2018 IL App (1st) 171952-U

SIXTH DIVISION
Originally filed: June 29, 2018
Modified upon Denial of Rehearing: July 27, 2018

No. 1-17-1952

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re V.H., a Minor,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County
	)	
Petitioner-Appellee,	)	
	)	No. 17 JD 1035
v.	)	
	)	
V. H.,	)	Honorable
	)	Stuart F. Lubin,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held*:** The evidence was sufficient to support the respondent's adjudication of delinquency for robbery beyond a reasonable doubt. However, the gang-related conditions of the respondent's probation were overbroad. We vacate those conditions and remand for further proceedings.

¶ 2 Respondent, V.H., appeals from the circuit court's judgment which adjudicated her a delinquent minor for committing one count of robbery and which sentenced her to 3 years' probation with conditions. Respondent argues (1) that there was insufficient evidence to find her

delinquent beyond a reasonable doubt and (2) certain conditions of probation which the court imposed, including that she have "no gang association," are unconstitutionally overbroad and vague, and violate her right to due process. We affirm in part, vacate in part, and remand in part.

¶ 3 In an amended petition for adjudication of wardship, the State alleged that the 16-year-old respondent committed one count each of armed robbery (720 ILCS 5/18-2(a)(1) (West 2016)), robbery (720 ILCS 5/18-1 (West 2016)), and theft (720 ILCS 5/16-1(a)(3) (West 2016)); and two counts of aggravated battery (720 ILCS 5/12-3.05(c) (West 2016)).

¶ 4 At the bench trial, Sandra Ortega testified that at approximately 9:00 p.m. on May 8, 2017, she was sitting on a Chicago Transit Authority (CTA) pink line train. A few stops after Ortega boarded, respondent, wearing black clothing consisting of a "tight T-shirt" that may have had silver writing on it, boarded the train with a friend who was wearing a white jacket. These two individuals sat next to Ortega. As the train approached the Pulaski Road station, Ortega saw respondent approach her. The three individuals were staring at each other when respondent, who was about three feet away, "came" and "snatched" the mobile phone which Ortega was holding in her lap. Ortega testified regarding her view of respondent as follows:

> "Q [(ASSISTANT STATE'S ATTORNEY)]. When the train stopped at Pulaski, you said you saw the minor respondent, along with the girl in the white, they were staring at you. Is that correct?
>
> A. Yes.
>
> Q. Did you have an opportunity to look at them?
>
> A. I did look at them when we came to the stop.
>
> Q. Okay. So when they stood up, you had an opportunity to see them and look at them as they were looking at you?

A. Yes. I looked at [respondent] and then I looked at her friend."

After respondent took Ortega's phone, she and her friend exited the train and ran down the station escalator. Ortega ran after them but quickly ran back to the train to retrieve her backpack. Exiting the train again, Ortega continued her pursuit of the friend, respondent having disappeared from her view. She caught up with the friend and physically detained her with "locked hands". After walking for a few minutes, Ortega saw respondent in "the corner of a dark alley" and tried to get her phone back. Respondent and the friend then "Maced" Ortega, dropped her to the ground, and began kicking and punching her. After a car pulled up to the scene, respondent and the friend ran away with the phone. Upon further questioning, Ortega testified that when the train was stopped, nothing obstructed her view of respondent. CTA video recordings showing the station platform and turnstiles at the time of the incident were played at trial. Ortega identified herself, respondent, and respondent's friend on the recordings. The recordings show two persons sprinting off the stopped train and Ortega chasing close behind, after running back onto the train briefly to retrieve her backpack. The lead person in the chase is wearing a black long-sleeved garment and black pants. About a week after the incident, Ortega met with a Chicago police detective and identified respondent as her assailant from a six-person photograph array.

¶ 5 On cross-examination, Ortega testified that shortly after the incident, but before her visit to the police station, she saw respondent "[o]n a Facebook post on ABC News" which she watched several times. The post contained a video story reporting that respondent was apprehended with respect to a different incident. The video showed respondent but did not report her name. Ortega further testified that before her phone was taken, she was not paying particular attention to respondent or her friend.

¶ 6 Chicago Police Officer Lucena testified that on May 29, 2017, he and his partner apprehended respondent, who was wanted as a robbery suspect. A can of Mace was recovered from respondent during a search. Respondent rested without calling any witnesses. Based on this evidence, the trial court adjudicated respondent delinquent on the robbery count but found her not guilty on the remaining counts.

¶ 7 The case proceeded to a dispositional hearing, where the trial court received a social investigation report. According to the report, respondent "denies personal gang affiliation but admits to associating with peers that are affiliated with the Traveling Vice Lords and New Breeds. She admits to spending all of her free time in their company for the last year. Mother expressed concern that [respondent] is allowing herself to be manipulated by these individuals. They engage in physical confrontations with other groups of girls and post them on social media." The probation officer recommended that the court order respondent to refrain from "gang-related contact and activities."

¶ 8 The trial court sentenced respondent to 3 years' probation with various conditions. In setting forth the conditions of her probation, the judge stated: "No gang membership. You can't be in a gang. You can't associate with anyone who you know is in a gang. You can't represent the gang in any way." The sentencing order included the handwritten notation "no gangs" and the probation order has a handwritten notation "no gang association." The court did not ask whether these probation conditions interfered with respondent's family, school, or employment relationships, although respondent signed the probation order, which states "[b]y signing, *** you are indicating that you have read and fully understand all of the conditions of your Probation." Respondent neither objected to the probation conditions at the dispositional hearing nor filed a post-adjudication motion. This appeal followed.

¶ 9 On appeal, respondent argues that the evidence was insufficient to find her adjudicated delinquent beyond a reasonable doubt because of the "unreliable" testimony of Ortega, the sole occurrence witness. In particular, respondent takes issue with Ortega's "suggestive" post-incident Facebook search.

¶ 10 "When reviewing the sufficiency of the evidence to sustain a verdict on appeal, the relevant inquiry 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. Pollock*, 202 Ill. 2d 189, 217 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). The same standard applies in delinquency proceedings: the State must prove the essential elements of the offense alleged in the delinquency petition beyond a reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47 (citing *In re W.C.*, 167 Ill. 2d 307, 336 (1995)). "A positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007).

¶ 11 To determine whether a witness's identification testimony is reliable, Illinois courts apply the five-factor test set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id*. at 567. The *Biggers* factors are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199–200; *Piatkowski*, 225 Ill. 2d at 567. Here, these factors favor the State.

¶ 12 The first *Biggers* factor is the witness's opportunity to view the offender during the commission of the offense. *Biggers*, 409 U.S. at 199. Respondent emphasizes admissions by

Ortega that she was not constantly observing the respondent all the time they were on the train together, and respondent suggests that Ortega was engrossed in listening to music through headphones and did not even look at respondent until the phone was taken from her. Even after the theft, respondent argues, Ortega's view was focused on the friend, not respondent. The confrontation, however, was neither fleeting nor instantaneous. Not only did Ortega view respondent at close range on the train, she observed respondent again mere minutes later when she caught up to her in the alley and was sprayed with Mace. Ortega's version of the facts was also corroborated by the train video. Based on this testimony, we find that a rational trier of fact could have found that Ortega had a sufficient opportunity to view her offender.

¶ 13 With respect to the second *Biggers* factor, respondent argues that Ortega was not sufficiently attentive to her surroundings at the time of her identification of respondent. Ortega testified that before the phone was taken, she was not paying attention to respondent and her friend. However, afterwards, it is clear that Ortega engaged in an immediate, directed, and concerted effort to recover her phone from respondent. She abandoned her backpack and exited the train, re-entered it to recover her backpack, and exited the train again, all while it was stopped at the station. Ortega then chased respondent and/or the accompanying friend down a staircase, through city streets, unwilling to merely give up the phone to a thief. She was then assaulted at close range by the two. Based on this evidence, we cannot say that Ortega's identification was undermined by any lack of attention on her part.

¶ 14 The third *Biggers* factor is the accuracy of the witness's prior description of the criminal. The record does not reveal whether Ortega's description ever included any information regarding her assailant's height, weight, or physical characteristics, as opposed to the style of clothes she wore. She was not asked to describe respondent's physical characteristics during her testimony.

Ortega did describe respondent's clothes, though, and the description varied, at one point describing a black T-shirt and at another, a black hoodie. As noted above, the video shows the lead person in the chase wearing a black long-sleeved top. Ortega's descriptions are sufficiently similar that we are not convinced that their slight differences undermine the overall accuracy of her identification. We find that this factor is neutral.

¶ 15 The fourth *Biggers* factor is the level of certainty of the identification. We acknowledge that Ortega's identification of certain characteristics of her assailant varied slightly over time, but those differences are slight and do not indicate lack of reliability or uncertainty. Further, Ortega never wavered in her identification of respondent, and consistently identified her in various settings: the photo array, the Facebook search, and in person in the courtroom. The posted comments to the ABC Facebook report led Ortega to additional photographs of respondent on her own Facebook page. Upon viewing these photographs, Ortega was not less certain of her identification, but was actually more certain of it. While we acknowledge respondent's concern that the Facebook postings were unduly suggestive, the full record does not support the conclusion that Ortega was simply fishing for someone to blame and found someone on Facebook to blame who had committed similar acts. We therefore find that this *Biggers* factor favors the State.

¶ 16 The final factor is the length of time between the occurrence and the identification. Here, Ortega viewed a news report on Facebook only a few days after the incident and immediately recognized the individual in the report as her assailant. She maintained this identification when she viewed the photo array a few days later. This length of time was not so great as to undermine the quality of the identification. See *People v. Slim*, 127 Ill. 2d 302, 313 (1989) (interval of 11 days "not significant"). Therefore, this factor favors the State.

¶ 17 The trial court weighed the evidence and found Ortega's identification reliable. After viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found beyond a reasonable doubt that respondent committed the robbery. The evidence was sufficient to support the adjudication of delinquency, as the victim had sufficient opportunity to view the offender, identified her in open court and in a pretrial photo array, and where a video recording corroborated the victim's testimony.

¶ 18 Respondent also contends that the probation conditions which the trial court imposed, including that she have "no gang association," constitute overbroad impairments on her rights under the United States Constitution. Specifically, she argues that the restrictions lack exceptions for "innocuous" situations such as contact with home, work, school, and family members. She also notes that she attends a school in a neighborhood with gang activity. She contends that this court's decision in *In re Omar F.*, 2017 IL App (1st) 171073 is controlling on the issue.

¶ 19 The State, in response, argues that respondent forfeited this claim of error by not raising it in the trial court. On the merits, the State contends that respondent's argument regarding her probation conditions amounts to an as-applied constitutional challenge, which fails because the record does not establish that her personal circumstances warrant any exceptions to the trial court's order. The State also contends that the *Omar F.* court's analysis was flawed and should not be followed. The State directs our attention to *In re R.H.*, 2017 IL App (1st) 171332, in which this court declined to follow *Omar F.* The *R.H.* court not only upheld a condition of a juvenile's probation which required the respondent to have no contact with "any gangs, guns, or drugs," but also disagreed with the *Omar F.* court's conclusion that it could reach the issue under the plain error doctrine. *R.H.*, 2017 IL App (1st) 171332, ¶ 44-45.

¶ 20 While briefing was ongoing in this case, the same panel in this division handed down an opinion in the case of *In re J'Lavon T.*, 2018 IL App (1st) 180028. In *J'Lavon*, the minor respondent was sentenced to a term of probation with conditions that included "no gang contact or activity" and "no gang involvement." This court found that gang-related conditions attached to probation were generally valid because they related to a juvenile's rehabilitation. *Id.* ¶ 14. Nonetheless, this court found that the condition was unconstitutionally overbroad. *Id.* ¶ 15. In so holding, this court specifically decided to follow *Omar F.* rather than *R H. Id.* ¶ 17. The *J'Lavon* court also found that it could excuse the respondent's forfeiture and review the conditions of the respondent's probation under the plain error doctrine. *Id.* ¶ 20.

¶ 21 The probation order in this case, and the underlying facts, parallel those in *J'Lavon.* We see no reason to depart from the reasoning and analysis of the *J'Lavon* court and therefore find that (1) the "no gang association" condition of respondent's probation is unconstitutionally overbroad; and (2) that the plain error rule excuses respondent's forfeiture of the issue. See *id.* ¶ 21. And like the *J'Lavon* court, we remand the cause so that the trial court may consider whether such restrictions are still warranted, and, if so, what appropriate exceptions related to family, school, employment, and the like should be applied. See *id.* We affirm the judgment of the trial court in all other respects. Based on this holding, we need not reach respondent's additional contention that the probation conditions violate her due process rights.

¶ 22 Affirmed in part; vacated in part; and remanded in part.