

2019 IL App (1st) 170743-U

No. 1-17-0743

Order filed March 29, 2019

Fourth 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. 16 CR 1065
	)	
DAMENION THOMAS,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE GORDON delivered the judgment of the court.  
Presiding Justice McBride and Justice Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction affirmed where the eyewitness's in-court identification was based on observations independent of the suppressed out-of-court identification procedure.

¶ 2 Following a bench trial, defendant Damenion Thomas was found guilty of one count of armed robbery and one count of aggravated unlawful restraint. The court merged the counts and sentenced defendant to 10 years' imprisonment for armed robbery. On appeal, defendant argues the trial court erred in denying his motion to suppress a witness's in-court identification of him

because the State failed to show the in-court identification was independent of an unduly suggestive pretrial identification procedure that the court suppressed. We affirm.

¶ 3 Defendant was charged by information with one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2016)) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2016)), arising from an incident in Chicago on January 4, 2016. Prior to trial, defendant filed a motion to suppress his pretrial identification by the complaining witness, Germaine Bonds, and any in-court identification by Bonds that lacked an independent basis from the pretrial identification procedure.

¶ 4 At a hearing on the motion, the defense called Chicago police officer Kevin Paruszkiewicz, who testified that at approximately 9:30 a.m. on January 4, 2016, he responded to a call reporting a robbery in the area of 71st Street and Emerald Avenue and spoke with Bonds. Bonds described the offender as male, black, and “between five four and five six.” She also described him as having short dreadlocks and wearing a gray sweater and black jogging pants with no jacket. This information matched the description of an individual whom Officer Fiore had in custody at a hospital.<sup>1</sup> About 20 minutes after the robbery, Paruszkiewicz showed Bonds a single photograph of an individual named Damenion Thomas from a computer in his squad car. Bonds identified the individual as the man who robbed her, but stated that his hair looked different in the photograph. Paruszkiewicz was not aware that Bonds was ever taken to a physical showup or lineup or shown a photo array.

¶ 5 Defendant rested, and the State moved for a directed finding that Bonds’s pretrial identification of defendant was admissible. The trial court denied the State’s motion and stated

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<sup>1</sup> Officer Fiore’s first name does not appear in the record.

that the pretrial identification procedure was unduly suggestive. The State then called Bonds to show that her in-court identification would be admissible independent of the pretrial identification.

¶ 6 Bonds testified that at approximately 9 a.m. on January 4, 2016, she stopped at a grocery store on 71st and Halsted Street on her way to the daycare center where she taught. Inside the store, she saw a man, whom she identified in court as defendant, who “had a bunch of scars and scratches all over him” and was not wearing a coat despite the cold weather. Bonds watched defendant, who “kept pacing back and forth and watching people,” and at one point she was within one foot of him. After five or six minutes, she bought water, breakfast snacks, and some toys for the children at the daycare center, and she put these items in a black plastic bag. Bonds exited the store, “saw the defendant look out behind [her],” and headed east on 71st.

¶ 7 As Bonds approached an alley, she saw someone running up beside her from the right, within half a foot of her. The man, whom Bonds again identified in court as defendant, grabbed her by the collar and told her to come with him. Bonds “turned around and snatched away,” and as she turned, she saw a pocket knife in defendant’s hand. She screamed, and two men passing by in a white truck jumped out to help her. Defendant saw the two men, grabbed Bonds’s black plastic bag, and ran south down Emerald. Bonds returned to the store and called the police, describing the offender to them as light-skinned, thin-built, and “five four to five six.” She also said he had short dreadlocks and was wearing a gray sweater and black jogging pants, but no jacket or coat. Additionally, Bonds testified that defendant had nothing covering his face, and the lighting that morning was “fine.” About 20 minutes after Bonds was robbed, police officers met her at the daycare center and asked her to review a single photograph on a computer. Without

hesitation, Bonds told the officers that the photograph depicted defendant, but mentioned his hair was cut off in the photograph.

¶ 8 On cross-examination, Bonds testified that when she walked into the store, defendant was standing by a chip rack. She “looked dead in his face” and passed by him immediately. Defendant followed her as she shopped and was behind her when he came within one foot of her. Bonds testified that she saw defendant’s face again when she returned to the front of the store and saw him walking back and forth. Although there were two other customers there when Bonds entered the store, only she, defendant, and the employees remained when she left. “[F]our or five minutes at the most” after Bonds left the store, defendant approached her from the street side of the sidewalk and grabbed her collar. Bonds turned around and was “face to face” with defendant, who was pointing a knife approximately two inches long at her. Bonds testified that she was not focused on the knife although she was afraid, and that the encounter lasted two or three minutes.

¶ 9 The parties rested. The State argued it had met its burden of proof in showing Bonds made her in-court identification of defendant based on her independent recollection of the incident and not based on Paruskiewicz’s single-photo identification procedure. The fact that she had identified defendant’s hair as being different than the hair in the photograph was evidence of this independent recollection. According to the State, Bonds “had ample opportunity to observe this offender,” and she gave a detailed description of how defendant appeared, what he was wearing, and where he ran after taking her bag. Defense counsel argued that Bonds was “a bit contradictory” in describing the length of the encounter, which had not “lasted for all that long.” He also suggested that the knife pointed at Bonds was distracting. Because the single-

photograph identification procedure was impermissibly suggestive, defense counsel requested that the court suppress “any potential in-court identification.”

¶ 10 The trial court found the single-photograph procedure in which Bonds identified defendant out of court was unduly suggestive, and excluded it “for purposes of trial.” Nonetheless, the trial court held that Bonds “had ample opportunity to see the offender not only during the course of the offense,” but also when she was in the store. The court noted that Bonds recalled defendant’s location in the store, that she noticed him because of his “lack of a coat in the cold weather,” and that she watched him due to his “peculiar behavior pacing by the front of the store.” According to the court, Bonds “was paying fairly close attention to this individual,” and indicated her certainty when identifying him. There also was no “long delay” between the robbery and the time of the single-photograph identification. As to Bonds’s time estimates, the trial court found Bonds had accurately “indicated it all happened fairly fast,” even though “she wasn’t very succinct on how many minutes would have passed by.” The trial court held that because Bonds’s recollection was independent of the unduly suggestive pretrial identification procedure, she would be able to identify defendant in court. The court denied defendant’s motion to suppress any in-court identification, and the case proceeded to trial on the same day.

¶ 11 At trial, the parties adopted Bonds’s testimony from the motion to suppress hearing but did not adopt the testimony of Paruszkiewicz. The State recalled Bonds and entered into evidence a video depicting the outside of the grocery store where Bonds saw defendant. We have viewed the video, which depicts a man wearing a gray sweatshirt and black pants walking across the street and entering the store from 9:19 to 9:20 a.m. Bonds identified this man in court as defendant, though his face is not clear in the video. At 9:22 a.m., a woman carrying a pink purse,

whom Bonds identified as herself, also walks into the store. From 9:23 to 9:24 a.m., Bonds leaves the store holding her pink purse and a black bag, and she walks down the sidewalk, toward the left side of the screen and out of the camera's view.

¶ 12 In the video, as Bonds is leaving, the man identified as defendant is seen holding the grocery store's door open and looking in her direction. He appears to pull something from his waistband before he exits the store and runs down the middle of the street in the same direction as Bonds. At about 9:25 a.m., Bonds can be seen again walking from the left side of the screen, looking back down the street, and then reentering the store. Bonds testified that the white truck that had stopped to help during the robbery can also be seen passing by in the video. She also stated that she had never seen defendant before the day of the robbery. On cross-examination, Bonds testified that while walking back to the store after the robbery, she turned around and saw defendant run east in the middle of the street on 71st before turning south on Emerald.

¶ 13 Chicago police officer Thomas Laureto testified that at approximately 9:15 a.m. on January 4, 2016, he responded to a report of a suspicious person in an area about "[o]ne block away, half a block away" from the intersection of 71st and Halsted. He saw an individual, whom he identified in court as defendant, about 30 feet away in an open lot on 71st and Emerald. Defendant, who was wearing black sweatpants and a gray sweatshirt and "acting erratically," threw something resembling a cell phone and went westbound out of sight. When Laureto found defendant again, Fiore had detained him and he was no longer wearing his gray sweatshirt, but had pants and shoes on, and his hair was in short black braids. An ambulance transported defendant to a hospital, and the officers arrested him. On cross-examination, Laureto testified

that he could not remember seeing a plastic bag in defendant's hand or finding a knife on defendant when he searched him.

¶ 14 The State rested and the court denied defendant's motion for directed finding. Defendant rested without presenting any evidence.

¶ 15 The trial court found defendant guilty of armed robbery and aggravated unlawful restraint. The court stated it was "convinced beyond a reasonable doubt" that defendant robbed Bonds, and that Bonds had ample opportunity to observe defendant and her account was corroborated by the video evidence. Although the robbery occurred during a short period of time, Bonds and defendant "were within six inches of one another, looked at each other in the face in broad daylight, and this was somebody that she had seen before, just moments before at the store."

¶ 16 Defense counsel filed a motion to reconsider, arguing the trial court erred in admitting Bonds's in-court testimony because "there was no real way to separate" it from the suppressed out-of-court identification. According to defense counsel, defendant was not proven guilty beyond a reasonable doubt because Bonds was the only eyewitness presented, and she did not have an opportunity to observe the person who robbed her. The court denied defendant's motion, merged the counts, and sentenced defendant to 10 years' imprisonment for armed robbery.

¶ 17 On appeal, defendant argues the State failed to show Bonds's in-court identification was independent of the unduly suggestive single-photo identification procedure, and therefore, the trial court erred in denying his motion to suppress Bonds's in-court identification. Defendant additionally asserts that because this improperly admitted in-court identification was the only evidence at trial identifying him as the offender, a reversal of the denial of his motion to suppress

would also necessitate a reversal of his conviction. The State responds that the trial court properly found there was an independent basis for Bonds's in-court identification, as Bonds had ample opportunity to observe defendant and confidently provided a detailed description of him.

¶ 18 “Criminal defendants have a due process right to be free from identification procedures that are unnecessarily suggestive and conducive to irreparable mistaken identification.” (Internal quotation marks omitted.) *People v. Jones*, 2017 IL App (1st) 143766, ¶ 27; see U.S. Const., amend. XIV. To suppress an identification, a trial court must find “(1) that the confrontation was unduly suggestive, and (2) that the identification was not independently reliable.” *People v. Lacy*, 407 Ill. App. 3d 442, 459 (2011).

¶ 19 The defendant has the burden of proving that the pretrial identification was impermissibly suggestive. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). Once the defendant has established an identification was unduly suggestive, “the State may nevertheless overcome that obstacle, by a clear and convincing showing, based on the totality of the surrounding circumstances, that ‘the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime.’ ” *People v. McTush*, 81 Ill. 2d 513, 520 (1980) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 122 (1977)). “An in-court identification is admissible regardless of the suggestiveness of pretrial identification procedures when \*\*\* it is shown \*\*\* that the identification was based on observations of the defendant other than during the arguably improper pretrial identification.” *People v. Nunn*, 101 Ill. App. 3d 983, 991 (1981).

¶ 20 “ ‘[R]eliability is the linchpin in determining the admissibility of identification testimony.’ ” *McTush*, 81 Ill. 2d at 521 (quoting *Manson*, 432 U.S. at 114). When determining whether a witness' identification has an independent origin, the court considers:

“the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *McTush*, 81 Ill. 2d at 521; see also *Manson*, 432 U.S. at 114 (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

Illinois courts will also consider whether the witness had “ ‘any acquaintance with the suspect prior to the crime.’ ” *McTush*, 81 Ill. 2d at 521 (quoting *People v. Blumenshine*, 42 Ill. 2d 508, 514 (1969)). “These factors are to be weighed against the corrupting effect of the suggestive identification itself.” *People v. Wallace*, 210 Ill. App. 3d 325, 338 (1991). When affirming the trial court’s denial of a motion to suppress, the reviewing court may consider evidence presented both at trial and at the suppression hearing. *Brooks*, 187 Ill. 2d at 127-28; *People v. Caballero*, 102 Ill. 2d 23, 34-36 (1984); *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 28.

¶ 21 Defendant does not challenge the sufficiency of the evidence at trial as to the elements of armed robbery and aggravated unlawful restraint, and he does not dispute whether Bonds’s in-court testimony sufficiently supported his conviction. Rather, defendant argues that if the trial court had suppressed Bonds’s in-court identification testimony, there would not have been sufficient evidence at trial to identify him as the offender. The first prong in considering this argument, whether Bonds’s identification of defendant was properly found to be unduly suggestive, is not raised by the State on appeal. Therefore, we must determine whether the State presented clear and convincing evidence that, based on the totality of the surrounding circumstances, Bonds identified defendant solely on the basis of her memory of events at the time of the crime. *McTush*, 81 Ill. 2d at 520.

¶ 22 When considering the first factor, “the opportunity of the witness to view the criminal at the time of the crime” (*McTush*, 81 Ill. 2d at 521), “courts look at whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation” (internal quotation marks omitted) (*People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40). Bonds’s testimony and the video evidence showed that it was daytime when the robbery occurred, and Bonds testified that the lighting was “fine.” Bonds looked defendant “dead in his face,” which was not covered, when she entered the grocery store. Defendant followed Bonds through the store and at one point was within one foot of her. When the robbery occurred, defendant was within half a foot of her, and she was “face to face” with him. Bonds testified that the robbery lasted about two or three minutes, although video evidence suggested the incident lasted less than two minutes. Based on Bonds’s testimony and the corroborating evidence, we find this factor weighs in favor of finding Bonds could identify defendant in court based on her memory of events at the time of the crime. *Wallace*, 210 Ill. App. 3d at 338-39 (finding a witness had a “good opportunity” to observe a robber, where she saw his face for a “‘second or two’ ” during the robbery, and where she had seen the offender earlier that same evening).

¶ 23 Regarding the second factor, Bonds’s degree of attention, Bonds testified that when she entered the store, defendant was standing near a chip rack, and she looked him “dead in his face.” Defendant caught her attention in the grocery store because he was not wearing a coat despite the cold weather, and because he “had a bunch of scars and scratches all over him.” Bonds also noticed him because he was “pacing back and forth and watching people.” Bonds had the opportunity to observe defendant’s face in close proximity both in the grocery store and during the robbery. Although defendant was pointing a knife at her and she was afraid, Bonds

testified that her attention was not focused on the knife. *People v. Robinson*, 206 Ill. App. 3d 1046, 1052 (1990) (“Excitement, rather than detract from an identification, could increase the powers to observe.”). Bonds provided reasons why defendant caught her attention, as well as where defendant was positioned in the store and during the robbery. Accordingly, we find this factor also weighs in favor of finding Bonds’s testimony had an independent origin. *People v. Simpson*, 172 Ill. 2d 117, 141 (1996) (finding a witness had a “high degree of attention to defendant,” who stood in front of her at a service desk at the time of the confrontation).

¶ 24 As to the third factor, Bonds’s description of defendant was detailed and corroborated by other witnesses and video evidence. When reporting the robbery to police officers, Bonds described the offender as light-skinned, thin-built, and “five four to five six.” She stated he had short dreadlocks and was wearing a gray sweater and black jogging pants with no jacket or coat. At the suppression hearing, Officer Paruszkiewicz testified that this description matched a separate description he received of defendant. *Brooks*, 187 Ill. 2d at 127-28 (stating a reviewing court can consider evidence both at trial and the suppression hearing when affirming the denial of a motion to suppress); see also *Caballero*, 102 Ill. 2d at 34-36. Officer Laureto testified at trial that he also observed defendant wearing a gray sweater and black jogging pants, and the video evidence depicted a man wearing similar clothing. Given the accuracy and detail of Bonds’s description of defendant, and the evidence corroborating this description, this factor weighs in favor of finding Bonds’s identification was independently reliable. *People v. Murray*, 262 Ill. App. 3d 1056, 1058, 1066 (1994) (finding a witness met the accurate description factor where she only described the offender as “black, husky, and about 5 feet 7 inches tall”).

¶ 25 As to the fourth and fifth factors, although Bonds identified defendant in court more than one year after the robbery, she did not express any doubt in identifying him. *Simpson*, 172 Ill. 2d at 141-42 (witness had adequate independent recollection where she identified the offender in court with confidence, even though the in-court identification occurred 21 months after the offenses). Moreover, we note that Bonds gave a detailed description of defendant's appearance and clothing before she identified him in the suppressed photo identification procedure, which occurred only 20 minutes after the robbery. Defendant argues this court should give less weight to Bonds's confidence in identifying him as the offender because scientific evidence has shown that a witness's confidence in an identification is "essentially worthless." In support of this argument, defendant additionally cites a newspaper article discussing scientific studies. However, Illinois courts still recognize the level of certainty as a factor in considering the independence of an in-court identification (*Ortiz*, 2017 IL App (1st) 142559, ¶ 22), and defendant did not attempt to enter into evidence the article or any other evidence regarding the psychology of eyewitness identifications (*People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994) ("[T]his court will not take judicial notice of critical evidentiary material not presented in the court below \*\*\*.")). Accordingly, we will consider Bonds's certainty alongside the other five factors, and find that this factor weighs in favor of admitting Bonds's in-court identification.

¶ 26 As to the sixth factor, Bonds did not know defendant prior to the robbery, but saw him for a prolonged amount of time while in the grocery store. While this single factor may not be dispositive, it does not weigh against finding Bonds's in-court identification reliable. Thus, the majority of the remaining factors weigh in favor of admitting Bonds's in-court identification.

¶ 27 To the extent defendant asks us to reevaluate the reliability of Bonds's testimony by comparing Bonds's estimates of the robbery's timeframe to the actual timeframe depicted in the video evidence, we note that the trial court found these apparent discrepancies did not affect the reliability of her testimony. The court observed that Bonds accurately stated the robbery "happened fairly fast," even if "she wasn't very succinct on how many minutes would have passed by." Giving proper deference to this credibility determination, we find the trial court did not err in finding Bonds's testimony credible. *People v. Faber*, 2012 IL App (1st) 093273, ¶¶ 50, 54 ("It is within the province of the fact finder to determine the credibility of witnesses \*\*\*.").

¶ 28 Considering the six factors for determining the reliability of Bonds's testimony, as weighed against the corrupting effects of the suppressed pretrial identification procedure and the totality of the circumstances, we find the State presented clear and convincing evidence showing that, Bonds identified defendant "solely on the basis of [her] memory of events at the time of the crime." (Internal quotation marks omitted.) *McTush*, 81 Ill. 2d at 520. Therefore, the trial court properly held Bonds's in-court identification was reliable and based on observations made independently of the suppressed pretrial identification. As noted, defendant does not dispute whether Bonds's in-court identification testimony sufficiently supported his conviction, nor does he challenge the sufficiency of the evidence establishing the elements of armed robbery and aggravated unlawful restraint. Because the trial court properly denied defendant's motion to suppress Bonds's in-court identification, defendant's conviction must be affirmed.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 30 Affirmed.