



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Tony Spencer
Reg. No. N-71789
Western Illinois Correctional Center
2500 Rt. 99 South
Mt. Sterling IL 62353

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

November 26, 2019

In re: People State of Illinois, respondent, v. Tony Spencer, petitioner.
Leave to appeal, Appellate Court, First District.
125294

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 12/31/2019.

Very truly yours,

Carolyn Taft Gosboll

Clerk of the Supreme Court



OFFICE OF THE STATE APPELLATE DEFENDER
FIRST JUDICIAL DISTRICT

203 North LaSalle Street • 24th Floor
Chicago, Illinois 60601
Telephone: 312/814-5472 • Fax: 312/814-1447
www.state.il.us/defender • E-mail: 1stDistrict@osad.state.il.us

JAMES E. CHADD
STATE APPELLATE DEFENDER

PATRICIA MYSZA
DEPUTY DEFENDER

DOUGLAS R. HOFF
ASSISTANT DEPUTY DEFENDER

KARL H. MUNDT
ASSISTANT APPELLATE DEFENDER

August 29, 2018

Mr. Tony Spencer
Register No. N71789
Menard Correctional Center
P.O. Box 1000
Menard, IL 62259

RE: *People v. Tony Spencer*
Appellate Court No. 1-16-0102

Dear Mr. Spencer:

I am sorry to inform you that your conviction and sentence have been affirmed by the Appellate Court. A copy of the court's decision is enclosed.

After reviewing the decision in your case, I have determined that there are no issues with sufficient legal merit to justify the continued representation of you by this Office. Thus, your file will now be closed. However, in the event you wish to appeal your case further, you can do so on your own or with other counsel retained by you. The following pages describe the procedures necessary to urge higher courts to look at your case.

There are several ways to proceed. You can ask the Appellate Court to look at your case again (petition for rehearing) or you can appeal directly to the Illinois Supreme Court (petition for leave to appeal) in Springfield. If the Illinois Supreme Court does not give you relief, depending on what arguments you are making, you might also be able to file a petition for certiorari with the United States Supreme Court, and/or pursue relief through a post-conviction petition and federal habeas corpus. Please note particularly that the filing of a successive post-conviction petition that is deemed frivolous may result in the loss of up to six months of good time, as well as additional monetary penalties. Good luck to you.

Sincerely,


KARL H. MUNDT

Assistant Appellate Defender

encls: AC Decision, Packet A.

CL1 Client No. 116285

The Photo of the Lineup was highly suggestive. And favor only me as the suspect in the robbery. Because of the description of the cloth's that the suspect was wearing

Given a line up and I picked off John G. Tamm

After being questioned he admitted

Being a thief

Spent the night in the

Police station

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (1st) 160102-U

No. 1-16-0102

Order filed August 24, 2018

Fifth 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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
Respondent-Appellee,) Circuit Court of
v.) Cook County.
TONY SPENCER,)
Petitioner-Appellant.) No. 03 CR 26651
)
) Honorable
) Joseph M. Claps,
) Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 **Held:** The circuit court properly dismissed petitioner's postconviction petition at the second stage of postconviction proceedings because petitioner failed to make a substantial showing of ineffective assistance of appellate counsel based on counsel's failure to challenge on direct appeal the trial court's failure to properly admonish potential jurors about fundamental principles concerning the presumption of innocence and the defendant's decision not to offer evidence or testify. Despite the trial court's erroneous admonishment, petitioner failed to make a substantial showing that appellate counsel's forfeiture of this issue prejudiced the defense because the evidence of defendant's guilt was not closely balanced.

¶ 2 In this proceeding under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2012)), defendant Tony Spencer appeals the circuit court's order that granted the State's motion to dismiss his petition. Defendant argues that he made a substantial showing of ineffective assistance of appellate counsel based on counsel's failure to challenge on direct appeal the trial court's failure to properly question potential jurors about their understanding and acceptance of fundamental principles regarding the presumption of innocence and defendant's decision not to offer evidence or testify. Defendant argues that he is entitled to an evidentiary hearing on this claim because he made a substantial showing that counsel's forfeiture of this erroneous admonishment issue prejudiced defendant because the evidence identifying him as the offender was closely balanced.

¶ 3 For the reasons that follow, we affirm the circuit court's second stage dismissal of defendant's postconviction petition.¹

¶ 4 I. BACKGROUND

¶ 5 Defendant was arrested for and convicted of the robbery of Chicago police sergeant Ralph Craig, at gunpoint, at an automated teller machine (ATM) located near Washington Boulevard and Loomis Street at about 3 a.m. on November 22, 2003.

¶ 6 At the jury trial in 2008, the State presented evidence showing that at the time of the offense Sergeant Craig was not in uniform and drove an unmarked squad car from his office to the ATM. The ATM was outdoors and in an illuminated alcove just outside a building's revolving door. As Craig withdrew \$10 from the ATM, defendant approached Craig from behind. Defendant told Craig to give him the money or he would kill Craig. Craig turned and

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

faced defendant, who was approaching quickly and pointing a gun directly at Craig. Defendant wore a black jacket and a gray hooded sweatshirt. Defendant took Craig's \$10 and ordered him to empty his pockets and turn over all his money. Craig emptied his pockets and his police badge, police identification, wallet, and \$7 fell to the ground. Defendant picked up Craig's money. When defendant realized that Craig was a police officer, defendant threatened to kill Craig, demanded his gun, and patted him down searching for his gun. When defendant's gun "dipped down a little bit," Craig pushed defendant to the side and moved away from the alcove. Craig fell and injured his leg as he pulled out his gun. Defendant came out of the alcove, facing Craig. Craig tried to regain his balance and fired two gunshots at defendant, missing him both times. Then defendant fled and Craig called for assistance from his squad car.

¶ 7 The ATM's surveillance video camera recorded the crime, and the State introduced into evidence several still photographs taken from the camera and the video recording. Craig identified defendant in the camera stills and described what occurred in each photo. Craig testified that during the offense defendant faced him and came as close as one foot away from Craig's face. The area was lit from a nearby streetlamp, and Craig could see defendant's face despite the hood of defendant's sweatshirt. Although Craig could not describe defendant's hairstyle due to the hood defendant wore, Craig said that defendant had a "slight, thin mustache" and "some facial hair."

¶ 8 According to the record, the first radio report described the offender as a black male between six feet one inch and six feet two inches tall, weighing about 200 pounds, and wearing "blue gray sweats" and a black jacket. A second radio report described the offender as a black male, 30 years old, weighing 200 pounds, having a short Afro haircut, and wearing a black jacket and gray sweatpants. Detective Patrick Deenihan interviewed Craig at the scene and testified that

Craig had described the offender as a black male, about 25 to 30 years old, clean shaven, wearing a gray hooded sweatshirt under a dark overcoat, and armed with a blue steel semiautomatic handgun.

¶ 9 On the date of the offense, Officer Adrienne Seiber and her partner were in a marked squad car, heard the description of the offender, and began touring the area near Washington Boulevard and Loomis Street at about 3:15 a.m. They saw defendant, who was walking and wearing a puffy black coat over a gray hooded sweatshirt. The officers drove alongside defendant and followed him for about 30 seconds. Officer Seiber rolled down her window and said, "Hey, come here." Defendant turned, looked at her, and then fled down the street and into a gangway. Seiber pursued defendant on foot while her partner followed in the squad car. Defendant fled into an unlit construction site, and Seiber lost sight of him due to the darkness. Seiber and her partner continued touring the area in their squad car, looking for defendant.

¶ 10 At about 4 a.m., Officer Anthony Gibbons and his partner were driving their marked squad car and saw defendant walking and carrying a puffy black jacket and wearing a gray hooded sweatshirt. Because defendant fit the description of the offender, the officers turned their car around and approached defendant from behind. Defendant turned, looked in the officers' direction, and immediately began to run. The officers followed him in their squad car. Defendant fled into a parking lot and then jumped over the wrought-iron fence surrounding the parking lot. Officer Gibbons pursued defendant on foot and noticed another marked squad car, which was occupied by Officer Timothy Parker and his partner, also approach defendant.

¶ 11 Officer Parker stopped and exited his squad car and assisted Gibbons. They saw defendant drop the jacket he was carrying and run into a backyard. Gibbons saw what looked

like the handle of a gun protruding from a pocket of the jacket. Gibbons remained with the jacket while Parker followed defendant into the backyard and took him into custody. Parker described defendant as having a mustache and a "scruffy" beard. Officer Seiber arrived at the scene and identified defendant as the man who fled when she asked him to "come here."

¶ 12 The police recovered the black jacket and the gun, which was not loaded and did not contain a magazine for bullets. The gun lacked a magazine safety feature and thus could be fired without a magazine. The police also recovered from the ground at the scene of the ATM Sergeant Craig's \$10 ATM receipt.

¶ 13 At about 6:30 a.m., a lineup was held at the police station. Defendant chose the third position in the lineup. He wore the same blue sweatpants and gray hooded sweatshirt he was wearing at the time of his arrest. The four other participants in the lineup wore dark-colored jackets or sweatshirts, which were the clothes they were wearing when they were arrested. Craig identified defendant as the offender and recognized his face and the gray hooded sweatshirt. Craig also identified the gun used in the robbery. A photograph of the lineup was introduced into evidence.

¶ 14 The gun was tested for DNA evidence. The results revealed that a mixture of two incomplete human DNA profiles was present on the gun. The major and minor profiles were incomplete because not enough DNA was present at 13 locations on the DNA strands to obtain the full information necessary to constitute a complete profile. Defendant was excluded as a contributor to the minor profile but could not be excluded from having contributed to the major profile. The calculation of the expected occurrence of the major profile in the general population

was 1 in 330,000 black people, 1 in 4.2 million white people, and 1 in 1.1 million Hispanic people.

¶ 15 The jury convicted defendant of armed robbery, and the trial court sentenced him to natural life in prison as a habitual criminal based on his two prior convictions for armed robbery.

¶ 16 On direct appeal, defendant argued that the State failed to prove his guilt because (1) he did not resemble Craig's description of the offender or the person shown on the surveillance video, (2) Sergeant Craig's limited view of the offender rendered his identification testimony unreliable, (3) Officer Seiber's identification of defendant was an unreliable showup identification, and (4) the lineup was impermissibly suggestive. This court affirmed defendant's conviction. *People v. Spencer*, 2011 IL App (1st) 091813-U.

¶ 17 In July 2012, defendant filed the *pro se* postconviction petition in the instant case, and appointed counsel amended the petition to allege ineffective assistance of appellate counsel for failing to challenge the trial court's improper admonitions to the venire members. Specifically, the amended petition alleged that appellate counsel failed to raise this issue under the plain error doctrine and the evidence identifying defendant as the offender was closely balanced.

¶ 18 The State moved to dismiss the petition, and the circuit court granted the State's motion. Defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues that he is entitled to an evidentiary hearing on his claim that he suffered prejudice when appellate counsel rendered ineffective assistance by forfeiting review of the trial court's failure to properly admonish the potential jurors about fundamental principles

concerning the presumption of innocence and defendant's decision not to offer evidence or testify because the evidence identifying defendant as the offender was closely balanced.

¶ 21 A proceeding under the Act is a collateral attack on the defendant's prior conviction and allows only constitutional claims to be heard that were not presented during trial and could not have been raised in the appeal from the conviction. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). Therefore, *res judicata* bars any issues previously decided at trial or on direct appeal and issues that could have been presented in the appeal from the conviction but were not. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005). However, the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. *People v. Williams*, 209 Ill. 2d 227, 233 (2004).

¶ 22 The Act provides a three-stage process for hearing a petitioner's constitutional claims. *Harris*, 224 Ill. 2d at 125. A petition that states the gist of a constitutional claim advances from the first stage to the second stage if the trial court examines it independently and determines it is not frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012). A petition is frivolous and patently without merit when it has no arguable basis in either fact or law. *People v. Hedges*, 234 Ill. 2d 1, 13 (2009). At the second stage of the process, the trial court may appoint counsel for the defendant, the petition may be amended, and the State may either answer the petition or move to dismiss it. 725 ILCS 5/122-4, 122-5 (West 2012); *Harris*, 224 Ill. 2d at 126.

¶ 23 The petition may be dismissed at the second stage "when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, the court shall focus only on the legal sufficiency of the claims, and all well-pleaded facts in the petition and

any accompanying affidavits, which are not positively rebutted by the record, are taken as true.

People v. Domagala, 2013 IL 113688, ¶35. Any fact-finding or witness credibility determinations must await an evidentiary hearing at the third stage of the postconviction proceedings. *Id.* The defendant, however, is not entitled to an evidentiary hearing as a matter of right; the allegations of the petition must be supported by the record or by accompanying affidavits, and nonspecific and nonfactual assertions that merely amount to conclusions are not sufficient to warrant a hearing under the Act. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

When, as here, a petition is dismissed at the second stage of the postconviction process, we review the matter *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶24 A defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing that “counsel’s performance was deficient” and the deficient performance “prejudiced the defense.” To satisfy the test’s performance prong, the defendant must show “that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To satisfy the prejudice prong, the defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then that course should be taken and the court does not need to consider the quality of the attorney’s performance. *Id.* at 697.

¶25 Appellate counsel is not obligated to raise “every conceivable issue on appeal,” but, rather, is expected to “exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.” *Williams*, 209 Ill. 2d at 243. Appellate counsel’s

assessment of the merits of an issue, furthermore, depends on the state of the law at the time of the direct appeal. See *People v. Weninger*, 292 Ill. App. 3d 340, 345 (1997). Appellate counsel is not required to raise issues that counsel reasonably determines are not meritorious. *People v. Collins*, 153 Ill. 2d 130 (1992); see also *Strickland*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

¶ 26 Defendant contends that he should receive a third-stage evidentiary hearing under the Act because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which requires the court to ask the venire members if they understand and accept four principles about the presumption of innocence, the burden of proof, and the defendant’s decision not to offer evidence or testify. Defendant argues that he was prejudiced by appellate counsel’s unreasonable forfeiture of this issue because the evidence identifying defendant as the offender was so closely balanced that the trial court’s error threatened to tip the scales of justice against him.

¶ 27 Forfeited claims of error are reviewable under the plain error rule, which is a narrow and limited exception to forfeiture. *People v. Hiller*, 237 Ill. 2d 539, 545 (2010). To obtain relief under this rule, a defendant must show that a clear or obvious error occurred. *Id.* The defendant bears the burden of persuading the court that either (1) the evidence at the hearing was so closely balanced (regardless of the seriousness of the error) as to severely threaten to tip the scales of justice against the defendant, or (2) the error was so serious (regardless of the closeness of the evidence) as to deny the defendant a fair trial and challenge the integrity of the judicial process.

People v. Herron, 215 Ill. 2d 167, 187 (2005). If the defendant cannot meet this burden of persuasion, the “procedural default must be honored.” *People v. Walker*, 232 Ill. 2d 113, 124 (2009). In order to determine whether the plain error doctrine should be applied, the reviewing court must first determine whether any error occurred. *Herron*, 215 Ill. 2d at 187.

¶ 28. Rule 431(b) requires the trial court to ask prospective jurors if they understand and accept that (1) a defendant is presumed innocent of the charges against him; (2) the State must prove the defendant guilty beyond a reasonable doubt before he can be convicted; (3) the defendant is not required to offer any evidence on his own behalf; and (4) if a defendant does not testify, it cannot be held against him. “The court’s method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in [Rule 431(b)].” *Id.* The trial court’s questioning of the venire concerning these four principles, which are commonly referred to as the *Zehr* principles, is intended to ensure compliance with *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), which sought to end the practice where the judge made a broad statement of the applicable law followed by a general question concerning the juror’s willingness to follow the law. Ill. S. Ct. R. 431, Committee Comments.

¶ 29. According to the record, the trial court told the venire members that it was “absolutely essential as we select this jury that each of you understand and embrace these fundamental principles” that all persons charged with a crime were presumed innocent, that the State had the burden of proving the defendant guilty beyond a reasonable doubt, and that the defendant had no obligation to testify on his own behalf or call any witnesses in his defense. The court explained that the defendant “may simply sit here and rely upon what he and his attorneys perceive to be the inability of the State to present such evidence to meet their burden. Should that happen, you

will have to decide the case on the basis of the evidence presented by the prosecution. The fact that the defendant does not testify must not be considered by you in any way in arriving at your verdict." The court explained that if defendant elected to testify or his attorneys presented witnesses on his behalf, then the jurors should consider that evidence in the same manner and by the same standard as the evidence presented by the State. The court repeated that there was no burden on defendant to prove his innocence. Rather, it was the State's burden to prove him guilty beyond a reasonable doubt.

¶ 30 Later, the court again fully explained the first and third *Zehr* principles regarding the presumption of defendant's innocence and no requirement that he offer any evidence on his own behalf. Concerning the fourth *Zehr* principle, the court explained that the defendant "need not testify; and if he chooses not to testify, you must not consider that in any way in arriving at your verdicts." However, if defendant "does testify, then you should judge his testimony in the same manner and by the same standards that you use in judging the testimony of any other witness." Then the court asked, "Does anybody here not accept those principles of law and are unwilling to follow them? Anybody? No response."

¶ 31 Finally, the court asked, "Do each of you also understand and accept the provision that the State has the burden of proving the defendant's guilt beyond a reasonable doubt? This is their burden. Anybody not accept that? No response."

¶ 32 The record establishes that the trial court properly admonished the venire regarding the second *Zehr* principle concerning the State's burden of proof. However, the trial court failed to ask the venire members whether they *understood* the first, third, and fourth *Zehr* principles. Furthermore, the trial court did not completely and accurately state the fourth *Zehr* principle;

when the trial court admonished the venire against considering “in any way” defendant’s choice not to testify, the trial court omitted the admonishment that a defendant’s decision not to testify *cannot be held against him*.

¶33 A trial court’s questions about the *Zehr* principles “constitute preliminary instructions to potential jurors on how they must evaluate the evidence” (*People v. Sebby*, 2017 IL 119445, ¶ 67), and “an instruction given at the end of the trial will have little curative effect” (*Zehr*, 103 Ill. 2d at 477). The *Zehr* principles were directly implicated in this case where defendant did not testify or present evidence. The trial court’s failure to properly admonish the venire regarding these principles was clear error. *Sebby*, 2017 IL 119445, ¶ 49.

¶34 Once clear error has been established, the relevant question in a first-prong plain error case is whether the evidence was closely balanced. *Id.* ¶ 69. Defendant must show that the quantum of evidence presented by the State against him rendered the evidence closely balanced. *Id.* ¶ 51. “Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge.” *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). In order to determine whether the evidence was closely balanced, “a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment within the context of the case.” *Sebby*, 2017 IL 119445, ¶ 53. This “inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses’ credibility.” *Id.*

¶35 Defendant argues that the evidence identifying him as the offender was closely balanced because (1) he did not resemble either Craig’s description of the offender or the surveillance camera stills of the offender, (2) Craig did not have a good opportunity to see the offender’s face

during the crime, (3) the lineup at the police station was impermissibly suggestive, and (4) the robbery proceeds were not found on defendant, who never gave an inculpatory statement.

¶ 36 First, defendant argues that Craig described the offender as clean shaven and about 25 to 30 years old whereas defendant was 42 years old and had a graying beard (a mustache and connected goatee) when he was arrested one hour after the offense. Defendant also contends that the offender in the camera stills was a distinctly clean shaven young man with thin lips and a small angular nose whereas defendant has pronounced lips and a wide nose and had unmistakable facial hair.

¶ 37 Second, defendant argues that Craig had a limited opportunity to see the offender's face because Craig's attention was drawn to the offender's gun and the robbery occurred in less than 30 seconds. During that time, according to defendant, Craig and the offender faced away from each other for about 22 seconds. Moreover, defendant claims that during the approximately 8 seconds when they faced each other, Craig's view of the offender was obscured by the hood of his sweatshirt and the lack of light outside the alcove of the ATM. Third, defendant contends that the suggestive nature of the lineup would have completely overwhelmed Craig's memory of the offender because defendant's light gray sweatshirt caused him to stand out drastically from the four other lineup participants, who wore dark coats.

¶ 38 Fourth, defendant argues that he did not have any proceeds of the robbery on his person when he was arrested about three blocks from the scene of the robbery. He asserts that it would have been illogical for the offender to have stayed near the scene of the robbery and maintained possession of the jacket, sweatshirt, and gun used during the robbery because those items would have been readily identifiable by the police officer robbery victim, who could quickly obtain assistance from other police officers in the search for the offender.

¶ 39 In determining whether a witness's identification is reliable, courts have considered the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's 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. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Courts also consider whether the witness was acquainted with the suspect before the crime, and whether there was any pressure on the witness to make a certain identification. *People v. Brooks*, 187 Ill. 2d 91, 130 (1999).

¶ 40 After reviewing the record in this case, we do not find the evidence to be closely balanced. Craig did not know defendant prior to the offense, a gun was displayed and pointed at Craig during the robbery, the robbery occurred quickly, and there was some variation in the descriptions of the offender's facial hair. Nevertheless, identifications based on a view of an offender for only a few seconds have been found reliable, and a witness's failure to mention a physical characteristic such as a mustache or facial hair does not render an otherwise positive identification unreliable. *Williams*, 118 Ill. 2d 407, 413-14 (1987).

¶ 41 Craig positively and credibly identified defendant as the offender shortly after the offense. The testimony and pictorial evidence established that the ATM alcove had lighting and the area was illuminated by a nearby streetlamp. Moreover, Craig explained that the offender came as close as one foot to Craig's face while they faced each other, and the sweatshirt hood did not conceal the offender's face. Craig also testified that he described the offender to Detective Deenihan as having a "slight, thin mustache" and "some facial hair." Even if Deenihan accurately recorded Craig's description at the scene as including the term "clean shaven," this detail does not raise a significant discrepancy. Defendant did not have a heavy or full beard but

rather had groomed his facial hair to sport a goatee with a connected mustache while the sides of his face had been shaved.

¶ 42 Contrary to defendant's argument on appeal, the offender shown in the surveillance camera stills resembles defendant's appearance at the time of his arrest, and this pictorial evidence is not at odds with either Craig's description of the offender's facial hair or Officer Parker's description that defendant had a mustache and a "scruffy" beard. In addition, this court rejected on direct appeal defendant's assertion that the lineup was impermissibly suggestive because he was the only person wearing a gray hooded sweatshirt. Defendant was not required to wear distinctive clothing worn by the suspect in the crime (see *People v. Gabriel*, 398 Ill. App. 3d 332, 349 (2010)), and the four other lineup participants also wore clothing similar to that worn by the offender—*i.e.*, dark coats. Finally, although the police did not recover the \$17 robbery proceeds on defendant when he was arrested, he was found near the scene of the robbery shortly after the offense, he fled police officers who approached him, and he was still in possession of the gun, sweatshirt, and black jacket at the time of his arrest.

¶ 43 The present case is distinguishable from *Sebby*, 2017 IL 119445 at ¶ 63, where the court concluded that the evidence was closely balanced because the State and defense eyewitnesses presented two conflicting yet credible versions of the events without extrinsic evidence to corroborate or contradict either version. Specifically, the defendant was convicted of resisting a peace officer after three deputies went to a residence to serve a court order regarding the custody of a minor. *Id.* ¶¶ 3, 5. The three deputies testified that the defendant became agitated, yelled, poked one of the deputies and then struggled and fell when the deputies attempted to handcuff him. *Id.* ¶¶ 10-21. The defendant and two other occupants of the house testified that the defendant remained calm and did not make any contact with the deputies, who were belligerent,

cursed and threatened the defendant, and then grabbed and pulled him, which caused him to fall on his face onto the gravel covered ground. *Id.* ¶¶ 22-36.

¶ 44 Here, in contrast, Craig identified defendant as the offender, and no opposing witness testified otherwise. Furthermore, the camera stills of the offense and the recovery of the gun, sweatshirt, and jacket in defendant's possession near the scene of the robbery and shortly after the offense occurred corroborated the testimony of Craig and the police officers who responded to the call to locate the offender.

¶ 45 Given the totality of the evidence, the evidence finding defendant guilty of armed robbery was not closely balanced. Because the evidence was not closely balanced, defendant fails to make a substantial showing that appellate counsel rendered ineffective assistance to defendant by not invoking the plain error rule and challenging the trial court's erroneous admonishments concerning the *Zehr* principles.

¶ 46

III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the circuit court's second stage dismissal of defendant's postconviction petition.

¶ 48 Affirmed.

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (1st) 091813-U
No. 1-09-1813

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).

FIRST DIVISION
August 8, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	No. 03 CR 26651
TONY SPENCER,)	The Honorable
Defendant-Appellant.)	Joseph M. Claps,
)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court:
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Where the victim had a clear view of the assailant's face and unequivocally identified defendant as gunman, the evidence was sufficient to support defendant's conviction, and lineup in which defendant wore clothing similar to attacker and distinct from that worn by other participants was not impermissibly suggestive; the trial court's judgment was affirmed.

¶ 1 Following a jury trial, defendant Tony Spencer was convicted of armed robbery and was sentenced as a habitual

criminal to natural life in prison. On appeal, defendant contends the evidence was insufficient to establish his guilt because he did not match the description of the offender or resemble the person shown on surveillance video, the victim had a brief period to view the offender, and the police lineup at which he was identified was suggestive. Defendant also asserts the trial court erred in denying his motion to suppress the lineup identification because he wore clothing distinct from that worn by the other lineup participants. We affirm.

¶ 2 Defendant was convicted of robbing Ralph Craig, a Chicago police sergeant, at gunpoint at an automated teller machine (ATM) near Washington and Loomis streets in Chicago. Before trial, defendant filed motions to quash his arrest and suppress his identification.

¶ 3 At the hearing on the motion to quash, Chicago police officer Anthony Gibbons testified that at about 3 a.m. on November 22, 2003, he received a radio report of shots fired. The parties stipulated the first message, sent at 3:12 a.m., described the offender as a black male between 6 feet 1 inch and 6 feet 2 inches tall and weighing about 200 pounds, wearing "blue gray sweats" and a black jacket. Officer Gibbons spotted a man who met that description wearing a gray sweatshirt and carrying a black jacket. A second message, issued at 3:39 a.m., described a black male who was 30 years old and weighed 200 pounds with a "short Afro" haircut and wearing a black jacket and gray sweatpants.

¶ 4 The suspect fled upon seeing the police car. Officer Gibbons pursued the suspect, who dropped his jacket, and a weapon in the jacket became visible to the officer. The suspect was apprehended by police while Officer Gibbons remained with the jacket. The court denied defendant's motion to quash his arrest, stating the police had probable cause to arrest defendant based on the firearm in his jacket.

¶ 5 At the suppression hearing, Chicago police detective Patrick Deenihan testified he met with Craig between 3:15 and 3:30 a.m. after the robbery. Detective Deenihan said Craig described the robber as a black male between 6 feet and 6 feet 2 inches tall and weighing between 180 and 200 pounds. Craig said the man wore a black coat with a gray hooded sweatshirt underneath and was armed with a semi-automatic handgun. The written report of Craig's description indicated that he said the offender was between 25 and 30 years old and "clean shaven."

¶ 6 Defendant was arrested at about 4:30 a.m. and was placed in a lineup viewed by Craig. Detective Deenihan testified the lineup included defendant and four black men that "to the best we could" matched defendant's physical characteristics. Defendant wore blue pants, a gray sweatshirt and a gray or white T-shirt. The four other participants wore black coats or black sweatshirts. Craig identified defendant in the lineup as the robber.

¶ 7 The trial court denied defendant's motion to suppress the lineup identification, stating, *inter alia*, that although

defendant was the only person wearing a gray sweatshirt, the other lineup participants wore dark coats, which also was clothing described as being worn by the robber. The court noted: "There is no requirement that I'm aware of to dress everybody in the lineup in the way as described by the victim." The court stated the lineup composition did not improperly suggest that defendant should be identified as the offender.

¶ 8 At trial, Craig testified that on the night of the offense, he was not in uniform and drove an unmarked squad car. As Craig withdrew \$10 from the ATM, which was located in an illuminated vestibule, defendant entered the area, approached Craig from behind, and said, "Give me your money or I will kill you." Craig turned around to face defendant, who wore a black jacket and a gray hood. Craig testified he could see defendant's face despite the hood. Craig said the area also was lit from a nearby streetlamp.

¶ 9 Craig said defendant pointed the gun directly at him and "got as close as a foot from my face, face-to-face." After Craig handed defendant the \$10, defendant ordered him to empty his pockets. As Craig did so, his police star and ID fell on the ground. When defendant recognized those items, defendant patted Craig down for a weapon while still continuing to hold his gun. Craig testified defendant "came within a foot of my face" while reaching around his waist to search for a weapon.

¶ 10 Craig was carrying a weapon in his waistband that defendant failed to detect in his search. When defendant's gun

"dipped," Craig pushed defendant, drew his own weapon and fired twice at defendant while defendant faced him. Craig injured his knee while firing, and defendant exited the vestibule and fled. Craig reported the crime on the radio of his unmarked squad car parked nearby.

¶ 11 Craig said he chose defendant from the lineup because he "recognized his face from the incident" and also because he wore a gray hooded jacket. The State entered into evidence several still photographs taken from surveillance video, and Craig described what occurred in each photo. The surveillance video was shown to the jury and admitted into evidence, along with a photograph of the lineup.

¶ 12 On cross-examination, Craig said he turned around and faced defendant when defendant first spoke to him. Craig stated he was focused on the gun in defendant's hand. Craig could not describe defendant's hairstyle because of the hood he wore; however, Craig could see defendant's face and said defendant had a "slight, thin mustache" and "some facial hair." Chicago police officer Timothy Parker, who placed defendant in custody, described defendant as having a mustache and a "scruffy" beard. Chicago police officer Adrienne Seiber testified she and her partner, who were in a squad car, received the radio report regarding the ATM robbery and spotted a man meeting the suspect's description. Officer Seiber said that when she asked the man to "come here," he fled. The officer identified the man in court as defendant.

¶ 13 Detective Deenihan conducted the lineup identification between 6:30 and 7 a.m. Based on Craig's description of the offender, the detective selected men in custody in the police station as "fillers" in defendant's lineup. Defendant chose his position in the center of the lineup, and the men wore the clothing they had on when they were arrested. Defendant was not wearing his black jacket because it was being inventoried as evidence in the case. Detective Deenihan acknowledged the other lineup participants were wearing clothing under their black coats or jackets but he did not ask them to remove their outer garments.

¶ 14 On appeal, defendant first contends the State failed to prove his guilt beyond a reasonable doubt. He argues: (1) he did not resemble either the person shown in the surveillance video or the physical description of the offender; (2) the identifications of him by Craig and a police officer were unreliable; and (3) the remaining evidence was insufficient to establish his guilt.

¶ 15 When reviewing the sufficiency of the evidence of a criminal conviction, the task of a reviewing court is to determine whether, 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); *People v. Ward*, 215 Ill. 2d 317, 322 (2005). Under this standard, this court will not substitute its judgment for that of

the trier of fact on issues of the weight of the evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). A conviction will only be reversed when "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010).

¶ 16. Defendant contends several differences exist in the characteristics of the man pictured in the ATM surveillance video and Craig's description of the attacker, when compared to defendant's own appearance. Defendant argues the man in the video was "distinctly clean-shaven" and had a "small angular nose and thin lips," and defendant points out Craig described his assailant as clean-shaven and between 25 and 30 years old. In contrast, defendant said he was 42 years old at the time of the offense and had a mustache and "connected goatee," "pronounced lips" and a "wide nose."

¶ 17. As defendant acknowledges, the identification of the accused by a single witness is sufficient to sustain a conviction if the witness viewed the perpetrator under circumstances permitting a positive identification, even if that testimony is contradicted by the accused. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009); *People v. Slim*, 127 Ill. 2d 302, 207 (1989). The inability of a witness to precisely describe a suspect's physical characteristics is not fatal to an identification but simply affects the weight to be given that testimony, and discrepancies between a witness' description of the accused and

the defendant's physical appearance do not, in and of themselves, generate a reasonable doubt as long as a positive identification has been made. *People v. Holmes*, 141 Ill. 2d 204, 240-41 (1990). The failure to accurately describe an offender's facial hair or any other single characteristic is not fatal to an otherwise positive and credible identification. *Slim*, 127 Ill. 2d at 310. It was the province of the jury as the trier of fact to compare the description provided by Craig and determine if the man who was pictured in the surveillance video and chosen in the police lineup reasonably met that description.

¶ 18. Defendant next asserts Craig's identification of him in the lineup was unreliable. To determine whether an identification is reliable, courts look to several factors, including: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of any prior descriptions of the suspect by the witness; (4) the level of certainty by the witness at the time of the confrontation; and (5) the length of time between the crime and the confrontation. *People v. Lacy*, 407 Ill. App. 3d 442, 459-60 (2011), citing *People v. Brooks*, 187 Ill. 2d 91, 129-30 (1999). No single factor is dispositive, and the identification's reliability is based on the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Defendant's challenge to the identification in this case involves the first three factors only. As to the opportunity and degree of attention that Craig paid to his assailant, defendant argues

Craig could not view his attacker at length. Defendant contends Craig viewed the offender's face only for about eight seconds, based on a time stamp on the surveillance video, and defendant further points out that according to Craig's own testimony, he was focused on the gun and escaping the offender. Defendant also contends that as shown in the video, the hood worn by the assailant cast a shadow "on a substantial portion of [the attacker's] face."

¶ 19 The evidence presented at trial established that Craig viewed defendant's face at close range under sufficient lighting. Craig testified defendant was about a foot away from his face at one point as he searched Craig for a weapon. Identifications based on a view of an offender that last only a few seconds have been found reliable. See, e.g., *People v. Brooks*, 187 Ill. 2d 91, 130 (1999) (witness viewed defendant for "a second or so" during shooting); *People v. Williams*, 118 Ill. 2d 407, 413 (1987) ("[t]hat the victim saw her attacker's face for only several seconds did not preclude her from making a positive identification"). Although defendant argues Craig likely focused on the gun and not on the gunman's face, Craig had a clear view of defendant as he reached in Craig's waistband to search for a weapon.

¶ 20 As to the third factor, the accuracy of any prior descriptions of the suspect, defendant reiterates the differences between his physical features and Craig's account of his assailant's characteristics. He contends Craig's description of

his attacker as "clean-shaven" weakens the reliability of his identification in light of defendant's facial hair. The failure of a witness to mention a physical characteristic such as a mustache or facial hair does not render an otherwise positive identification unreliable. *Williams*, 118 Ill. 2d at 414.

¶ 21 Defendant does not discuss the fourth or fifth factors. We observe that Craig's identification of defendant in the lineup was unequivocal, and the time span between the offense and the identification was about four hours, which is not an unduly long period.

¶ 22 As a general rule, the reliability of a witness's identification of a defendant is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007) (applying factors). The three factors discussed by defendant all weigh in favor of the reliability of Craig's identification of defendant. Regarding defendant's attempt to independently analyze the surveillance video on appeal at length, the video was presented into evidence, and the jury was able to analyze its content as well as the still photographs.

¶ 23 Defendant argues, however, that although the jury's determination is entitled to deference, this court may reverse a conviction upon finding the State's evidence insufficient to establish his guilt, and defendant points to "substantial weaknesses and conflicts" in the State's case. The evidence presented here was not so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's

guilt in this case. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Defendant was apprehended in the vicinity of the offense, while carrying a weapon and a black coat. Defendant met the description of Craig's attacker, and Craig's unwavering identification of defendant was based both on his facial features and his clothing.

¶ 24 Defendant further argues the remaining evidence offered by the State, other than the identification testimony, did not establish his guilt beyond a reasonable doubt. He contends no proceeds of the robbery were recovered from him and he points out, he did not confess to the crime. A lack of physical evidence in a case does not raise a reasonable doubt where the defendant has been positively identified as the offender. *People v. Reed*, 396 Ill. App. 3d 636, 649 (2009). Furthermore, sufficient evidence to convict can exist even without a defendant's inculpatory statement, and defendant in this case has provided no authority to the contrary.

¶ 25 Defendant also challenges Officer Seiber's identification of defendant as an unreliable showup identification. Defendant did not object to the officer's testimony at trial. Furthermore, even aside from that evidence, the identification testimony of Craig was sufficiently reliable to support his conviction.

¶ 26 Defendant's second main contention on appeal is that the trial court erred in denying his motion to suppress Craig's identification in the police lineup. Defendant argues his gray

sweatshirt matched the description of the offender and that attire distinguished him from the four "fillers" in the lineup who wore black coats. He contends the lineup could have been made more neutral by having the "fillers" remove the black coats and be shown in the shirts they wore underneath.

¶ 27 In a motion to suppress identification testimony, the defendant bears the burden of proving a pretrial identification was impermissibly suggestive. *Gabriel*, 398 Ill. App. 3d at 348. An identification can be suggestive if the defendant is required to wear distinctive clothing worn by the suspect in the crime. *Gabriel*, 398 Ill. App. 3d at 349, citing *United States v. Wade*, 388 U.S. 218, 233 (1967).

¶ 28 Craig testified his attacker wore a black coat with a gray hooded sweatshirt underneath. Although defendant was dressed differently than the four "fillers" in the lineup, police are not required to find matching clothing for all participants of a lineup. See *People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999) (citing numerous cases finding lineups not impermissibly suggestive even if defendant is only person wearing clothing similar to that worn by suspect). Indeed, here, all of the men in the lineup with defendant wore clothing similar to that worn by the offender; the attire of the four "fillers," who wore black coats, matched the attire described by Craig, as did defendant's gray hooded sweatshirt. That defendant was the only person wearing a gray hooded sweatshirt did not render the composition of the lineup unduly suggestive.

¶ 29 Defendant nevertheless maintains that suspects should not appear to be "substantially different" from the "fillers" in a lineup, citing section 107A-5(c) of the Code of Criminal Procedure (725 ILCS 5/107A-5(c) (2004)). Defendant points out that statutory section was adopted in 2003, after *Peterson* and similar decisions were issued, and he argues the "substantially different" standard therefore supercedes the earlier case law.

¶ 30 The statute to which defendant refers states, in pertinent part:

"Suspects in a lineup or photo spread should not appear to be substantially different from "fillers" or "distracters" in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." 725 ILCS 5/107A-5(c) (2004).

¶ 31 This court has discovered no published decisions defining the term "substantially different" as used in this statute, and defendant has not directed us to any such case law. Since 2003, this court has held that participants in a lineup are not required to be physically identical. *Gabriel*, 398 Ill. App. 3d at 348; *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). To the extent that defendant suggests the rules stated in *Peterson* and the cases cited therein are nullified by the statute, we reject that contention in the absence of any contrary authority.

¶ 32 To suppress an identification based on a violation of due process, a court must find both that (1) the confrontation was unduly suggestive and (2) the identification was not independently reliable, which is measured by applying the factors we have set out above. *Lacy*, 407 Ill. App. 3d at 459. We have concluded in our analysis of the previous issue that Craig's identification of defendant was reliable under those factors.

¶ 33 Accordingly, the judgment of the trial court is affirmed.

¶ 34 Affirmed.