2019 IL App (1st) 163038-U

No. 1-16-3038

Order filed February 22, 2019

Fifth 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. 15 CR 6803
	)	
DEANDRE MILLER,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction of the crime of armed habitual criminal is affirmed over his challenge to the reliability of his identification by an eyewitness police officer. Trial counsel was not ineffective for failing to file a motion to suppress the officer's identification.

¶ 2 Following a bench trial, defendant Deandre Miller was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to six years in prison. On appeal, defendant challenges the sufficiency of the evidence, arguing that his

conviction should be reversed because it depended on a police officer's unreliable identification of him as the man who threw a gun while running from the police. In the alternative, defendant contends that trial counsel was ineffective for failing to file a motion to suppress the police officer's identification. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of April 1, 2015. Following his arrest, defendant was charged by information with one count of AHC, four counts of unlawful use of a weapon by a felon (UUWF), and four counts of aggravated unlawful use of a weapon (AUUW). Prior to trial, the State nol-prossed two of the four counts charging UUWF and all four counts charging AUUW. The State proceeded to trial on one count of AHC and two counts of UUWF.

¶ 4 At trial, Chicago police officer Timothy Lammert testified that about 9:40 p.m. on the night in question, while on patrol in a marked squad car with three other officers, he heard a dispatch report of a man with a gun in the area of 5800 South Indiana Avenue. Lammert agreed that the dispatch included "descriptions," but did not elaborate as to what those descriptions were. Lammert turned his car around and drove toward the area of 57th Street and State Street, where, less than a minute earlier, he had seen "people *** that matched the description." In court, Lammert identified defendant as one of those people.

¶ 5 When Lammert arrived at the area of 58th Street and State Street, he saw defendant and two other people "walking southbound in the alley of 58th and State." Lammert stopped his car "right around the alley," got out, stated his office, and asked the group to stop. Defendant and the two other people immediately ran eastbound on 58th Street.

¶ 6 Lammert and one of his partners pursued defendant, who was running alone and holding the right side of his waistband. Lammert saw defendant throw an object, which he believed was a

weapon. The object hit a fence, making a metallic rattling noise. While Lammert's partner continued chasing defendant, Lammert stopped, went around the fence, and recovered the object. The object, which Lammert never lost sight of, was a loaded 9 millimeter handgun. Lammert made a broadcast that he saw defendant throw an object over the fence and that he had recovered it. He then waited for his fellow officers to come to him. Fewer than five minutes later, Lammert saw defendant again. Defendant was being detained by other officers. At that time, Lammert identified defendant as the man who threw the handgun "wearing the black clothing."

¶ 7 On cross-examination, Lammert agreed that the dispatch call he heard "was for two people," but that when he responded to the call, he saw three black men walking and that three men were arrested. When asked whether he submitted the recovered handgun for fingerprint or DNA testing, Lammert answered, "I thought I did. I believe so, yes." Lammert agreed that it was dark out during the incident and that he had never before met defendant or the two other men who were with him. Lammert acknowledged that when he testified in a "previous proceeding regarding this case," he had said defendant ran westbound on 58th Street.

¶ 8 On redirect examination, Lammert testified that although it was dark out, there were streetlights, and he did not have any difficulty seeing.

¶ 9 Chicago police officer H. Gomez testified that on the night in question, he monitored a flash message from Officer Lammert. Then, about 9:55 p.m., he and his partner detained a man. In court, Gomez identified that man as defendant. Gomez explained that after defendant was detained, he and his partner took defendant to see Lammert, who "positively ID'd him" and "said it was him that he was chasing." Gomez thereafter took defendant to the police station for processing.

¶ 10 The State entered into evidence a certified copy of conviction reflecting that defendant was convicted of UUWF in 2015 and of possession of a controlled substance in 2006.

¶ 11 Defense counsel made a motion for a directed finding. In support of the motion, counsel argued that while the original dispatch reported two men, ultimately, three men were arrested; that the officers had not met defendant before; that it was dark out; and that the chase was quick. Counsel also noted that Lammert had been impeached with prior inconsistent testimony regarding which direction the suspects ran and suggested, "Perhaps he was simply confused in identifying Mr. Miller as opposed to anyone else today."

¶ 12 The trial court denied the motion.

¶ 13 Defendant did not testify or present any evidence.

¶ 14 Following closing arguments, the trial court found defendant guilty of AHC and both counts of UUWF. In the course of announcing its decision, the court commented that the "the only real substantive impeachment" of Lammert was his prior testimony about the direction defendant ran. The court found Lammert to be a "highly persuasive witness," stating, "I viewed his demeanor and manner while testifying *** and I just didn't feel like he was gilding the lily in any way during the course of his testimony." With regard to Lammert's identification of defendant, the court stated as follows:

> "He had identification circumstances while it was a show-up or immediately following the time when the officer testified that he [had] seen the defendant throw the gun, I will indicate that the defendant was wearing clothing that might have also been a factor in the identification, but the officer was clear

> and unequivocal in his identification of the defendant, the man he saw throw the article[.]"

¶ 15 Defendant filed a motion for a new trial, asserting, among other things, that the trial court erred in finding Lammert's identification credible. When presenting the motion, defense counsel argued that this was a case of mistaken identification as "somebody else" threw the handgun. Counsel noted that Lammert did not know the person he was chasing, that his view of the person he was chasing was "from behind," that his attention was on the object the suspect threw, and that he only observed the suspect for a short time. Counsel again noted that while Lammert's trial testimony was that the offender ran eastbound, his prior testimony was that he ran westbound. The trial court denied the motion.

¶ 16 The trial court merged all three guilty findings into the count charging AHC and imposed a sentence of six years, to be followed by three years of mandatory supervised release.

¶ 17 On appeal, defendant first challenges the sufficiency of the evidence, arguing that his conviction should be reversed because the State failed to prove he was the person that threw the gun over the fence while being pursued by the police. Defendant maintains that Officer Lammert's identification of him was weak because Lammert did not have a good opportunity to view the offender. Defendant notes that Lammert never said he saw the offender's face, and asserts it would be unreasonable to infer that Lammert saw defendant's face, as Lammert was driving when he first saw the group of men, it was nighttime, there was no evidence of how close Lammert was to the men in the alley when he stopped the police car, there was no evidence regarding whether the men were facing the police car when Lammert stopped, and chasing people involves looking at their backs, not their faces. Further, defendant argues that there was

no evidence as to Lammert's degree of attention, that Lammert's description of the offender as a black man in black clothing was generic and vague, and that Lammert did not say how confident or certain he was in his identification. Finally, defendant asserts that Lammert's identification of him was unreliable because it was based on a suggestive show-up.

¶ 18 When reviewing the sufficiency of the evidence, 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 19 To assess identification testimony, this court applies the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *People v. Branch*, 2018 IL App (1st) 150026, ¶ 25. Those factors are: (1) the opportunity that 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; and (5) the length of time between the crime and the identification. *Id.*

¶ 20 We find that the majority of the *Biggers* factors favor the State in this case.

¶ 21 First, Lammert had sufficient opportunity to observe the offender who threw the gun. We disagree with defendant's assertion that because Lammert never said he saw defendant's face and did not provide any identifying characteristics, "evidence on this point is completely lacking." To the contrary, Lammert testified that although it was dark out, there were streetlights and he did not have any difficulty seeing. He stopped his car "right around" the alley where the offender was walking. Then, when he announced his office and the offender immediately started running, he gave chase. While the encounter Lammert described may have been brief, the brevity of a witness's observation does not undermine his identification testimony. *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006). Moreover, the positive identification of an accused can be sufficient even if the witness gives only a general description of an offender. *Slim*, 127 Ill. 2d. at 309. Thus, although Lammert did not mention any "identifying characteristics" in his testimony, that does not mean he did not have an adequate opportunity to view the offender at the time of the offense.

¶ 22 As to the second factor, we disagree with defendant's assertion that there was no evidence as to Lammert's degree of attention. This was not a chance encounter between a civilian witness and an offender, where the witness's attention may have been elsewhere until the instant the crime was committed. Rather, when Lammert observed the offender and the two other men in the alley, he was specifically looking for men who matched a description given in a police dispatch. Then, Lammert was actively pursuing one of those men when the man threw a handgun. These circumstances demonstrate that Lammert's attention was highly focused. Moreover, Lammert testified to details about the encounter, in particular, the offender's holding

of the right side of his waistband before throwing the handgun, that demonstrate his high degree of attention at the time. See *Branch*, 2018 IL App (1st) 150026, ¶ 26.

¶ 23 Third, Lammert's prior description of the offender as a black man wearing black clothing accurately matched defendant's appearance when Lammert identified him at the show-up. While defendant may be correct that Lammert's prior description was "vague" and "generic," we cannot say that it was inaccurate. As noted above, a general description of an offender may nevertheless be found sufficient. *Slim*, 127 Ill. 2d at 309.

¶ 24 The fourth *Biggers* factor is the level of certainty demonstrated by the witness at the identification. As defendant accurately observes, Lammert never said how confident or certain he was in his identification. On the other hand, the State is also correct that Lammert never wavered in his identification, and that the trial court found him to be "clear and unequivocal in his identification of defendant." We find that this factor is neutral.

¶ 25 Fifth, Lammert testified that fewer than five minutes passed between the time of the encounter and his identification of defendant at the show-up. Defendant concedes that the timing factor thus weighs in favor of the State, and we agree.

¶ 26 Defendant makes much of the fact that Lammert identified defendant in a show-up. He argues that show-ups in general are unduly suggestive, and that here, the suggestiveness of the show-up, combined with other factors, rendered Lammert's identification of him unreliable, both at the scene and in court. However, our supreme court has held that prompt show-ups near the scene of a crime are acceptable police procedure, as they are designed to aid the police in determining whether to continue or to end the search for culprits. *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). Also, show-ups are not *ipso facto* unduly suggestive just because defendants are

in police custody when they are conducted. *People v. Jones*, 2017 IL App (1st) 143766, ¶ 30. Rather, show-ups implicate the due process clause only when they are so unnecessarily or impermissibly suggestive that there exists " 'a very substantial likelihood of irreparable misidentification.' " *Id.* ¶ 27 (quoting *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994)). Determining whether an identification procedure comports with due process " 'involves an inquiry into both the suggestiveness of the identification and the necessity of the suggestive identification.' " *Id.* ¶ 28 (quoting *People v. Follins*, 196 Ill. App. 3d 680, 688 (1990)).

¶ 27 Here, we cannot find that the show-up was unnecessarily suggestive. Based on the record, the police had ample reason to conduct a show-up rather than wait to assemble a photo array or a lineup. Lammert witnessed a suspect throw a gun while running from the police. Within minutes, another officer detained defendant. Lammert's show-up identification allowed the police to determine that they did not need to continue to search for a culprit. Although defendant was in police custody during the show-up, this factor alone does not render the identification procedure unduly suggestive. *Id.* ¶ 30.

¶ 28 Finally, we are mindful of defendant's observation that Lammert testified that the three men in the alley ran eastbound, and also testified that he chased only defendant, who was running alone. Defendant asserts that this is an "inconsistency" that casts doubt on Lammert's identification. We disagree, as it is not at all impossible that Lammert could have chased only one of three suspects, even if all three of those suspects fled in the same direction, or that the suspects could have parted ways at some point during the chase. We note that when a true inconsistency was brought to the trial court's attention, *i.e.*, Lammert's prior testimony that the offender ran *westbound*, the trial court acknowledged the "substantive impeachment." Yet,

despite this impeachment, the court specifically found that Lammert was a highly persuasive witness who was clear and unequivocal in his identification of defendant. The trial court was well aware of the defense's position that Lammert's identification was questionable and found defendant guilty nevertheless. We will not substitute our judgment for that of the trier of fact on this issue of credibility. *Brooks*, 187 Ill. 2d at 131; *Branch*, 2018 IL App (1st) 150026, ¶ 29.

¶ 29 Where the majority of the *Biggers* factors weigh in favor of the State, we do not find Lammert's identification "so unsatisfactory, improbable or implausible" as to create a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Defendant's challenge to the sufficiency of the evidence fails.

¶ 30 Defendant's second contention on appeal is that trial counsel was ineffective for failing to file a motion to suppress Lammert's identification, where it was the only evidence connecting him to the offense and was based on a suggestive show-up. Defendant argues that due to the suggestive circumstances of the show-up, there was a reasonable probability that a motion to suppress would have been granted. Therefore, he asserts, counsel's failure to file such a motion was objectively unreasonable. Defendant further argues that he was prejudiced by counsel's failure to file a motion to suppress, since without Lammert's identification, nothing would have tied him to the offense. As relief, defendant asks that this court reverse his conviction and remand for a suppression hearing.

¶ 31 To succeed on a claim of ineffective assistance of counsel, a defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that absent counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). Where a

claim of ineffective assistance of counsel is based on counsel's failure to file a motion to suppress, "in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 32 The success of a suppression motion depends on the defendant "proving that the identification procedures were so unnecessarily suggestive as to give rise to a substantial likelihood of an irreparable misidentification." *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005). A court looks to the totality of the circumstances in evaluating such a claim (*id.*), and the "suggestiveness" requirement involves inquiring into both the suggestiveness of the identification and the necessity of the suggestive identification (*Follins*, 196 Ill. App. 3d at 688). While show-ups are generally recognized as being suggestive, courts have found them not to be unnecessarily suggestive in certain circumstances. *Id.* For instance, courts have found show-ups to be justified in "fleeing-offender" situations because they facilitate the immediate release of innocent suspects and enable the police to determine whether they must resume searching for the fleeing offender. *Id.*

¶ 33 We find that any motion to suppress Lammert's identification of defendant would not have been meritorious. The instant case involved a "fleeing-offender" situation where the police were justified in using a show-up identification procedure. In addition, as discussed at length above, the resulting identification satisfied the majority of the *Biggers* factors. Given these circumstances, a motion to suppress the identifications would have failed. Therefore, defendant

cannot establish prejudice (see *Henderson*, 2013 IL 114040, ¶ 15), and we reject his claim of ineffective assistance of counsel.

¶ 34 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 35 Affirmed.