

No. 1-10-1193

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07CR4436
)	
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; trial court did not abandon its role as a neutral and impartial arbiter of fact; and trial court did not err in imposing upon defendant a three-year period of MSR where defendant was properly sentenced as a Class X offender. Mittimus corrected to properly reflect number of days served in presentence custody.

¶ 1

ORDER

¶ 2 After a bench trial, defendant Larry Russell was found guilty of possession of a stolen motor vehicle (PSMV) and theft. On appeal, defendant contends that the trial court erred in denying his motion to suppress identification; that he was denied his right to due process where

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the court "abandoned its role as a neutral arbiter of fact," and that he was sentenced to an improper amount of mandatory supervised release. Defendant also contends, and the State properly concedes, that his mittimus should be corrected. For the following reasons, we affirm and modify the mittimus.

¶ 3. **BACKGROUND**

¶ 4 After a bench trial, defendant was found guilty of PSMV and theft. Defendant was charged separately with theft from person in case 07CR4436.¹ Defendant also appealed that conviction and sentence, and we affirmed. *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23).

¶ 5 Although these are separate cases, the facts of the theft from person case are intertwined with the facts of the instant case. The ruling on the motion to suppress identification at issue in the case at bar was filed and heard in this case, but adopted and considered in the theft from person case.

¶ 6 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.

¹In that case, the facts of which are included in the instant briefs on appeal, defendant was charged with theft from person after taking Mary Leone's wallet and credit card and then fleeing in a nearby vehicle. When the police searched for that vehicle, they found defendant sitting in the vehicle, alone. Upon investigation, police found that the vehicle was stolen, which is part of the crime at issue in the case at bar.

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The trial court held a hearing on the motion in which Chicago police detective Anthony Reyes was the sole witness who testified.

¶ 7 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.

¶ 8 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.

¶ 9 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 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

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burden in showing that the subject lineup was impermissibly subjective. Therefore, the motion to suppress the identification is denied."

¶ 10 A bench trial followed. At the trial, ninety-two year old John Konieczny testified that he drove to Burger King at 5211 South Cicero in Chicago at approximately 12:20 p.m. on December 23, 2006. He drove a Ford Focus, licence plate JFK333. John parked near the entrance, put his keys in his pocket and walked toward the vestibule area of Burger King. John had his wallet in his back pocket.

¶ 11 John testified that he entered a glass enclosed vestibule area before entering Burger King. Defendant and another man were in this vestibule and they blocked John from entering Burger King. It was light out and there was nothing covering either man's face. John stood within one foot of defendant's face while in the vestibule and got a "good look" at his face. John testified that the men told him they dropped something. As they said this, John realized that his back pocket was empty. He demanded the men give him his wallet back. Defendant returned the wallet. John testified that he could clearly see defendant's face when defendant returned the wallet.

¶ 12 Defendant followed John into the restaurant with a "scary" look on his face. Defendant left the restaurant shortly thereafter. John ate lunch and, when he returned to the parking lot, he discovered his car was missing. The keys that were previously in his pocket were missing, as well. John called the police.

¶ 13 When asked if he could identify an offender in court, Konieczny initially said he could

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not, but then, upon further observation of the people in the courtroom, he identified defendant.

Konieczny has macular degeneration in his right eye.

¶ 14 John testified that he went to the police station on January 17, 2007, and viewed a lineup of five men. He "immediately" identified defendant as one of the offenders. He denied ever having given defendant permission to drive his car.

¶ 15 After John testified, the State's Attorney said the State would rest. The court responded:

"THE COURT: Well, you need a stipulation, right?"

The State responded:

"[STATE'S ATTORNEY:] Oh, you're right. I'm sorry. I would have realized that."

The State and defendant then stipulated that the testimony of Mary Leone and Officer Driscoll from defendant's theft from person trial should be introduced as testimony in the PSMV and theft trial. Although the parties stipulated to this evidence, defense counsel renewed her objection to the "State being allowed to use the evidence as to case number 07CR3196 in relation to the trial as to this case."

¶ 16 It was stipulated that seventy-four year old Mary Leone testified in the theft from person case that on January 16, 2007, at approximately 11:00 a.m., she went to Walgreens at Belmont Avenue and Central Avenue in Chicago. It was a sunny day and the lights were on in Walgreens. As she walked into the store, she noticed defendant who stood five to six feet away from her. Defendant caught her attention because he looked lost and was very thin.

¶ 17 At the trial in the theft from person case, Mary Leone testified that when she was standing

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at the checkout, she again noticed defendant, who was now standing by the door. After checking out, Mary approached the door carrying her open purse. When she reached the door, she stood next to defendant. Defendant informed Mary that there was something wrong with the door. He then walked out. Mary looked at the door and realized there was nothing wrong with it. She was suspicious and looked in her purse. Mary realized her wallet was missing. Mary identified defendant in court as the man who took her wallet.

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

¶ 19 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.

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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 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."

¶ 20 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. This is the car at issue in the case at bar.

¶ 21 It was stipulated that detective Reyes testified 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 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."

¶ 22 Defendant, in the Mary Leone case, filed a motion to suppress identification, arguing that the lineup was suggestive. The trial court denied the motion. Defendant appealed the denial to this court and we affirmed. *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23). In that appeal, defendant contended that the trial court erred when it did not suppress pretrial identification evidence that defendant alleges was the result of an

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unnecessarily suggestive lineup. Defendant asserted several reasons why he believed 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 argued 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 argued 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 decision on the fact that the officers did not instruct defendant to wear or not to wear his glasses. *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23). We affirmed the trial court, finding, in pertinent part, that defendant's physical traits were not so dissimilar to others' in the lineup so as to make the lineup impermissibly suggestive, defendant's glasses were not the main identifier for Mary, and the eyeglasses did not create a suggestive identification. *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23).

¶ 23 After the State rested, the court heard and denied defendant's motion for a directed finding. Defendant rested. The court then found defendant guilty of PSMV and theft.

¶ 24 Defendant filed a motion for a new trial on both his theft from person conviction and his PSMV and theft conviction. The court denied the motions. The court then held a simultaneous sentencing hearing. The court sentenced defendant to 10 years' imprisonment on his theft from person conviction in case 07CR3196, and 20 years' imprisonment on his PSMV conviction to run concurrent to 10 years' imprisonment on his theft conviction in case 07CR4436. The court ordered that defendant's sentence in the theft case run concurrent to the PSMV and theft

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sentences.

¶ 25 Defendant appeals.

¶ 26 ANALYSIS

¶ 27. I. The Motion to Suppress

¶ 28 First, 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. Specifically, defendant argues that he is entitled to a new trial where the lineup identifications made by John Konieczny in the PSMV case and by Mary Leone in the related theft from person case were "unreliable" because they were based on a "suggestive" lineup due to alleged differences in his appearance and that of the other lineup participants. 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.

¶ 29 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.

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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.*

¶ 30 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 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.).

¶ 31 Initially, the State maintains that defendant has forfeited any claim regarding the suggestiveness of Mary's identification. Defendant admits that he failed to properly preserve this

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issue for appeal where, although defense counsel objected to the admissibility of Leone's identification testimony in a motion to suppress and a posttrial motion in the prior theft case, in the case at bar he stipulated to Leone's testimony without specifically renewing his motion to suppress her identification testimony and only objected to her testimony on the grounds that it was improper other crimes evidence. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (Failure to properly preserve an alleged error by both an objection at trial and a written post-trial motion constitutes a procedural default of that error on review). Defendant urges us to consider it as plain error on the basis that the evidence was closely balanced. 134 Ill. 2d R. 615; *People v. Herron*, 215 Ill. 2d 167,186-87 (2005) (plain error rule permits consideration of errors even though technically waived for review where the evidence is closely balanced or where the claimed error is of such magnitude that there is a substantial risk that the defendant was denied a fair and impartial trial). We first consider whether any error occurred at all. *People v. Durr*, 215 Ill. 2d 283, 299 (2005). If an error is deemed to have occurred, we then turn to the prongs of the plain error analysis. *Durr*, 215 Ill. 2d at 299. In the alternative, defendant maintains that, if we find this issue waived, we should also find his counsel ineffective for failing to renew an objection to Mary's testimony at John's trial.

¶ 32 We have previously considered defendant's claim that the lineup at issue was overly suggestive and found that it was not. *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23). We see no reason to deviate from that decision here. In particular, in the previous case, we considered the question of the suggestiveness of the lineup and determined:

"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 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.

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." *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23).

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We considered defendant's arguments and concluded:

"Ultimately, the facts of this case show there was no "substantial likelihood of irreparable 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." *People v. Russell*, No. 1101192 (2012) (unpublished order under Supreme Court Rule 23).

¶ 33 We continue to find no error in the trial court's denial of defendant's motion to suppress the pretrial identification made by Mary Leone.

¶ 34 Nor do we find error in the trial court's denial of defendant's motion to suppress the pretrial identification made by John. At defendant's bench trial for PSMV and theft, John Konieczny testified that he drove to Burger King on the day in question in his Ford Focus, license plate JFK333. John parked near the entrance, put his keys in his pocket, and walked

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toward the vestibule area of the Burger King. John had his wallet in his back pocket. Upon entering the vestibule area of the restaurant, defendant and another man blocked John from entering Burger King. It was light out and there was nothing covering either man's face. John stood within one foot of defendant's face while in the vestibule. Although John initially stated that he could not identify an offender in court, upon further observation of the people in the courtroom, he identified defendant. John had macular degeneration in one eye.

¶ 35 John further testified that one of the men stated he dropped something. John realized his back pocket was empty and demanded the men give him his wallet back. Defendant returned John's wallet. John testified that he could clearly see defendant's face at that time. John then went into Burger King, ordered his food, and ate his meal. Defendant initially followed John into the restaurant, but then left. When he finished eating, John returned to the parking lot where he discovered the keys from his pocket were missing, as was his car. John called the police.

¶ 36 John testified that he went to the police station on January 17, 2007, and viewed a lineup of five men. John "immediately" identified defendant as one of the offenders because he had gotten a "good look" at him.

¶ 37 As in the previous case, defendant has failed to meet his burden to show that the lineup identification by John 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. He points to nothing in the record to show that we should treat John's identification of defendant any

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differently than we treated Mary's identification of defendant. We find no error in the trial court's denial of defendant's motion to suppress identification here. Accordingly, defendant cannot establish plain error here. See Durr, 215 Ill. 2d at 299.

¶ 38 In the same manner, defendant's claim that his counsel was ineffective for failing to renew her objection to Mary's testimony during Konieczny's trial also fails. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *Palmer*, 162 Ill. 2d at 475-76.

¶ 39 Here, even if counsel's representation was deficient, defendant's claim fails because he is unable to show resulting prejudice. See *Easley*, 192 Ill. 2d at 317. Defendant has not shown any reason the trial court would have or that we should treat John's identification of defendant as the

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offender differently than that of Mary. Had counsel filed a motion to suppress Mary Leone's lineup identification in the PSMV case, the court would have properly denied the motion for the same reason it denied it in the theft from person case. "Counsel is not required to make losing objections in order to provide effective representation." *People v. Lewis*, 88 Ill. 2d 129, 156 (1981). Defendant cannot show his counsel was ineffective.

¶ 40 II. The Court as a Neutral and Impartial Arbiter of Fact

¶ 41 Next, defendant contends he was denied his right to due process where the court abandoned its role as a neutral and impartial arbiter of fact when, after the State rested, the court suggested the State reopen its case and present additional evidence to satisfy its burden of proving defendant possessed John Konieczny's car and keys. We disagree.

¶ 42 As described above, defendant was charged in two separate cases, one for theft from person for the theft of Mary Leone's wallet, and one for PSMV and theft for the theft of John Konieczny's wallet, keys, and car. The facts of the two cases were intertwined, as it was during the investigation in the theft from person case that defendant was found seated and alone in the driver's seat of John's stolen car. Defendant was first tried in a bench trial in the theft from person case. Mary Leone testified at that trial that after defendant tried to take her wallet and credit card, he fled in a car with license plate JFK333. Officer Driscoll testified in that case that shortly after the theft was reported, he found defendant, alone, seated in the driver's seat of a car with license plate JFK444.

¶ 43 The court found defendant guilty of theft from person. Then, a bench trial followed for

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the PSMV case before the same judge. Prior to the trial, however, the State filed a "Motion to Allow the People to Introduce Evidence of Other Crimes." Specifically, the State requested, in relevant part, to introduce evidence from the theft from person case to help establish defendant's guilt of PSMV. Defendant filed a response to this motion asking the court to deny the request. The court granted the State's motion.

¶ 44 John testified at trial. At the conclusion of his testimony, the State asked that the identification marks be stricken from their exhibit and the photograph be admitted into evidence. The court entered the exhibit into evidence without objection. Then the following took place:

"[ASSISTANT STATE'S ATTORNEY:] With that the State would rest.

THE COURT: Well, you need a stipulation, right?

[ASSISTANT STATE'S ATTORNEY:] Oh, you're right. I'm sorry. I would have realized that. Judge, at this time there would be a stipulation that the evidence that you heard during the course of the trial on case 07CR3196, the testimony taken on the 23rd of April, 2009, related to the witnesses have Mary Leon as well as Officer Driscoll, there would be a stipulation that the evidence would also be admissible in this court. Correct?

[DEFENSE COUNSEL:] So stipulated, your honor.

THE COURT: Stipulate the evidence that I heard from Mis. Leon and Officer Driscoll on April 23, 2009, at a prior bench trial will

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be admitted as evidence in this case.

[ASSISTANT STATE'S ATTORNEY:] With that the State would rest."

Defense counsel then made a motion for a directed finding, which the court denied. The defense rested without presenting any further evidence.²

²Both parties agree that defendant failed to properly preserve this issue both by failing to make a contemporaneous objection as well as failing to include the issue in a posttrial motion. While we accept this agreement, we note for the record that the following transpired after the State rested:

[ASSISTANT STATE'S ATTORNEY:] With that the State would rest.

THE COURT: Defense?

[DEFENSE COUNSEL:] Judge, certainly we would still despite any stipulation to that evidence, we would in fact still be renewing our objection to the State being allowed to use the evidence as to case number 07CR3196 in relation to the trial as to this case, just so that the record is clear.

THE COURT: Right. And no way is that waiving any subsequent issue on appeal.

[DEFENSE COUNSEL:] Of course."

Nonetheless, the parties then stipulated to the evidence and defendant clearly did not include this

¶ 45 Initially, the State maintains and defendant concedes that he forfeited this issue for appeal. See *Enoch*, 122 Ill. 2d 176, 186 (1988) (Failure to properly preserve an alleged error by both an objection at trial and a written post-trial motion constitutes a procedural default of that error on review). Defendant urges us to consider this issue because consideration is proper where the "doctrine of forfeiture 'is not rigidly applied where the basis for the objection is the conduct of the trial judge' (Quoting *People v. Sims*, 192 Ill. 2d 592, 636 (2000))." While we recognize that forfeiture rules are relaxed in cases of judicial misconduct, we are also cognizant that the failure to raise contemporaneous objections ' "can be excused only under extraordinary circumstances, such as when a trial judge makes inappropriate remarks to a jury [citation] or relies on social commentary, rather than evidence, in sentencing a defendant to death [citation].' " *People v. Brisco*, 2012 IL App (1st) 101612, quoting *People v. Mclaurin*, 235 Ill. 2d 478, 485 (2009). The situation at bar clearly did not rise to the level of the "extraordinary circumstances" required to relax the forfeiture rule. The State filed a "Motion to Allow the People to Introduce Evidence of Other Crimes." The court granted the motion. A bench trial was held, which defendant participated in. At the close of the State's evidence, the court reminded the State that it had not yet stipulated to the other crimes evidence about which it had previously filed the motion. The State responded, "Oh, you're right. I'm sorry. I would have realized that." Both the

issue in his posttrial motion. Accordingly, we address this issue herein as one not properly preserved for appeal.

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State and defense counsel then stipulated to the facts from the previous trial regarding the theft of Mary's wallet. This falls short of the "extraordinary circumstances" required to relax the forfeiture rule, and we decline to do so.

¶ 46 In the alternative, defendant urges us to address this issue as plain error on the basis that "when the court abandons his role as a neutral and impartial arbiter of fact, this Court can review a defendant's claim under the second prong [of plain error] because the trial court's conduct pertained to the defendant's right to a fair trial." 134 Ill. 2d R. 615; *Herron*, 215 Ill. 2d at 186-87 (plain error rule permits consideration of errors even though technically waived for review where the evidence is closely balanced or where the claimed error is of such magnitude that there is a substantial risk that the defendant was denied a fair and impartial trial). We first consider whether any error occurred at all. *Durr*, 215 Ill. 2d at 299. If an error is deemed to have occurred, we then turn to the prongs of the plain error analysis. *Durr*, 215 Ill. 2d at 299.

¶ 47 A trial court abuses its discretion when it adopts the role of advocate for one of the parties. *People v. Murray*, 194 Ill. App. 3d 653, 658 (1990). A trial court does not "assume the role of prosecutor merely because its questions solicit evidence material to the State's case." *People v. Smith*, 299 Ill. App. 3d 1056, 1062 (1998), quoting *People v. Sutton*, 260 Ill. App. 3d 949, 959-60 (1994). A judge has "wide discretion to control the course of a trial." *People v. Jackson*, 250 Ill. App. 3d 192, 204 (1993). Our supreme court has said: "[i]t is a judge's duty to see that justice is done, and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued it is his duty to interpose and either by suggestions to counsel or an examination conducted by himself avoid the miscarriage of justice." *People v.*

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Franceschini, 20 Ill. 2d 126, 132 (1960), quoting *People v. Lurie*, 276 Ill. 630, 641 (1917).

Moreover, "[i]t is in the sound discretion of the trial court whether a case may be opened up for further evidence, and this discretion will not be interfered with except where clearly abused."

Franceschini, 20 Ill. 2d at 132.

¶ 48 In the case at bar, the trial court did not assume the role of an advocate, but merely remarked that the evidence which he had already ruled could be introduced had not yet been introduced. The State previously filed a motion to allow it to introduce stipulated evidence from a previous trial, which the court granted. A bench trial was held, which defendant participated in. When the State rested, the court reminded counsel of the stipulation, which it technically had not yet put into evidence. By reminding the State to introduce the stipulation already ruled admissible into evidence, the court fulfilled its duty to see that justice was done. See *Franceschini*, 20 Ill. 2d at 132. We find no error in the actions of the trial court and, accordingly, defendant is unable to establish plain error.

¶ 49 II. Defendant's Term of Mandatory Supervised Release

¶ 50 Next, defendant contends that the trial court erred in sentencing him to a three-year term of mandatory supervised release (MSR). Specifically, defendant concedes he should be sentenced to a term of MSR, but maintains that we should reduce his MSR term to two years. He argues that, although he was sentenced as a Class X offender and the proper MSR sentence for a Class X felony is 3 years, the appropriate sentence in this case is the MSR term applicable to the underlying felony, which would be a two-year sentence. We disagree.

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¶ 51 Defendant was convicted of possession of a stolen motor vehicle, a class 2 felony, and theft, a Class 3 felony. 625 ILCS 5/4-103(a) (West 2008); 720 ILCS 5/16-1(a)(1) (West 2008). Due to defendant's prior convictions, he was sentenced as a Class X offender on the PSMV conviction to 20 years' imprisonment. The trial court did not specify the length of defendant's MSR term, and the mittimus does not specify the length of the MSR term. However, both defendant and the State agree that the term defendant was sentenced to is a term of 3 years.

¶ 52 The mandatory Class X sentencing statute concerns situations in which a defendant's criminal history requires sentencing the defendant as a Class X offender. It provides, in relevant part, that a defendant who is convicted of a Class 1 or Class 2 felony after having been twice convicted of another Class 2 or greater class felony, shall be sentenced as a Class X offender. 730 ILCS 5/5-5-3(c)(8)(West 2010). The imposition of MSR is automatically required by section 5-8-1(d) of the Unified Code of Corrections when a prison sentence is imposed. 730 ILCS 5/5-8-1(d) (West 2008). The statute establishing MSR terms provides that each sentence includes a certain term in addition to the term of imprisonment, with the MSR term "for first degree murder of a Class X felony . . . [being] 3 years," and "for a Class 1 felony or a Class 2 felony . . . [being] 2 years." 730 ILCS 5/5-8-1(d)(1), (2) (West 2008). Because this issue involves a question of statutory interpretation, our review is *de novo*. *Vuletich v. United States Steel Corp.*, 117 Ill. 2d 417, 421 (1987).

¶ 53 Defendant acknowledges this court has repeatedly held that a defendant sentenced as a Class X offender receives the Class X MSR term of three years, but maintains that these cases were wrongly decided. We disagree with defendant and see no reason to depart from the well-

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reasoned precedent before us. See, e.g., *People v. Brisco*, 2012 IL App (1st) 101612 (three-year period of MSR appropriate for defendant sentenced as a Class X offender, although the underlying offense was a Class 2 felony); *People v. Lampley*, 2011 Ill. App. (1st) 90661B (MSR term of three years applied to defendant's conviction for burglary, although it was a Class 2 offense requiring only a 2-year MSR term, where defendant was sentenced as a Class X offender); *People v. McKinney*, 399 Ill. App. 3d 77 (2010); *People v. Lee*, 397 Ill. App. 3d 1067 (2010); *People v. Watkins*, 387 Ill. App. 3d 764 (2009); *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Anderson*, 272 Ill. App. 3d 537 (1995).³ We decline to depart from these decisions and hold that the trial court did not err in imposing upon defendant a three-year period of MSR where defendant was sentenced as a Class X offender.

¶ 54 IV. Modify the Mittimus

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

¶ 56 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

³Defendant acknowledges these holdings, but maintains that *People v. Pullen*, 192 Ill. 2d 36 (2000), compels a different result. This court recently rejected this precise argument in *People v. Brisco*, 2012 IL App (1st) 101612, and we decline to depart from that sound precedent.

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March 19, 2010. The mittimus incorrectly reflects a credit of 1155 days. 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. 134 Ill. 2d R. 615(b)(1); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 57

CONCLUSION

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

¶ 59 Affirmed; mittimus modified.