

No. 1-10-1192

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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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07CR3196
)	
LARRY RUSSELL,)	The Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concur in the judgment.

Held: Trial court affirmed where pretrial lineup identification was reliable where defendant and other lineup participants shared similar physical characteristics. Mittimus corrected to properly reflect number of days served in presentence custody as well as one-year term of mandatory supervised release.

¶ 1

ORDER

¶ 2 After a bench trial, defendant Larry Russell was found guilty of theft from person. On appeal, defendant contends that the trial court erred in denying his motion to suppress identification. Specifically, he argues that the lineup identification was unreliable because the lineup itself was impermissibly suggestive. Defendant also contends, and the State properly

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concedes, that his mittimus must be corrected. For the following reasons, we affirm defendant's conviction and sentence and modify his mittimus.

¶ 3

BACKGROUND

¶ 4 After a bench trial, defendant was found guilty of theft from person. Defendant was charged separately with possession of a stolen motor vehicle (PSMV) and theft in case 07CR4436.¹ Defendant also appealed that conviction and sentence, which appeal is currently pending in this court as number 1-10-1193. Although these are separate cases, the facts of the theft case are intertwined with the facts of the PSMV case. The ruling on the motion to suppress identification at issue in the case at bar was filed and heard in the PSMV case, but adopted and considered in the theft from person case.

¹ In that case, the facts of which are included in the instant briefs on appeal, defendant was charged with possession of a stolen motor vehicle and theft based on his possession of the car in which he was arrested in the instant case. The day after defendant was arrested in the instant case, the car's owner, John Konieczny, identified defendant out of the same lineup the victim in the instant case viewed as one of two individuals who had stolen Konieczny's keys approximately three weeks before this incident occurred. The State originally elected to proceed on the case involving Konieczny, and a hearing on a motion to suppress Konieczny's identification was held on November 24, 2008. The motion was denied, and on April 23, 2009, the State changed the elected case to the one at bar. During the theft from person trial, the court adopted this motion to suppress identification, which motion is at issue herein.

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¶ 5 Initially, the State elected to proceed on the PSMV case. Defendant filed a motion to suppress a lineup identification in which he claimed the lineup was suggestive because he was the only participant wearing glasses and because only he and one other participant had short hair. The trial court held a hearing on the motion in which Chicago police detective Anthony Reyes was the sole witness who testified.

¶ 6 At the hearing, Detective Reyes testified that on January 17, 2007, he was assigned to construct a lineup in which defendant was to participate. At that time, defendant was a suspect in six separate cases. Detective Reyes arranged for the various victims to view the lineup. Reyes looked for four people, whom he termed "fillers," who looked similar to defendant. Detective Reyes stated that, like defendant, all of the fillers were male, African American, and had dark complexions. All of the fillers had some facial hair, with three of the fillers having the same amount of facial hair as defendant. Once Detective Reyes located the fillers, he asked defendant what position he wanted to take in the lineup. Defendant chose the first position. Detective Reyes testified that, while defendant had a short hairstyle and the person in the third position had a long hairstyle, the person in the second position had a short hairstyle.

¶ 7 Defendant was the only participant who wore eyeglasses in the lineup. Detective Reyes did not ask defendant to remove his glasses, nor did he ask the other participants to wear glasses. Photographs of the lineup were introduced as exhibits at the hearing. The victim in the PSMV case, John Konieczny, viewed the lineup.

¶ 8 Defense counsel argued that the lineup was impermissibly suggestive because defendant was the only individual wearing glasses and his hairstyle was unique compared to most of the

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men in the lineup. The court denied the motion, noting:

"THE COURT: In [the motion to suppress identification], the defense presents two arguments in support of the suppression of this lineup identification. First, that the lineup identification was suggestive because the defendant was the only one wearing glasses in the lineup. And second, the defense further asserts that the defendant and only one other participant had a short hairstyle. The facts that came out during the course of the hearing was that the make up of the lineup, of the five individuals in the lineup all were male blacks, all were dark in complexion, and all had some level of facial hair. During the course of the hearing there was only one witness and that witness said that the defendant was not told to wear glasses nor was he asked to take the glasses off.

To me more importantly there was no evidence presented that the witness who viewed the lineup said that the offender was wearing glasses at the time and therefore somehow make [*sic*] that lineup suggestive. The lineup- - There was no evidence that the offender was described as wearing glasses or having a short hairstyle. Furthermore, the defendant according to the uncontradicted testimony was allowed to pick his position within the lineup.

Based on the testimony of the only witness, the exhibits, the pictures that were introduced by the defense and the totality of the circumstances, the Court finds that the defendant has not met its burden in showing that the subject lineup was impermissibly subjective. Therefore, the motion to suppress the identification is denied."

¶ 9 On the day the PSMV case was set to proceed to trial, the State informed the court that the victim had a family emergency and, therefore, the State would proceed to trial on the theft from person case in 07CR3196. A bench trial ensued.

¶ 10 At trial, 74-year-old Mary Leone testified that on January 16, 2007, at approximately 11:00 a.m. she was shopping at Walgreens on Belmont Avenue and Central Avenue in Chicago. The day was sunny and the lights were on in Walgreens. As she entered the store, she noticed defendant, who stood five to six feet away from her. He looked lost and was walking slowly. When she finished her shopping, she noticed defendant was still in the store, now near the door. After she paid for her items, Mary approached the door carrying her open purse. Defendant, now beside her, told her that something was wrong with the door. As Mary looked at the door, defendant left the store. Mary then realized there was nothing wrong with the door. She was suspicious and looked into her purse. She saw that her wallet was missing.

¶ 11 Mary testified that she then left Walgreens and saw defendant walking "briskly" to a vehicle. She yelled "stop that man, he got my wallet." A passerby stopped defendant. Mary approached defendant and demanded her wallet. Defendant returned her wallet to her, saying she

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had dropped it. Mary looked inside and saw that her credit card was missing. She asked defendant where her credit card was. Defendant told her she had dropped the credit card, as well, and handed it back. He then broke away from the passerby who was detaining him and fled in a nearby vehicle. Mary testified that she saw the vehicle he fled in, remembered the license plate number, and then called the police.

¶ 12 When asked to identify defendant in court, Mary said:

"[THE WITNESS [MARY LEONE]]: I think that's him right over there.

[ASSISTANT STATE'S ATTORNEY]: Okay. Could you describe something he is wearing?

A: Now?

Q: Yes.

A: The green outfit.

[ASSISTANT STATE'S ATTORNEY]: Your Honor, may the record reflect the witness has identified the Defendant, Larry Russell?

THE COURT: Yes."

¶ 13 Mary testified that she went to the police station the following day and viewed a lineup. There were five individuals in the lineup. Mary was on the other side of a glass partition from the lineup participants. There were two detectives or officers on her side of the glass, neither of whom spoke to her. Mary identified defendant as the person who took her wallet and credit card.

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When asked what the first thing she noticed at the lineup was, Mary testified, "I just saw him period."

¶ 14 On cross-examination, Mary was asked to recall the description of the offender she gave to the police, and she testified:

"[THE WITNESS]: Thin. Just thin, dark skin.

[DEFENSE COUNSEL]: Well, a male?

A: Male.

Q: Black?

A: Black.

Q: About 5'10"?

A: About 160 pounds.

Q: Thin as you said?

A: Yeah, thin.

Q: Glasses?

A: Right.

Q: Wearing black clothing?

A: Right."

Defense counsel also asked if anybody else in the lineup was wearing all black clothing and Mary responded:

"[THE WITNESS]: I didn't really focus on - - The minute he walked out I could tell it was him. I didn't even focus on the

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clothing to be truthful. I recognized him like that because it was very traumatic.

[DEFENSE COUNSEL]: But would it be fair to say there is no one else in that line-up that was wearing all black clothing?

A: [Looking at photograph of the lineup] This guy has got all dark clothes on. It could be all black here. Very dark, very dark blue, very, very dark.

Q: How about glasses? Anybody else wearing glasses?

A: I didn't really notice the glasses.

* * *

There was nobody else wearing glasses, but I didn't focus on the glasses to be truthful with you."

¶ 15 Chicago police officer Tom Driscoll testified that he was working on January 16, 2007, when he was called to the Walgreens at Belmont and Central in response to an apparent theft. Officer Driscoll learned that the offender left in a car with a particular license plate number, and put out a flash message with this number. Within minutes, Officer Driscoll learned that another officer had located the vehicle about one mile away. Officer Driscoll went to that location and found defendant alone, seated in the driver's seat of the car. Officer Driscoll arrested defendant.

¶ 16 Detective Reyes testified that he was the primary detective investigating the theft from Mary Leone on January 17, 2007. He assembled a lineup in which defendant participated. Detective Reyes testified that he tried to find "fillers" for the line-up who matched the

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demographics of defendant. On cross-examination, Detective Reyes testified that defendant was the only individual in the line-up who was wearing glasses. He testified that he did not instruct defendant to remove his eyeglasses, nor did he provide eyeglasses for the other lineup participants to wear. Reyes testified that three of the five lineup participants had short hair, one had longer hair with braids, twists, or dreads, and one had "something of an afro."

¶ 17 The State rested. Defendant made a motion for a directed finding, which the court denied. Then defense counsel informed the court that she realized the motion to suppress identification was heard on the PSMV case and not on the current theft case. Defense counsel asked the court to consider an oral motion to suppress identification and further asked the court to consider testimony from the previous hearing on the motion as well as testimony from the trial in the theft case. The court granted defense counsel leave to file the motion, noting that it involved the same evidence, the same lineup, and the same legal bases for argument. The court then denied the motion to suppress identification.

¶ 18 Defendant testified on his own behalf. Defendant testified that, although he went to the Walgreens in question on the morning of January 16, 2007, he did not see Mary Leone while there. Defendant denied leaving in the stolen vehicle. He testified that he was arrested for being in the stolen vehicle and the police returned him to Walgreens where he saw Mary Leone, a woman he had never seen before, standing in the doorway of the store. The police were talking with Mary while she pointed at the police car in which defendant was riding. Defendant denied having taken Mary's wallet or her credit card. He denied having been detained by somebody he did not know.

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¶ 19 Defendant rested, and the State introduced certified copies of defendant's previous convictions for escape, possession of a controlled substance, and retail theft. The parties stipulated that defendant had a prior conviction for felony theft.

¶ 20 After argument by both parties, the court found defendant guilty of theft from person. Defendant filed a motion for a new trial regarding both his theft from person conviction as well as his PSMV and theft conviction. The court denied the motion. The court held a simultaneous sentencing hearing and sentenced defendant to 10 years' imprisonment on his theft from person conviction in case 07CR3196 to run concurrent to the sentences ordered in the PSMV and theft case.

¶ 21 Defendant appeals.

¶ 22 ANALYSIS

¶ 23 I. Motion to Suppress Identification

¶ 24 Defendant maintains that the trial court erred when it did not suppress pretrial identification evidence that defendant alleges was the result of an unnecessarily suggestive lineup. Defendant asserts several reasons why he believes Mary Leone's identification of him was based on a "suggestive" lineup due to alleged differences in his appearance and that of the other participants. Specifically, defendant argues that the lineup was suggestive because he was the only lineup participant who was wearing glasses, and only one of two individuals in the lineup with short hair. He also argues that the court's decision was against the manifest weight of the evidence due to certain statements made by the court, and that the court erred by basing its

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decision on the fact that the officers did not instruct defendant to wear or not to wear his glasses. However, based upon our review of defendant's arguments, as well as the record on appeal and included photographs of the lineup, we disagree.

¶ 25 Evidence of a pretrial identification of a defendant by a witness will not be excluded at trial unless the procedure was unnecessarily suggestive and there was a substantial likelihood of irreparable misidentification. *People v. Love*, 377 Ill. App. 3d 306, 311 (2007), citing *People v. Enis*, 163 Ill. 2d 367, 398 (1994). The defendant bears the burden of proving that the pretrial procedure was unduly suggestive, and the court considers the totality of the circumstances in reaching its decision. *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). A trial court's ruling on a motion to suppress evidence is reviewed under the two-part test adopted by the United States Supreme Court in *Orenelas v. United States*, 517 U.S. 690, 699 (1996). *People v. Absher*, 242 Ill. 2d 77, 82 (2011). The court's factual findings are upheld unless they are against the manifest weight of the evidence. *Id.* at 82. The reviewing court then assesses the established facts in relation to the issues presented and may reach its own conclusions as to what relief, if any, should be allowed. *Id.* Accordingly, the ultimate legal question of whether suppression is warranted is reviewed *de novo*. *Id.*

¶ 26 It is well-established that participants in a lineup need not be physically identical, and that differences in age, size, and appearance go only to the weight of the evidence and not to admissibility. See *Love*, 377 Ill. App. 3d at 311 (lineup not impermissibly suggestive even where witness testified that offender had braids and defendant was the only person in the lineup with braids, but other lineup participants shared a similar skin tone, all participants wore casual

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clothing, and police did not force defendant to wear braids); *People v. Kelley*, 304 Ill. App. 3d 628, 637-38 (1999) (lineup participants' hairstyles need not be physically identical and any differences go only to weight given to lineup evidence, not its admissibility); *People v. Johnson*, 222 Ill. App. 3d 1 (1991) (same, examining participants' clothing); *People v. Brewer*, 118 Ill. App. 3d 189 (1983) (same, examining participants' ages); see also *People v. Kubat*, 94 Ill. 2d 437, 472 (1983) (A lineup is not *per se* impermissibly suggestive simply because the defendant is the only subject wearing glasses. Specifically, a photo array was not impermissibly suggestive where the defendant was the only individual wearing eyeglasses, particularly where witnesses also identified the defendant in photographs in which he was not wearing eyeglasses.).

¶ 27 Here, we find no error in the trial court's denial of defendant's motion to suppress the lineup identification by Mary Leone where defendant failed to show that the lineup identification was impermissibly suggestive merely because only defendant wore eyeglasses and not all lineup participants had short hair. We have reviewed the record on appeal, including the photographs of the lineup. The record and the lineup photographs do not support defendant's characterization that the lineup participants were physically dissimilar. Defendant's hairstyle was not so distinctive as to render the lineup suggestive. In fact, the participant sitting beside defendant had a very similar, short-cropped hairstyle, and participant four also had fairly short hair. Only one lineup participant had a noticeably dissimilar hairstyle, which was substantially longer and twisted or braided. Participants in a lineup do not have to be physically identical. *People v. Richardson*, 123 Ill. 2d 322, 350 (1988). Moreover, the physical characteristics of the lineup participants here were generally similar. All of the participants were of similar age, race, skin

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tone, and build. They were all dressed casually. There is no evidence that defendant was forced to wear his eyeglasses nor evidence that the other participants were forced not to wear eyeglasses. Moreover, the lineup photographs in the record reveal that defendant's glasses are not highly noticeable. Rather, they are small, wire-rimmed glasses. Although the lineup participants were not identical, there is no requirement that they be so. We can see no evidence that defendant, due to his physical characteristics or dress, stood out from the other lineup participants.

¶ 28 Defendant also claims the lineup was suggestive because Mary described the offender to the police as having worn glasses and, later, defendant was the only lineup participant with glasses. However, Mary identified defendant because she knew his face. She saw him multiple times, including when she entered the store, when she was checking out at the store, when she went out into the parking lot, and when the passerby held defendant. The lighting was bright and Mary was close to defendant for an extended period of time. She testified at trial that the minute defendant walked out in the lineup, she could tell that it was him. She also testified that she "didn't focus on his glasses" in order to identify defendant. In our opinion, the glasses were not the main identifier for Mary and their presence did not create a suggestive identification.

¶ 29 Defendant also claims that the "main reason" the court denied the motion to suppress was because there was no evidence that the witness who viewed the lineup described the offender as having worn glasses. The specific comments about which defendant complains are as follows:

"[THE COURT:] To me more importantly there was no evidence presented that the witness who viewed the lineup said that the offender was wearing glasses at the time and therefore somehow

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make [*sic*] that lineup suggestive. The lineup- - There was no evidence that the offender was described as wearing glasses or having a short hairstyle."

The court also stated:

"[THE COURT:] The facts that came out during the course of the hearing was that the make up of the lineup, of the five individuals in the lineup all were male blacks, all were dark in complexion, and all had some level of facial hair. During the course of the hearing there was only one witness and that witness said that the defendant was not told to wear glasses nor was he asked to take the glasses off."

It then found that, based on the testimony of the witness, the exhibits, the pictures that were introduced by the defense and the totality of the circumstances, defendant had not met his burden of showing that the lineup was impermissibly suggestive.

¶ 30 Defendant argues that the court's ruling should be overturned because, in fact, Mary specifically testified that she described defendant to the police as having worn glasses. While we agree that Mary testified that she described defendant as having worn glasses, we disagree that the court erred on this point. At the time the court made the comments in question, it was ruling on the motion to suppress the lineup identification made by the victim in the PSMV case. This was on February 6, 2009. Mary did not testify regarding the glasses until April 23, 2009. The court denied the motion to suppress identification regarding the PSMV case and then, after the

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State rested in the theft from person case at bar, defense counsel asked the court to consider an oral motion to suppress the identification testimony, stating:

"[DEFENSE COUNSEL:] I am asking the Court to consider not only the testimony that was provided thus far during the course of this trial, but also as to the evidence that was heard by Your Honor on the hearing as to the Motion to Suppress the identification testimony that was already decided by Your Honor."

The court allowed the motion to be filed, stating:

"[THE COURT:] Okay. I will grant you leave to file that motion. Just add the case number to the original motion that you filed as it is the same evidence, same line-up and the same legal basis on which you based your argument and the State argued against. Unless the State has anything else to say, I've considered the arguments before and I will stand on the ruling that I made in the prior matter, which was [case number 07CR4463]. And the Motion To Suppress the identification made as to the lineup was denied."

We disagree with defendant that the court's decision was against the manifest weight of the evidence because Mary Leone testified that she described the offender as wearing glasses. We see no error here where the comments of concern to defendant took place in regards to the PSMV case, not the theft from person case. The trial court then allowed the adoption of the motion

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during the theft from person case. The court considered the testimony from the original hearing on the motion as well as the events from the theft from person case in its determination to deny the motion to suppress identification.

¶ 31 We further disagree with defendant's characterization of the court's decision as based "on the grounds that police never told [defendant] to wear his glasses or take them off." Defendant cannot meet his burden of showing that the lineup was unduly suggestive. As discussed above, it is clear from the record that the court properly based its determination on the totality of the circumstances. See *Simpson*, 172 Ill. 2d at 140 (the defendant bears the burden of proving that the pretrial procedure was unduly suggestive, and the court considers the totality of the circumstances in reaching its decision). In making its ruling, the court reviewed the evidence before it and then stated:

"[THE COURT:] Based on the testimony of the only witness, the exhibits, the pictures that were introduced by the defense and the totality of the circumstances, the Court finds that the defendant has not met its burden in showing that the subject lineup was impermissibly subjective. Therefore, the motion to suppress the identification is denied."

The court's ruling was not based upon whether or not the officers instructed defendant to wear or not wear his eyeglasses during the ruling, but rather was properly based on the totality of the circumstances.

¶ 32 Ultimately, the facts of this case show there was no "substantial likelihood of irreparable

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misidentification." See *Love*, 377 Ill. App. 3d at 311, citing *Enis*, 163 Ill. 2d at 398. The lineup participants were similar in race, skin tone, clothing, and build. Mary had ample opportunity in good lighting to observe defendant. Her identification of defendant was not based solely on the fact that he was wearing glasses nor on the fact that his hair was short. We have carefully reviewed the photographs of the lineup in question. We find no evidence of an attempt to focus the witness' attention on defendant. We find that the lineup was not impermissibly suggestive, and, accordingly, find no error in the trial court's denial of the motion to dismiss identification.

¶ 33 Defendant's reliance on *Israel v. Odom*, 521 F. 2d 1370 (7th Cir. 1975), does not persuade us differently. *Odom* is inapposite to the case at bar. In *Odom*, an intruder broke into the victim-witness' apartment and raped her. *Id.* The victim described the intruder as black, taller than she, having a moustache, and wearing a coat and dark-rimmed eyeglasses. *Id.* She testified that the "outstanding feature" of defendant was his glasses. *Id.* at 1371. The day after the attack, the victim was shown a single sketch depicting a black man and asked whether "this resembles the man." *Id.* The following day, the victim viewed a lineup. *Id.* Although the lineup was not photographed, testimony at the hearing on the motion to suppress and during trial revealed that the defendant was the only person in the lineup to wear glasses and that, of the five men in the lineup, three were approximately 6 feet tall or taller, but the defendant was only 5 feet, 5 ½ inches tall. *Id.* The victim identified defendant in the lineup. *Id.* at 1373. On review, the court found that a series of pretrial actions together created an impermissibly suggestive lineup identification procedure. *Id.* at 1373. The series included the display of the suspect's picture alone prior to the lineup, the height discrepancy of the lineup participants, as well as the fact that

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defendant was the only lineup participant wearing glasses. *Id.* at 1374.

¶ 34 Here, in contrast, Mary Leone was not shown a single photograph of defendant prior to the lineup. Moreover, Mary did not find defendant's glasses to be a significant factor when she described defendant, but instead found his face and thin build to be most important. Unlike *Odom*, where there was a large height discrepancy, there were no other notable physical discrepancies between defendant and the other lineup participants. Two of the five lineup participants had the same short hairstyle, and at least one other had a hairstyle that was only slightly longer.

¶ 35 II. Modify the Mittimus

¶ 36 Next, defendant contends and the State properly agrees that the mittimus should be modified to correctly reflect the appropriate number of days he served in presentencing custody.

¶ 37 Here, the mittimus was issued on March 19, 2010, the same day that defendant was sentenced. Accordingly, defendant is not entitled to credit for that day. See *People v. Williams*, 239 Ill. 2d 503, 505-509 (2011). He is, however, entitled to credit for 1158 days of presentence custody, as the record reflects that defendant was arrested on January 16, 2007, and sentenced on March 19, 2010. The mittimus incorrectly reflects a credit of 1155 days.

¶ 38 Defendant also requests that we order the mittimus be modified to reflect a one-year term of mandatory supervised release (MSR). Defendant's mittimus does not currently reflect the imposition of a term of MSR. The imposition of and MSR is automatically required by section 5-8-1(d) of the Unified Code of Corrections when a prison sentence is imposed. 730 ILCS 5/5-8-

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1(d) (West 2010). Because defendant's theft from person conviction was for a Class 3 felony, the MSR term is one year. 720 ILCS 5/16-1 (West 2010); 730 ILCS 5/5-8-1(d)(3) (West 2010).

¶ 39 Pursuant to our authority under Supreme Court Rule 615(b)(1), we order the clerk of the circuit court to correct the mittimus to reflect a credit of 1158 days of presentencing custody, and to reflect a one-year term of MSR. 134 Ill. 2d R. 615(b)(1); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 40

CONCLUSION

¶ 41 For the foregoing reasons, we affirm the judgment of the trial court and modify the mittimus.

Affirmed; mittimus modified.