

No. 1-09-0966

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 07 CR 3238
)	
ANTHONY MARTIN,)	Honorable
)	Timothy Chambers,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

HELD: Defendant was convicted of armed robbery under subsection (a)(2) beyond a reasonable doubt where the evidence established that he was armed with a firearm. The trial court did not err in denying defendant's request for jury instructions on the lesser included offense of simple robbery and cross-racial witness identification. Finally, defendant forfeited his claim that the trial court failed to comply with Supreme Court Rule 431(b) and was not entitled to an additional day of presentence credit.

Defendant Anthony Martin was convicted of armed robbery (720 ILCS 5/18-2(a)(2) (West 2006)) and was sentenced to 30 years' imprisonment. On appeal, defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt

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where it failed to prove defendant possessed a dangerous weapon during the commission of the robbery; (2) the trial court erred in denying defendant's requests for a lesser included offense instruction on simply robbery and on cross-racial identification testimony; (3) the trial court erred when it failed to comply with Illinois Supreme Court Rule 431(b); and (4) the mittimus should be corrected. For the following reasons, we affirm the judgment of the trial court.

BACKGROUND

Dulce Cortes testified at trial that she was working as a cashier at Dunkin' Donuts on Green Bay Road in Evanston on the night of January 6, 2007. A couple of minutes after 7 p.m., an African-American man wearing a dark sweater with grey and white writing, gloves and a face mask came into the store and said something to Cortes. Cortes identified defendant as this man in open court. Cortes could not hear what defendant said so she moved closer to him and he said, "this is a stickup". Defendant then lifted his sweater and Cortes saw the handle of a gun. Cortes described the gun as five or six inches long and dark in color. She could not tell what kind of material the gun was made out of. Defendant put his shirt back down.

Cortes was fearful that defendant was going to shoot her or hit her with the gun so she opened one of the cash registers and gave him about \$200. She then opened the other register and showed him that it was empty. Defendant left with the money. The whole incident took about two or three minutes.

When defendant left, Cortes then went into the back of the store and told her co-worker what had happened and then called the police. When the police arrived, Cortes

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related what had happened and gave the police a description. Cortes told the police that the offender was an African-American male with a medium build, and was wearing a mask and a dark sweater. Cortes also told police that the man's "eyes really stood out." The following day, Cortes went to the police station and viewed a photo array. She did not recognize anyone in the photographs.

Cortes went to the police station again on January 14, 2007, to view a lineup. Before she viewed the lineup, she signed a form that stated she understood that the "suspect may or may not be in the lineup or photo spread", that she understood she was "not required to make an identification" and that she understood she was not to "assume that the person administering the lineup or photo spread knows which person the suspect is." Each person in the lineup was required to say, "[t]his is a stickup" and "[h]urry up". At the lineup, she identified defendant because of his body build and his eyes.

Cortes also identified the Philadelphia Eagles Football hooded sweatshirt, gloves and mask that defendant wore when he came into the Dunkin' Donuts. The jury then viewed the surveillance tape from the Dunkin' Donuts at the time of the robbery.

Gary Silver testified that he was working as the store manager for Office Depot on Green Bay Road in Evanston on the evening of January 6, 2007. Office Depot is about a block from the Dunkin' Donuts on Green Bay Road. At about 7 p.m., he was helping a customer in the front of the store, near the register, when an African-American man wearing a blue striped shirt walked in and asked for change for the pay phone. Silver testified that he thought it was unusual that the man did not have a jacket

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on because it was cold outside. The man left after Silver gave him the change. Less than a minute later, the man was talking to another Office Depot employee, Donald Fowler, about using their phone to call a cab.

Donald Fowler testified that he was working at Office Depot on Green Bay Road in Evanston on January 6, 2007. Fowler testified that a man, who he identified as defendant in open court, came into Office Depot a little before 7 p.m. on the evening of January 6, 2007. Fowler stated that he thought it was unusual that defendant was not wearing a coat or a hat. He also noticed that defendant was moving fast and seemed nervous. Defendant asked for change from Silver and left. Defendant returned almost immediately and walked over to Fowler and asked if there was a pay phone. When Fowler told him that there was no pay phone, defendant asked to use the store phone. Fowler stood near defendant while he used the phone and knew that defendant had called a cab. Defendant left after he finished using the phone.

Shortly after defendant left, Fowler got a call from an acquaintance who informed him that the Dunkin' Donuts on the next block had been robbed. Fowler spoke with Silver and they called the police. When the police arrived, Fowler gave them a description of defendant. Later that night, Fowler viewed a photo array but did not identify anyone. He also looked at digital photos the next day but did not identify anyone. A week later, Fowler identified defendant in a lineup. The video surveillance tape from Office Depot was played in court.

Giash Uddin, a cab driver for the North Shore Cab Company, testified that at 6:55 p.m. on the night of the robbery, he was dispatched to pick up someone named

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“Anderson” at the Office Depot on Green Bay Road. When Uddin arrived at the Office Depot at 7:05 p.m., a man who Uddin identified in court as defendant, approached the cab and asked Uddin if he was there for “Anderson”. Uddin said he was. Defendant told Uddin that he was “going to go get her” and went into the alley behind the store. When he went into the alley, defendant was wearing a black shirt and black pants, but no coat or gloves. When he came out of the alley three or four minutes later, defendant was wearing only a white t-shirt and was breathing heavily. He was carrying dark colored clothing in his hand. Defendant told Uddin that “Anderson” could not make it and asked Uddin to drop him off in the 300 block of Florence in Evanston. Uddin activated the meter at 7:09 p.m. and deactivated it at 7:26 p.m.

Later that night, the police contacted Uddin and Uddin looked at pictures at the police station, but did not identify anyone. A few days later, Uddin went back to the police station and viewed a picture of defendant taken from the Office Depot video. Uddin told police that defendant was the person who got into his cab. Uddin also identified defendant in a lineup on January 14, 2007.

Detective Timothy Van Dyk from the Evanston police department responded to Cortes phone call about the robbery. Detective Van Dyk learned from Cortes that the robber was an African-American man with a medium build, was six feet tall and had distinctive light eyes. He was wearing a mask, a dark colored hoodie with the word “Eagles” on the front and dark pants. The robber came through the door, demanded money and lifted his shirt to reveal a gun. While Detective Van Dyk was at Dunkin’ Donuts, a dispatcher advised him that someone had called from Office Depot to say

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that the offender may have been there shortly before the robbery. He sent another officer to Office Depot to speak with employees there.

Detective Van Dyk later obtained the surveillance video tapes from both Office Depot and Dunkin' Donuts and took some still frame shots from the Office Depot video. With those still shots, Detective Van Dyk created a bulletin to disseminate, which included a description of defendant. Detective Van Dyk also had an officer alert North Shore Cabs to inform the police if they got a call for any more drop offs in the 300 block of Florence.

Officer Timothy Curran was assigned to detain the man who would be getting dropped off by North Shore Cabs at 327 Florence in the early morning hours of January 14, 2007. Officer Curran identified defendant as the man who got out of the cab at that location. Officer Curran detained defendant and later helped transport him to the police station.

Defendant's uncle, Craig Martin, testified that he lived in the house at 327 Florence in Evanston with defendant, but that the house belonged to defendant's brother Cecil Martin. Cecil was a former NFL football player and had played for several teams including the Philadelphia Eagles. Cecil kept some of his NFL belongings in the house and kept clothes in a closet in the laundry area.

After obtaining a search warrant, officers searched the house at 10 a.m. on January 14, 2007. A dark sweatshirt that said "Eagles football," black and white football receiver gloves and a face mask were recovered from a basement closet. The video taken from Dunkin' Donuts, which was admitted into evidence and published to

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the jury, showed the offender wearing gloves and a sweatshirt exactly like those recovered from the house at 327 Florence. Cortes identified the sweatshirt, gloves and mask as those worn by defendant at the time of the armed robbery. Officer Van Dyk also recovered a striped sweatshirt from a bench in the foyer of the home, which Gary Silver, Donald Fowler and Giash Uddin identified as being similar to the sweatshirt worn by the defendant while he was in Office Depot. A video surveillance tape from Office Depot was admitted and played for the jury.

At the police station, defendant was advised of his *Miranda* rights and said he would speak with detectives, but would not sign any forms. Detective Van Dyk showed defendant a photo from the Office Depot video and one from the Dunkin' Donuts video. Defendant denied that the photos were of him or that he owned clothes similar to those that were worn in the photos.

Later, at about 5 p.m., when Detective Van Dyk and Sergeant Hearts-Glass were taking defendant back to the lockup, defendant shoved Sergeant Hearts-Glass aside and ran towards unsecured doors leading to the front lobby. After a struggle with Detective Van Dyk, defendant slammed Detective Van Dyk into the glass doors, ran through the doors and down the steps of the police station. Defendant was tackled by several officers. A video from the police station lobby was shown to the jury.

Defendant testified he was at Office Depot at 7 p.m. on the night of the armed robbery. He went inside to use the pay phone but there was no pay phone in the store so he called a cab from the store phone. When the cab arrived, he took it to his brother's house at 327 Florence in Evanston. Defendant denied going to the Dunkin'

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Donuts and denied putting on an Eagles sweatshirt, face mask or gloves. He did not have a coat on that day because his coat was stolen while he was filling out a job application at Dominick's.

Defendant testified that he was stopped by police after he returned to his brother's house by cab on January 14, 2007. Officers asked him about a robbery at a liquor store and told him he had an active warrant. He was taken to the Evanston Police Department.

At the police station, at about 5 a.m., he was taken into an interview room. Detectives Johnston and Barnes were present. Detective Van Dyk entered shortly thereafter. The detectives asked defendant to look at photographs and asked him about a cell phone. Defendant told them he wanted a lawyer. Detectives attempted to persuade him to sign a statement admitting to the robbery. Defendant would not agree so Detective Van Dyk struck him in the chest and slammed him against the wall. Detective Van Dyk then pulled him out of the interview room and swung him into the hallway causing him to fall to the floor. He tried to get up but Detective Johnston hit him in the back and choked him for three or four minutes. He was then taken to the lockup and denied any medical treatment.

On cross-examination, defendant stated that Fowler called the North Shore Cab company for him. Defendant told Fowler that his name was Anthony. When the cab arrived, defendant did not approach the cab and ask the driver if he was there for "Anderson" or "Anthony". When he opened the cab door, the driver asked, "Anthony?" and defendant said "yes". Defendant denied talking to the driver, leaving and then

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coming back. He also denied that he got into the cab wearing only a white t-shirt.

Defendant stated that he suffered injuries as a result of being beaten by detectives in the interview room. He said his injuries consisted of bruises to his back, a swollen jaw, a gash on his tongue, and redness around his face. He denied that these injuries occurred as a result of his being tackled by several officers after he attempted to escape from the police station. Photographs were taken of his injuries following his attempted escape. Defendant insisted that he sustained his injuries at 5 a.m. and when shown the video of the struggle with the officers, denied that his injuries occurred as a result of the altercation.

Defendant testified that he went to the hospital for the injuries he sustained and not because he had an asthma attack. He denied being given albuteral at the hospital, but did acknowledge a hospital emergency form with his name on it and discharge instructions which informed defendant to use an inhaler every six hours. Defendant denied being given the discharge instructions when he left the hospital. Defendant stated that he was given cream for his bruises at the hospital and not an inhaler.

Officer Gil Levy testified in rebuttal. Officer Levy testified that he took defendant to Evanston Hospital at 12:45 p.m. on the day of his arrest because defendant complained of asthma problems. Officer Levy was with defendant at all times in the hospital. After he was treated, defendant was given a discharge sheet reflecting defendant's diagnosis of unspecified asthma with instructions to use an inhaler. Defendant never complained of being beaten by any police officer, did not have any bruises and was not given cream for any bruises.

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In rebuttal, Detective Van Dyk denied that he struck defendant in the chest, picked him up by his shirt, slammed him into a wall or pushed him out of the interview room. Detective Van Dyk also denied that Detective Johnston struck or choked defendant. He testified that any injuries defendant sustained were the result of the struggle that ensued after defendant attempted to leave the police station. Detective Johnston testified that he did not choke or strike defendant.

After hearing all of the evidence, defendant was found guilty of armed robbery. He was sentence to 30 years' imprisonment. It is from this judgment that defendant now appeals.

ANALYSIS

Defendant first claims that the State failed to prove him guilty of armed robbery beyond a reasonable doubt because the State did not prove that defendant used a dangerous weapon as required by section 18-2(a)(1) of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(1) (West 2006)).

A criminal conviction will not be overturned unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. See *People v. Howard*, 209 Ill. App. 3d 159, 171 (1991). When a defendant is challenging the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of 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. Smith*, 185 Ill. 2d 532, 541 (1999). A guilty verdict should be given deference and "shall not be disregarded on review unless

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it is inconclusive, improbable, unconvincing or contrary to human experience." *People v. Schorle*, 206 Ill. App. 3d 748, 758 (1990).

At the forefront, we find it important to resolve a disagreement between defendant and the State as to which subsection of the armed robbery statute defendant was charged with and convicted. Defendant argues that the State failed to prove him guilty of armed robbery under section 18-2(a)(1) beyond a reasonable doubt because the State failed to prove that defendant was armed with a dangerous weapon. The State however, argues that defendant was charged with and proven guilty of section 18-2(a)(2), which required proof that defendant committed the offense of armed robbery and "[carried] on or about his person or be otherwise armed with a firearm." 720 ILCS 5/18-2(a)(1), (2) (West 2006).

In resolving this issue, we look to the indictment. The indictment in this case reads as follows:

"[Defendant] knowingly took property, to wit: United States currency from the person or presence of Dulce Cortes, by the use of force or by threatening the imminent use of force, and defendant carried on or about his person [or] was otherwise armed with a dangerous weapon, to wit: a firearm, in violation of chapter 720, act 5, section 18-2(a)(2) of the Illinois Compiled Statute 1992, as amended."

In 2000, the armed robbery statute was amended by Public Act 91-404. Pub. Act 91-404, §5, eff. January 1, 2000 (codified at 720 ILCS 5/33A-1(b)(1) (West 2000); 720 ILCS 5/18-2 (West 2000). The preamended version of the armed robbery statute read

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as follows: “[a] person commits armed robbery when he or she violates [s]ection 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon.” 720 ILCS 5/18-2 (West 1998). The 2000 amendment to the armed robbery statute created four distinct ways in which the offense of armed robbery can be committed. Specifically, the armed robbery statute, as amended by Public Act 91-404 provides:

" § 18-2. Armed robbery.

(a) A person commits armed robbery when he or she violates Section 18-1

[(robbery)];

and

(1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm; or

(2) he or she carries on or about his or her person or is otherwise armed with a firearm; or

(3) he or she, during the commission of the offense, personally discharges a firearm; or

(4) he or she, during the commission of the offense, personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person.” 720 ILCS 5/18-2(a), (b) (West 2000).

The purpose of Public Act 91-404 was “to deter the use of firearms in the commission

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of a felony offense.” Pub. Act 91-404, §5, eff. January 1, 2000 (codified at 720 ILCS 5/33A-1(b)(1) (West 2000)), by increasing the penalties for certain offenses, including armed robbery, when the offender is armed with a dangerous weapon other than a firearm, possesses a firearm, discharges a firearm, and discharges a firearm that causes great bodily harm, permanent disability, disfigurement or death. These additional penalties are commonly referred to as “15/20/25-to-life” sentencing provisions. *People v. Sharpe*, 216 Ill. 2d 481, 506 (2005).

Although defendant’s argument is premised on the fact that he was charged with armed robbery while possessing a “dangerous weapon” under subsection 18-2(a)(1), the indictment clearly indicates that defendant was charged with armed robbery under subsection 18-2(a)(2). This is significant because section 18-2(a)(2) does not require proof that defendant was armed with a dangerous weapon. Section 18-2(a)(2) simply requires proof that defendant, while committing a robbery as defined in section 18-1 “carries on or about his or her person or is otherwise armed with a firearm.” 720 ILCS 5/18-2(a)(2) (West 2006). “The current statute, specifically section 18-2(a) makes clear that ‘dangerous weapon’ and ‘firearm’ are two different offenses under different subsections.” *People v. Toy*, No. 1-07-2969 (January 21, 2001), slip op. at 16..

Although the offense in this case occurred in 2007, after the 2000 amendment to the armed robbery statute, the State in this case seemingly indicted defendant using language from the preamended version of section 18-2, when it charged that “defendant carried on or about his person [or] was otherwise armed with a dangerous

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weapon, to wit: a firearm.” However, the fact that the State charged defendant as such is not fatal to defendant’s conviction. A variance between allegations in an indictment and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his defense. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). An indictment must cite the statutory provision alleged to have been violated and set forth the nature and elements of the offense charged. *Collins*, 214 Ill.2d at 219. “[O]ther matters unnecessarily added may be regarded as surplusage.” *Collins*, 214 Ill. 2d at 219.

The term “dangerous weapon” as included in the indictment is mere surplusage. The indictment clearly apprises defendant of the fact that he was charged with armed robbery in violation of subsection (a)(2) and that the State was required to prove that he was armed with a firearm, which it did.

In *People v. Hill*, 346 Ill. App. 3d 545 (2004), the defendant was charged and convicted of attempt armed robbery. On appeal, he argued that the weapon he was carrying could not be considered a dangerous weapon or a firearm for purposes of Section 18-2(a) because it was inoperable and therefore did not qualify as a firearm within the meaning as provided in Section 1.1 of the Firearm Owners Identification Card Act (FOID Act). In reviewing defendant’s argument, the *Hill* court noted that the 2000 amendment to the armed robbery statute deleted the requirement of proof of a dangerous weapon when defendant is armed with a firearm under subsection (a)(2). The court rejected defendant’s argument for four reasons. First, there was no evidence

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that the gun was inoperable. Second, the evidence was sufficient to prove that the firearm could have been used as a dangerous weapon even if it were inoperable. Third, the evidence was sufficient to find the defendant guilty of armed robbery for carrying a dangerous weapon under subsection (a)(1). Finally, the firearm, even if inoperable, would qualify as a firearm under the definition as provided in Section 1.1 of the FOID Act. With respect to the definition of a firearm under the FOID Act, the court found:

“[T]he focus is on the intended purpose of the firearm based upon its *design*, not the current status of its ability to be used as intended. As such, the evidence here, which indicated that defendant was armed with a ‘nickel-plated automatic’ handgun, was sufficient to qualify as a ‘firearm’ within the meaning of section 1.1 of the FOID Act.” *Hill*, 346 Ill. App. 3d at 549.

Like *Hill*, the State here proved beyond a reasonable doubt that defendant possessed a firearm during the commission of the robbery. This was established by the testimony of Cortes who testified that she viewed a gun and described the gun as five or six inches long and dark in color. The trier of fact is in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence. *People v. Cochran*, 323 Ill. App. 3d 669, 679 (2001). The evidence was sufficient to establish that defendant possessed a

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firearm during the commission of the robbery beyond a reasonable doubt.

Defendant's reliance on *People v. Ross*, 229 Ill. 2d 255 (2008), is entirely misplaced. In *Ross*, the defendant was convicted of armed robbery after the evidence presented at trial established that the defendant demanded the victim's wallet while pointing a small, black, "very portable gun" at him. *Ross*, 229 Ill. 2d at 258. After the victim was released, he flagged down police officers who drove him back to the scene. When they approached, they observed the defendant throw some items into a bush. One of the officers recovered the victim's wallet and a 4.5 caliber BB gun from the bush. *Ross*, 229 Ill. 2d at 258.

On appeal, our supreme court considered whether a BB gun is a dangerous weapon under section 18-2 (720 ILCS 5/18-2(a) (West 1998)). The court determined there is not a mandatory presumption that guns are dangerous weapons. Instead, the trier of fact "may make an inference of dangerousness based upon the evidence." *Ross*, 229 Ill. 2d at 276. "The State may prove that a gun is a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or bludgeon." *Ross*, 229 Ill. 2d at 276. The *Ross* court determined that the State's evidence was insufficient to establish that the BB gun was a dangerous weapon where the BB gun, nor any pictures of the gun were presented at trial. In addition, the court noted that there was no evidence presented as to the weight or composition of the gun or that it was loaded or brandished as a bludgeon. *Ross*, 229 Ill. 2d at 277.

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Ross is inapplicable to the instant case because for two reasons. First, defendant was charged and convicted of possessing a firearm during the robbery, a violation of subsection (a)(2). Second, the *Ross* court considered the preamended version of section 18-2, which required the State to prove that a defendant was armed with a dangerous weapon. See 720 ILCS 5/18-2 (West 1998). These distinctions are fatal to defendant's argument.

Defendant next argues that the trial court erred when it refused to instruct the jury on the lesser offense of robbery where the evidence at trial supported such an instruction. When defendant requested the instruction, the trial court denied it stating, "we're not at the point of lesser included for robbery. It is simply the armed robbery instruction [sic] will be given."

An instruction on a lesser offense is justified when there is some evidence to support the giving of the instruction. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Simply identifying the existence of a lesser-offense does not necessarily create an automatic right to an instruction on that offense. *People v. Greer*, 336 Ill. App. 3d 965, 978 (2003). An instruction on a lesser-included offense is not required where the evidence rationally precludes the instruction. *Greer*, 336 Ill. App. 3d at 976. Said another way, if any evidence in the record could support a conviction on a lesser offense, the instruction regarding the lesser offense should be given. *People v. Willis*, 50 Ill. App. 3d 487 (1977). A circuit court's failure to give the instruction, where the evidence supports the instruction, is an abuse of discretion. *People v. Jones*, 175 Ill. 2d

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126, 132 (1997).

Defendant contends that a lesser-offense instruction on robbery was proper in this case because the evidence was insufficient to support a finding that the purported gun used in the robbery was a “dangerous weapon.” The defendants in *People v. Arnold*, 218 Ill. App. 3d 647 (1991) and *People v. Allen*, 249 Ill. App. 3d 888 (1993), raised similar arguments.

In *Arnold*, the defendant was charged with armed robbery, among other offenses, and requested a jury instruction on the lesser offense of robbery, which was denied. The testimony at trial established that three victims saw a dark colored handgun numerous times during the robbery. This court on appeal found that the trial court properly denied the instruction for simple robbery because there was no evidence to question the authenticity of the gun and defendant did not dispute the witnesses testimony. *Arnold*, 218 Ill. App. 3d at 652.

In *Allen*, the defendant argued on appeal that the trial court improperly denied his request for an instruction on robbery, as a lesser included offense of armed robbery, because the eyewitness to the crime could not say with certainty that the gun was real and therefore the jury could not conclude that the robbery was committed with a dangerous weapon. The *Allen* court rejected defendant’s argument, finding that the victim of the armed robbery testified at trial that she saw a black, metal gun, from a distance of less than one foot. The court noted that there was no evidence presented that contradicted the victim’s testimony or questioned the authenticity of the gun. As

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such, the trial court correctly concluded that the evidence precluded the finding of a lesser offense of robbery. *Allen*, 249 Ill. App. 3d at 888.

We find *Arnold* and *Allen* to be instructive. Similar to *Arnold* and *Allen*, there was no evidence presented in this case that questioned the authenticity of the gun or contradicted the victim's testimony regarding the gun. Here, Cortes testified that defendant entered the Dunkin' Donuts and after announcing "this is a stickup", defendant lifted his sweater and revealed a gun. Cortes described the gun as five or six inches long and dark in color. Although defendant testified in this case, his defense was one of mistaken identity. He did not challenge Cortes testimony regarding the gun. Accordingly, we find that the trial court did not err when it denied defendant's request for a jury instruction on the lesser included offense of robbery.

Defendant next claims that the trial court erred when it refused his non-pattern instruction on cross-racial identification, where his theory at trial was that Cortes misidentified defendant as the robber. Defendant proposed that the following instruction be given to the jury:

"In this case, the defendant, Anthony Martin, is of a different race than Dolce Cortez [sic] and Giash Uddin, the witnesses who have identified him. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater

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difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that he or she would not have greater difficulty in making a reliable identification."

The trial court denied the instruction and stated:

"I have read that and I don't know that sufficient ground has been established in this case for it to be given. As to discussions about the background of Ms. Cortes and Mr. Uddin, they certainly deal with people on a full-time, regular basis, one behind the counter of Dunkin Donuts, and the other is a cab driver. We don't know what their interaction is with African-Americans; certainly they are minorities themselves. With all due respect, I will not give that instruction."

Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Supreme Court Rule 451(a) (177 Ill. 2d R. 451(a)) provides that whenever the IPI contains an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the [IPI instruction] shall be used unless the court determines that it does not accurately state the law." Where no IPI instruction exists on a subject that the court determines the jury should be

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instructed, the court has the discretion to give a non-pattern jury instruction. *People v. Ramey*, 151 Ill. 2d 498, 536 (1992).

There is currently no Illinois Pattern Jury Instruction that deals with cross-racial identification and we find that the trial court did not abuse its discretion when it refused to give defendant's proffered non-pattern instruction. In *People v. Bias*, 131 Ill. App. 3d 98 (1985), this court rejected the defendant's argument that a similar instruction should have been given in his robbery case. The defendant argued the instruction was necessary where the eyewitness failed to identify key facial features of the offender of a different race and gave inconsistent descriptions. The court rejected the instruction finding that the empirical data failed to support such an instruction. *Bias*, 131 Ill. App. 3d at 103-104. See also *People v. White*, 58 Ill. App. 3d 226 (1978).

The jury in this case was given IPI Criminal 4th No. 3.15, which provides instruction on how the jury should assess identification testimony.

IPI Criminal, No. 3.15 states:

"When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witnesses had to view the offender at the time of the offense.

[2] The witness's degree of attention at the time of the offense.

[3] The witness's earlier description of the offender.

[4] The level of certainty shown by the witness when confronting the defendant.

[5] The length of time between the offense and the identification confrontation.”

IPI Criminal 4th No. 3.15 (Supp.2003).

Our supreme court had found that the five factors listed in IPI Criminal 4th No. 3.15 are an accurate statement of the law for “assessing the reliability of identification testimony.” *People v. Piatkowski*, 225 Ill.2d 551, 567 (2007). These factors are commonly known as the *Slim* or *Biggers* factors. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989), following *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

A defendant may be convicted on the testimony of even a single eyewitness if the witness viewed the accused under circumstances permitting a positive identification and the witness' testimony is positive and credible. *Slim*, 127 Ill. 2d at 307.

Considering these factors, there is nothing vague or doubtful about Cortes's identification of defendant as the offender. Cortes observed defendant walk into the Dunkin' Donuts and approach the counter. She then stepped closer to defendant because he was speaking to her but could not understand what he was saying. After defendant announced that “this is a stick-up”, Cortes emptied the cash out of one of the registers. The whole incident lasted a few minutes. Cortes testified that she observed defendant lift his shirt and reveal a gun that was tucked into his pants. Cortes's description of defendant was accurate. She testified that defendant was a male,

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African-American, with a medium build, dressed in a hooded sweater, gloves and a face mask. Cortes testified that although defendant's lower face was covered by the mask, she could see his eyes, which she described as very light in color and distinctive.

She originally described defendant as being dark complected but later changed that description to light complected after speaking with a police officer. The arrest report in this case indicates that defendant is six feet tall, weighed 220 pounds and had hazel eyes. Furthermore, her subsequent recognition and identification of defendant in a lineup as the offender at the scene was unwavering and occurred only eight days after the armed robbery. Cortes's identification of defendant was reliable in this case and there was no need to tender a non-IPI instruction of cross-racial eyewitness identification. Accordingly, the trial court did not abuse its discretion in denying defendant's request for such an instruction.

Defendant contends that he was denied his right to an impartial jury where the trial court failed to ask potential jurors if they accepted and understood the four *Zehr* principles as required by Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). *People v. Zehr*, 103 Ill. 2d 472, 477 (1984) (a trial court is required to ask potential jurors whether they understand and accept the following four principles: (1) a defendant is presumed innocent, (2) he is not required to present evidence on his own behalf, (3) the State must prove him guilty beyond a reasonable doubt, and (4) his decision not to testify may not be held against him). The State argues that defendant forfeited this claim and the issue can only be

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reviewed for plain error.

In his reply brief, defendant has acknowledged that *People v. Thompson*, 238 Ill. 2d 598 (2010), “effectively forecloses the argument raised in his opening brief.” Indeed, *Thompson* is dispositive here, where defendant is requesting review of his claim under the second prong of plain error, but not the first.

There is no question that failure to ascertain whether a jury understands and accepts the four Zehr principles is error. *Thompson*, 238 Ill. App. 3d 598. Under a plain error analysis, a court of review can consider a forfeited error when “(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.” *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Defendant in this case only argued that the trial court’s failure to comply with Rule 431(b) was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. However, a defendant can satisfy the second prong of plain error review if he is able to establish that he was tried by a biased jury. *Thompson*, 238 Ill. 2d at 614. However, a violation of Rule 431(b) does not implicate a fundamental right or constitutional protection and, therefore, a failure to conduct a proper Rule 431(b) questioning does not make it inevitable that the jury was biased. *Thompson*, 238 Ill. 2d at 609-10. The defendant must prove such bias. *Thompson*, 238 Ill. 2d at 614. As defendant did not allege plain error under the first prong, and did not establish jury bias, his argument is forfeited.

Similarly, defendant acknowledges pursuant to our supreme court’s recent

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decision in *People v. Williams*, 239 Ill. 2d 503, 510 (2011), he is not entitled to an additional day of presentence credit for the date of sentencing.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.