12 Defendant appealed, arguing that the trial court erred in denying his motion to quash and suppress evidence because the police did not have probable cause to arrest him and the court should have suppressed his lineup identification. We agreed. In *People v. Hill*, 1-13-1555 (2015)

(unpublished under Supreme Court Rule 23), this court held that defendant was unlawfully arrested without probable cause and that the victim's lineup identification must be suppressed as fruit of the unlawful arrest. However, we concluded that the record was not sufficient to determine whether the victim's in-court identification was attenuated from the unlawful arrest. In that same order, we also found that the conviction for robbery should be reversed since the State failed to prove defendant guilty beyond a reasonable doubt. Both parties also conceded that defendant's conviction for unlawful restraint should be vacated because it was based upon the same act that established his guilt of vehicular hijacking. Accordingly, we remanded the case for an attenuation hearing to determine whether the victim's in-court identification was admissible. We stated on direct appeal, "If the trial court finds that the victim's in-court identification of defendant was sufficiently attenuated from his illegal arrest to render it admissible, the court is directed to enter a judgment of conviction for vehicular hijacking and to conduct a new sentencing hearing to determine the appropriate sentence."

¶ 13 On May 12, 2016, an attenuation hearing was held. The victim testified that on the date in question, August 11, 2011, he was in his daughter's purple Dodge Caravan, when he was robbed by defendant. The victim identified defendant at the attenuation hearing and stated that he was "a hundred percent sure that's him." The victim testified that he was also certain of defendant's identity when he identified him in court during trial on October 31, 2012. The victim also stated that on the date in question, defendant approached his vehicle and asked if the victim would like to "make a couple of dollars" to give him a ride. Defendant got into the passenger seat, and three other men got into the back of his vehicle. The victim testified that he could see defendant, and that defendant was a foot away when he got in the vehicle. It was still light outside at 4:30 p.m.

The victim stated that they went to a gas station, where defendant and two other men exited the vehicle. The victim stated that he would be “right back.”

¶ 14 When the men returned, defendant got back into the front passenger seat, and the victim could see his face. Defendant was wearing the same clothes the entire time. The victim testified that the men asked him to pull over about a block away, whereupon one of the men handed a bag to defendant. Defendant produced a gun from the bag, and pointed it at the victim’s stomach. The victim testified that he looked at defendant’s face when defendant pointed the gun at him, and that it was still light outside. Defendant told the victim to “brake” himself. The victim told defendant that he did not have any money. The victim then got out of the car, and saw defendant slide into the driver’s seat and drive off.

¶ 15 On cross-examination, the victim testified that Dwayne did the negotiating for the cost of the ride on the day in question. The victim further testified that when defendant pointed the gun at him, he knew it was pointed at his stomach because he looked at it. The victim testified that he was using marijuana the day before the incident, but not on the day of the incident. He testified that he did not give any descriptions of the four men to police officers.

¶ 16 The trial court noted that the victim had described his daughter’s vehicle as a Dodge Caravan, but that the indictment read “Plymouth Voyager.” The trial court then took the case under advisement.

¶ 17 On July 7, 2016, the trial court stated that it reviewed the transcript of the attenuation hearing, and that there “was no indication that the lineup was any way suggestive, only that it was done without probable cause.” The trial court went on to address the discrepancy between the victim’s description of the car at the attenuation hearing, and at the indictment, stating, “[t]here are some differences between the cars, not distinct. He knew it was his daughter’s car.

They are both SUVs.” The trial court further stated, “I cannot say, looking at all of this and reflecting on it, that this identification was made because [defendant] was put in a lineup. I believe the witness was sincere and being as accurate as he could.” The trial court did not grant any relief as a result of the attenuation hearing, stating, “[t]he conviction stands.” Defendant was found guilty of vehicular hijacking.

¶ 18 Defendant filed a motion to reconsider, which the trial court denied. He was sentenced to six years in the department of corrections. Defendant now appeals.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant contends that the State did not meet its burden of proof at the attenuation hearing. Specifically, defendant argues that the State failed to prove by clear and convincing evidence that the victim’s in-court identification of defendant was “not influenced by his prior unlawfully obtained lineup identification of [defendant].”

¶ 21 An in-court identification may be admissible despite an illegal pre-trial identification if the State proves with clear and convincing evidence, based on a totality of the circumstances, that the witness is identifying defendant based solely on his memory of the events at the time of the crime. *People v. Smith*, 232 Ill. App. 3d 121, 130 (1992). “To determine whether the in-court identification had an independent basis, the court must consider the witness’ opportunity to view the offender at the time of the crime, the accuracy of the witness’ prior description of the offender, the witness’ level of certainty in identifying the offender, the length of time between the crime and the confrontation, and the witness’ acquaintance with the offender prior to the crime.” *Id.* Relying on cases from other states and several articles, defendant contends that these factors are not a reliable indicator because research shows that an in-court identification is influenced by any prior identifications. However, these factors are “indisputably the law in

Illinois for the purpose of assessing the reliability of an identification.” *People v. Polk*, 407 Ill. App. 3d 80, 109-11 (2010).

¶ 22 Defendant’s reliance on *People v. Lerma*, 2016 IL 118496, is misplaced. In *Lerma*, our supreme court found that the trial court abused its discretion in denying defendant’s request to allow expert testimony regarding the reliability of eyewitness testimony. In this case, no such request was made at trial or at the attenuation hearing. While that information may be admissible through expert testimony, the use of scientific articles on appeal for their substance and ultimate findings is not permitted because there is a concern regarding hearsay. See *People v Magee*, 374 Ill. App. 3d 1024, 1030 (2007) (striking portions of appellant’s brief that discussed psychological studies not presented at trial and that did not appear in the record on appeal).

¶ 23 We now determine whether the trial court’s finding that the State presented clear and convincing evidence that the victim identified defendant in court based solely on his memory of the crime was manifestly erroneous. See *Smith*, 232 Ill. App. 3d at 130 (trial court’s decision regarding attenuation of in-court identification was reviewed under a “manifestly erroneous” standard).

¶ 24 In this case, defendant’s testimony at both the trial and the attenuation hearing indicate that he had ample opportunity to view defendant at the time of the crime. He testified at both the trial and the attenuation hearing that he clearly saw defendant’s face, and interacted with him. Additionally, he stated that it was still light out at the time of the incident, and defendant spent at least ten minutes in the front passenger seat of the victim’s car. The victim also testified that defendant spoke to him before going into the gas station when he said he would be “right back,” and again when he directed the victim to their next destination after the gas station. The victim’s in-court identification happened in October 2012, approximately one year after the date of the

incident. The victim testified at the attenuation hearing that he was certain that his identification of defendant was accurate during the trial. Accordingly, we find that the trial court carefully considered all of the necessary factors, and that looking at the totality of the circumstances, it was not manifestly erroneous for the trial judge to rule that the State presented clear and convincing evidence that the victim identified defendant in court based solely on his memory of the crime.

¶ 25 We briefly note that defendant's arguments regarding the "burden shifting" and "independent investigation" of the trial court are without merit. Defendant contends that when the trial court announced its ruling, stating that it "cannot say *** that this identification was made because [defendant] was put in a lineup," it improperly shifted the burden away from the State's burden to prove by clear and convincing evidence that the in-court identification was not influenced by the unlawful arrest. At the attenuation hearing, it was up to the State to put forth clear and convincing evidence that the victim's in-court identification was based solely on his memory of the events at the time of the crime. The fact that the trial court made a comment indicating there was no evidence to suggest that defendant was identified in court merely because he had previously been identified in a lineup, supports its conclusion that the State proved by clear and convincing evidence that the in-court identification was based solely on his memory of the events at the time of the crime. This was not meant to shift the burden from the State, but merely a comment on the evidence.

¶ 26 And finally, the trial court did not improperly engage in its own investigation when it stated that it had checked on the difference between a Plymouth Voyager (as a detective described the van in both the indictment and to the grand jury) and a Dodge Caravan (as defendant described the van at the attenuation hearing). The trial court noted that the victim

knew it was his daughter's van. Additionally, at both the trial court and the attenuation hearing, the victim described the vehicle as a purple van, and the purple van was shown on the video surveillance at the gas station. Moreover, we defer to the trial court's assessment of the witnesses' credibility. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Accordingly, we find these arguments regarding the trial court's conduct to be without merit.

¶ 27 For the foregoing reasons, we affirm defendant's conviction and sentence for vehicular hijacking.

¶ 28 Affirmed.