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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0389**

State of Minnesota,
Respondent,

vs.

Daniel James Hart,
Appellant.

**Filed February 5, 2018
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-15-24661

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Daniel Hart challenges his convictions of first-degree aggravated robbery and second-degree assault, arguing that the evidence presented at trial was insufficient to

prove beyond a reasonable doubt that he was one of the three masked men who robbed a man at gunpoint. Because the evidence was sufficient to prove identity, we affirm.

FACTS

Hart's convictions stem from the armed robbery of E.B. On the evening of May 8, 2015, E.B. was in the garage of his Minneapolis home, cleaning his car, when a green Chevrolet Tahoe drove up. The driver—later identified as Dementry Loyd—got out of his car and briefly talked with E.B. before waving his hand over his head and driving away. Immediately after this, three black males, all wearing masks, approached E.B. The gunman—later identified as Daryll Keys—held a gun to E.B.'s head and told him to put his hands up. While Keys held the gun to E.B.'s head, the other two assailants "cleaned out" E.B.'s pockets and went through his car. Items stolen included a silver cross necklace and a Rolex watch.

E.B. immediately called the police. E.B. described the assailants as three black males. He said the gunman was the tallest assailant, with white jeans and shoulder-length dreadlocks sticking out from his hoodie. E.B. recalled the other two assailants wearing jeans and hoodies. E.B. also recalled the youngest-looking assailant stopping the gunman from shooting him.

Two days after the robbery, E.B.'s daughter showed him photos from Loyd's Facebook page featuring Loyd and two other men—later identified as Hart and Keys—wearing what appeared to be E.B.'s stolen jewelry. Hart was wearing the stolen cross necklace. E.B. called the police to report what his daughter had found. E.B. identified the three individuals in the photo as the men who had robbed him. E.B. based his identification

on the clothing the men in the pictures were wearing, claiming it was the same clothing worn by the men who had robbed him. E.B. did not express any uncertainty in his identification of the three assailants.

The next day, E.B. met with the investigating officer, showed him the Facebook photos, and provided a recorded statement. Again, E.B. identified the three men in the photos as the ones who had robbed him, specifically noting that his assailants included the “shortest” man in the group picture, and confirmed that they were all wearing the same clothes they had during the robbery. E.B. also identified the black ski mask, shown in some of the pictures, as the same mask that all three of the assailants had been wearing. E.B. described each man’s role in the robbery, identifying Hart as the individual who went through his pockets while Keys held a gun to his head. E.B. expressed no uncertainty in his identification of Hart during this conversation with the investigating officer.

On May 13, officers executed a search warrant on Loyd’s home. A green Chevrolet Tahoe, registered to Loyd’s mother, was found parked outside. Inside, officers recovered shoes and clothing that matched both E.B.’s description and the photos E.B. had used to identify the three assailants. Loyd was found wearing E.B.’s stolen silver cross. Loyd was arrested and later identified Hart as the third person in the photos.

Hart was taken into custody and interviewed. He denied knowledge of the robbery but admitted to being with Keys and Loyd the day it occurred. He did not give a definitive answer as to where he was during the time of the robbery and said he could not remember where he got the stolen cross necklace he was previously photographed wearing. In early

September, Hart was charged with aiding and abetting first-degree aggravated robbery and aiding and abetting second-degree assault.

Approximately two months after Hart was released on bail, E.B. found one of his assailants on his front porch in the early morning. E.B. took a golf club and confronted the man, and the man left. E.B. called the police and identified Hart as the man who had been on his porch and as “the youngest of the persons that robbed him.” E.B. told the police he was “1,000%” certain of his identification of Hart.

The week before Hart’s trial in November 2016, E.B. met with the prosecution and again reiterated the role that the “shortest” man in the Facebook photos played in the robbery. However, E.B. was a reluctant witness and testified at trial that his memory was “really bad” and “comes and goes.” He remembered the robbery and talking to the police but testified that he could not recall any of his prior statements in which he identified Hart as one of the assailants based on the photos, nor could he recall the testimony he gave at Loyd’s trial about the role that Hart played in the robbery. E.B. testified that he did not see the young man who robbed him in the courtroom.

When pressed further about his prior identifications of Hart, E.B. offered contradictory testimony. E.B. explained that he had initially believed Hart was one of the assailants because the photos showed Hart wearing his necklace but that he had made a mistake and now could “recognize none of them.” Yet E.B. later agreed that, based on his recollection, the “youngest one” in the photos was the assailant who told the gunman not to shoot him. Although the parties stipulated that Hart was pictured in the photos, E.B. insisted that he was unsure whether the person in the photos was actually Hart. Ultimately,

E.B. reaffirmed his great reluctance to testify against Hart, stating, “I don’t want to send this kid nowhere if I can’t recognize him. I don’t know if that was him, and I’m not going to sit here and say it was. Bottom line.” On redirect examination, however, E.B. agreed that Hart was the person who had saved his life and stopped the gunman from shooting him during the robbery.

E.B. also conceded to having concerns about his safety due to being a witness. He explained that “forcing” him to testify put him in “great danger.” While E.B. insisted that there had been no threats against him or his family, he repeated several times that, after this case concluded, “I got to live in that neighborhood” and raise grandchildren.

The jury found Hart guilty, and the district court entered a conviction on both counts. Hart was sentenced to 48 months in prison based on the first-degree aggravated robbery.¹ This appeal follows.

D E C I S I O N

Hart argues the state did not present sufficient evidence to prove beyond a reasonable doubt that he committed first-degree aggravated robbery and second-degree assault. Specifically, he challenges the sufficiency of the evidence to identify him as one of the assailants.

In considering a claim of insufficient evidence, this court’s review “is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the

¹ Hart was not sentenced on his second-degree assault conviction.

verdict which they did.” *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Hart suggests that the heightened standard of review that applies to circumstantial-evidence cases is appropriate here because “the state’s case is largely, if not entirely, based on circumstantial evidence.” *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (explaining that a conviction based on circumstantial evidence warrants heightened scrutiny). “Circumstantial evidence” is “evidence based on inference and not on personal knowledge or observation” and “all evidence that is not given by eyewitness testimony.” *Bernhardt*, 684 N.W.2d at 477 n.11 (quotation omitted). “Direct evidence,” in contrast, is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotation omitted). Here, the state presented direct evidence of the contested element—identity—in the form of E.B.’s testimony and previous identifications. *See State v. Williams*, 337 N.W.2d 387, 389 (Minn. 1983) (explaining that direct evidence includes “testimony of a person who perceived the fact through his senses, and testifies to it, or physical evidence of the fact itself”). Thus, the direct-evidence, and not the heightened circumstantial-evidence, analysis is appropriate.

Hart argues that the evidence was insufficient because E.B.'s identification was unreliable and not corroborated by other evidence linking Hart to the robbery. It is well established that "a conviction may rest on the testimony of a single credible witness" and that identification testimony is sufficient if a witness testifies that the defendant is the person he saw commit the crime. *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). However, if a "single witness' identification of a defendant is made after only fleeting or limited observation, corroboration is required if the conviction is to be sustained." *State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981). "The trustworthiness of an identification must necessarily be judged by the opportunity the witness has had for a deliberate and accurate observation of the accused while in his [or her] presence." *State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969).

Reliability

In *State v. Burch*, the supreme court set forth the following factors for evaluating the reliability of eyewitness identification: (1) the witness's opportunity to see the defendant at the time the crime was committed; (2) the length of time the assailant was in the witness's view; (3) the stress the witness was under at the time of the crime; (4) the lapse of time between the crime and the witness's identification; and (5) the effect of the police procedures as either testing the witness's identification or simply reinforcing the witness's initial identification of the defendant as the one who committed the crime. 284 Minn. 300, 315-16, 170 N.W.2d 543, 553-54 (1969).

Hart contends that E.B.'s identification was unreliable because E.B. identified Hart as a suspect only after seeing him in photos with the stolen jewelry and that such a

circumstance was “highly suggestive.” Hart rightly did not seek to suppress E.B.’s identification of him on this basis, since the Facebook photos were originally shown to E.B. by his daughter rather than investigating officers or other state actors, and state action is required to exclude identification evidence based on due-process concerns. *See id.* at 314, 170 N.W.2d at 553 (discussing due-process concerns regarding police identification procedures); *see also Goode v. State*, 136 A.3d 303, 310-11 (Del. 2016) (explaining that eyewitness identifications not involving state actors do not raise due-process concerns). Thus, any suggestiveness of E.B.’s identification went only to the weight of the evidence, and “[t]he weight and credibility of the testimony of individual witnesses is for the jury to determine.” *See Moore*, 438 N.W.2d at 108 (citing *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980)).

Hart also argues that E.B. had a limited opportunity to observe his assailants and was under stress during the robbery. It is true, as Hart points out, that E.B. was unable to see the robbers’ faces since they were all wearing masks. And, because a gun was being held to his head for the majority of the incident and he feared for his life, E.B. was likely also under considerable stress during the robbery. Nevertheless, E.B. had a significant period of time to observe his assailants. E.B. was able to provide the police with a detailed description of the gunman, recounting that he had dreadlocks and was wearing white jeans. He was able to provide a general description of the other two assailants as black men wearing jeans and hoodies. E.B. was also able to recall Keys’s “exact shoes” shortly after the robbery. Moreover, E.B. was able to distinguish between his assailants in the Facebook photos and describe their differing roles during the robbery.

Despite these details, Hart maintains that “while [E.B.’s] identification of Keys and Loyd as his assailants was based on hair, clothing, and a ski mask that matched those of the males that robbed him, [E.B.’s] identification of Hart was baseless.” We disagree. E.B. identified Hart as the “youngest” and “shortest” assailant and remembered him wearing jeans and a hoodie.

It is true that at trial E.B. claimed, essentially, that he merely assumed Hart was involved in the robbery based on the incriminating photos. But it was for the jury to determine the weight and credibility of Hart’s trial testimony. *See id.* The jury had cause to question E.B.’s retreat from his previous identifications, given his reluctance to appear in court and sudden memory loss. At trial, E.B. admitted that he felt he was in “great danger” due to testifying and repeatedly reminded the prosecutor that he would have to return to the neighborhood where the robbery occurred after Hart’s trial concluded. Furthermore, E.B.’s testimony was inconsistent: at one point he specifically identified Hart as the “youngest” assailant who “saved” him from the gunman. The jury had the opportunity to assess E.B.’s credibility and determine the proper weight to be given to his positive pretrial identifications of Hart as contrasted with his in-court reluctance to do so. *See State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) (concluding that on review for sufficiency of the evidence “inconsistencies and related credibility determinations were for the jury to assess”), *review denied* (Minn. Aug. 17, 2004). We will not second-guess the jury’s reasonable determination.

Corroboration

Hart contends that there was no independent corroboration of E.B.'s identification. Assuming corroboration is required in this case, we conclude that the record reflects a number of times when E.B.'s repeatedly consistent pretrial identifications were corroborated by other evidence. Hart admitted that he was with the other two robbers during the same day E.B. was robbed, and he could not account for his whereabouts during the time of the robbery. Facebook photos posted just days after the robbery show Hart posing (1) with the other two convicted assailants and wearing E.B.'s distinctive stolen jewelry and clothing that matched E.B.'s description, and (2) next to a ski-masked man in a car who was wearing clothing matching E.B.'s description. The Facebook photos also corroborate E.B.'s identification by placing Hart with the other two convicted assailants shortly after the robbery and with the stolen items.

Moreover, when officers searched Loyd's residence, they found a green Tahoe matching E.B.'s description, as well as clothes corresponding with E.B.'s description of what his assailants were wearing. These items matched the clothing the three suspects were wearing throughout the photos. Loyd was also wearing E.B.'s necklace when he was arrested. It is true, as Hart points out, that unlike Loyd, no clothing associated with the robbery or stolen jewelry was found in Hart's actual possession. However, Hart was pictured with the stolen necklace yet could not "remember" where he got it.

Taken together, Hart's admissions, the Facebook photos, and the physical evidence recovered at Loyd's home was incriminating, and it was reasonable for the jury to infer

that Hart, Loyd, and Keys acted together when they assaulted and robbed E.B. We conclude that the identification evidence was sufficient to support Hart's convictions.

Affirmed.