

FIRST DIVISION
November 13, 2012

No. 1-11-0402

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).

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. 09 CR 14132
)	
JULIAN HERNANDEZ,)	Honorable
)	Noreen Valeria-Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* Witness' identification of defendant along with circumstantial evidence was sufficient to establish defendant's identity and prove him guilty of attempted armed robbery, defendant's ineffective assistance of counsel claim fails where he could not establish trial counsel's failure to file a motion to suppress identification evidence caused him prejudice, and defendant is entitled to credit for \$30 Child Advocacy fee.
- ¶ 2 Following a bench trial, defendant Julian Hernandez was convicted of attempted armed robbery and sentenced to four years' probation and 89 days in jail, time served. On appeal, he claims his conviction should be reversed because the State failed to prove his identity as the

offender beyond a reasonable doubt, trial counsel was ineffective for failing to move to suppress identification evidence which was the product of an overly-suggestive police show-up and he is entitled to a \$30 credit for a post-sentencing fee. We credit defendant for the fee and affirm in all other respects.

¶ 3 On June 30, 2009, Anthony Lump left work around 11:30 p.m. and drove to a drive-thru automated teller machine (ATM) at a National City bank located on Ogden in Berwyn. The bank building was closed at the time, but the area was lit by overhead artificial lights. Lump completed his transaction at the ATM and then saw defendant standing about 10 to 12 feet in front of his car, pointing a gun at him. Lump, who had been in the military, noted that defendant had assumed a "SWAT"-style pose with the weapon. Lump observed defendant was wearing a wrap on his head, sunglasses, a long-sleeved dark jacket and dark pants. Defendant said something like "hey you." Concerned he would be shot, Lump accelerated towards defendant and "glazed" him with his side mirror. Lump drove a few blocks from the area, then flagged down a police sergeant who was driving by. Lump reported the crime and described defendant's clothing to the sergeant, noting defendant was "maybe 5'8, 5'10, 170, 180 pounds," and the sergeant radioed the description to other officers.

¶ 4 After hearing the sergeant's transmission, an officer arrived at the National City bank within two minutes in his police car. The officer turned into a residential area located about a block-and-a-half from the bank and there observed defendant, who matched the description given by the sergeant over the radio. Defendant began running and the officer chased him through nearby backyards until he was able to corner and detain him. At this time, the officer observed defendant was wearing dark-colored pants and a dark t-shirt. Defendant dropped something from his hand, which the officer later determined to be a bandanna with a knot in it. Officers also found a pair of sunglasses and a grip from a pellet gun on defendant's person and a pellet gun

with a missing grip and blue hooded sweatshirt nearby on the ground along the route of the foot chase.

¶ 5 After hearing that officers were in pursuit of a subject related to the robbery, and within an hour of the crime, Lump followed police to the residential neighborhood near the bank where defendant by this time had been handcuffed and was sitting in the back of a squad car. Upon Lump's arrival, officers removed defendant from the squad car. Lump explained the man he had seen was wearing a long sleeve jacket and sunglasses and had a wrap on his head. After Lump mentioned these items, officers produced a blue hooded sweatshirt, sunglasses and bandanna, each of which Lump in turn identified as having been worn by defendant.

¶ 6 Testimony from an arresting officer showed defendant lived at 5178 South Oak Park in Chicago, an estimated four miles from the site of the arrest. The officer also testified he received another call regarding a person running through backyards who had attempted to steal a grill in the same neighborhood after he had defendant in custody, but the complainant in that matter did not identify a subject.

¶ 7 After closing arguments, the court stated it found Lump had provided a "very accurate" description of defendant, and testimony from the police officers was "very credible." The court then found defendant guilty of attempted armed robbery.

¶ 8 Defendant first contends the State failed to prove him guilty beyond a reasonable doubt because the State's case hinged upon an unreliable identification of him by Lump, and the other evidence was circumstantial. Specifically, defendant argues Lump only initially observed defendant for a few seconds at night, then saw him again an hour later, dressed differently. He finally argues the only other evidence connecting defendant to the crime was the grip to the pellet gun found on defendant's person and the pellet gun found near the scene of the arrest.

¶ 9 When presented with a challenge to the sufficiency of evidence, our 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. Givens*, 237 Ill. 2d 311, 334 (2010). We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 10 Defendant here was convicted of attempted armed robbery, but only challenges the sufficiency of evidence related to his identity. See 720 ILCS 5/8-4 (West 2009); 720 ILCS 5/18-2 (West 2009).

¶ 11 We look to five factors when evaluating the reliability of an identification, including the witness' opportunity to view the offender, the witness' degree of attention, the accuracy of the witness' descriptions, the witness' level of certainty and the length of time between the crime and the confrontation. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989), citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Because reliability of the identification is the key inquiry, no one factor controls, and we must consider the totality of the circumstances. See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

¶ 12 Applying the facts as adduced at trial to the *Biggers* factors, Lump had an ample ability to view defendant. Though the crime took place at night, the bank area was lit by overhead artificial lights, and defendant was standing only 10 to 12 feet away. After Lump was threatened, he accelerated his car towards defendant and in fact "glazed" defendant, giving Lump more time to view defendant. Lump, who had been in the military, specifically noted that defendant was standing in a "SWAT"-style pose with the weapon, and defendant was wearing a head wrap, sunglasses and a long sleeve jacket, facts which indicate Lump's attention to defendant during the encounter. Soon after he drove to a place of safety, Lump related his specific observations of

defendant's clothing to a police officer, along with a description that defendant was "maybe 5'8, 5'10, 170, 180 pounds."

¶ 13 The length of time between the crime and the confrontation was not significant, as defendant was presented to Lump in a police show-up only about an hour after the crime was committed. The court found the police officers' testimony to be very credible and Lump's description "very accurate." In the totality of the factual circumstances, we find Lump's identification of defendant to be reliable under *Biggers*.

¶ 14 Lump's identification of defendant was also supported by circumstantial evidence. Circumstantial evidence is sufficient to sustain a criminal conviction, provided this evidence is deemed to have proven each element in an offense beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 15 Defendant, who lived four miles away, was seen and pursued by police a block-and-a-half from the scene of the crime minutes after it was committed, had a grip of a pellet gun in his possession, and a pellet gun missing a grip was found near the scene of his arrest. The sweatshirt, bandanna and sunglasses found either in defendant's possession or near the scene of his arrest all were positively identified by Lump as being worn by the offender as he committed the crime. We conclude that sufficient evidence of defendant's identity was presented to prove defendant guilty beyond a reasonable doubt.

¶ 16 Defendant also contends he was denied effective assistance of counsel because counsel failed to file a motion to suppress Lump's identification testimony. Defendant argues Lump's identification was the product of an overly suggestive and constitutionally deficient show-up conducted when defendant was in police custody and handcuffed. We disagree.

¶ 17 To establish ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance caused him prejudice. *People v.*

Albanese, 104 Ill. 2d 504, 526 (1984), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

We need not determine whether counsel's performance was deficient before examining whether the alleged deficiency caused prejudice to the defendant. *People v. Echols*, 382 Ill. App. 3d 309, 313 (2008), citing *Albanese*, 103 Ill. 2d at 527.

¶ 18 To establish he was prejudiced by trial counsel's failure to file a motion to suppress, a defendant must show the motion would have been granted and the outcome of the trial would have been different. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). When ruling on a motion to suppress a show-up under the due process clause, the trial court conducts a two-part inquiry. *Rodriguez*, 387 Ill. App. 3d at 829, citing *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003). A defendant must first prove the show-up was so unnecessarily suggestive that he was denied due process of law. *Id.* Although show-up identifications are inherently suggestive, show-ups conducted promptly after a crime is committed are appropriate in situations where police must determine whether a suspect is innocent and should be released immediately and whether the police should continue to search for a fleeing culprit. *People v. Rodriguez*, 387 Ill. App. 3d 812, 830 (2008); *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). That a defendant was in handcuffs when identified by a witness does not automatically render the identification unnecessarily suggestive. *People v. Howard*, 376 Ill. App. 3d 322, 331 (2007). Rather, we consider the totality of the circumstances. *Id.* at 332. If a defendant proves the show-up was unnecessarily suggestive, the State must then prove the identification was independently reliable. *Rodriguez*, 387 Ill. App. 3d at 829. Determining independent reliability involves weighing the *Biggers* factors. See *Id.*

¶ 19 Here, officers responded to the vicinity of the attempted armed robbery minutes after it was reported and within two blocks of the crime scene and observed defendant, who closely matched the description Lump had given. Defendant then fled before officers could determine whether he was indeed responsible for the crime. After detaining defendant and within one hour

after the crime, officers brought Lump to the scene of the detention. They removed defendant from the squad car where he had been sitting, handcuffed, and Lump positively identified defendant and the clothing items defendant was wearing. In the totality of the circumstances, we find the show-up conducted by officers was not unnecessarily suggestive.

¶ 20 Even assuming, *arguendo*, defendant could prove the show-up was unnecessarily suggestive, we believe the State would have been able to meet its burden of proving Lump's identification of defendant was independently reliable under the *Biggers* factors as discussed in detail above. Therefore, we do not believe defendant can establish a motion to suppress Lump's identification of defendant would have been granted, nor that he therefore experienced prejudice under *Strickland* by his trial counsel's failure to file that motion. We find defendant has not established that his trial counsel was ineffective.

¶ 21 Defendant finally contends, and the State correctly agrees, he is entitled to have the \$30 Child Advocacy Center fee which was assessed after his conviction credited in light of the 89 days he spent in pre-sentence custody.

¶ 22 A defendant is entitled to \$5 credit against certain fines for each day spent in presentence custody. 725 ILCS 5/110-14(a)(West 2009). The Child Advocacy Center fee is such a fine, because it does not seek to reimburse the State for expenses incurred as a result of the prosecution. See *People v. Graves*, 235 Ill. 2d 244, 255 (2009).

¶ 23 For the foregoing reasons, we order the clerk of the circuit court to correct defendant's fines and fees order and affirm the judgment of the trial court in all other respects.

¶ 24 Affirmed; fines and fees order corrected.