

SIXTH DIVISION  
November 2, 2012

No. 1-10-2617

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	07 CR 9487 (02)
	)	
JAMES LEWIS,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Lampkin and Justice Garcia concurred in the judgment.

**ORDER**

*HELD:* Trial court did not err in denying defendant's pretrial motion to suppress a show-up identification. The trial judge did not violate defendant's due process rights by failing to ensure that he received a behavioral clinical examination (BCX) to determine his fitness to stand trial. Defendant's assertions of ineffective assistance of counsel based on counsel's failure to request a fitness hearing must also fail since defendant cannot establish that such failure prejudiced him within the meaning of *Strickland*. And finally, we find that defendant's 60-year sentence was not excessive.

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¶ 1 Following a bench trial, defendant James Lewis was found guilty of aggravated kidnaping, home invasion, and two counts of armed robbery. Defendant was sentenced as a Class X offender to 60 years' imprisonment for each of the armed robberies and the home invasion, and was given 35 years for aggravated kidnaping, with all sentences to be served concurrently.

¶ 2 On appeal, defendant contends that a show-up identification of him conducted in the field moments after he was arrested should have been suppressed because it was unnecessarily suggestive and unreliable. Defendant also claims the trial judge violated his due process rights by failing to ensure that he received a behavioral clinical examination (BCX), which had been previously requested by a prior judge in the case to determine his fitness to stand trial; or alternatively, that his trial counsel was ineffective for failing to ensure that he received such an examination. And finally, defendant contends his 60 year sentence is excessive. For the reasons that follow we affirm.

¶ 3 The evidence presented at trial revealed that on the evening of April 18, 2007, Shalamarr Rowan was at the home he shared with his girlfriend, Traysha Hayden. Sometime that evening after 10:00 p.m., Hayden left the house to go to a nearby store. Shortly thereafter, Rowan exited the house and was walking to his parked minivan when he was kidnaped at gun-point by codefendant Bruce Booker<sup>1</sup> and another individual. Also involved in the kidnaping was Ricky Williams<sup>2</sup> and a number of other offenders who are not parties to this appeal.

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<sup>1</sup> Defendant and codefendant Bruce Booker were tried jointly. However, Booker is not a party to this appeal.

<sup>2</sup> Williams, a three-time convicted felon, pled guilty to kidnaping and testified for the State in exchange for an eight-year sentence.

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¶ 4 Rowan was forced into a van and ordered to lay face down in the back of the van. Defendant patted-down Rowan and took everything out of his pockets and told him that he was with the FBI and that they were taking him downtown. Williams testified that Booker took Rowan's minivan and followed behind their van.

¶ 5 Rowan was transported to a garage attached to a house owned by Williams' aunt. Rowan testified that once they entered the garage, defendant informed him that he had made a ransom call demanding one hundred thousand dollars for Rowan's safe return. Defendant made additional ransom calls, and at one point held the cell phone up to Rowan's ear and mouth so he could speak with his family members. Shortly thereafter, defendant tied-up Rowan with duct tape.

¶ 6 Rowan testified that defendant took his shoes, tied his feet together, tied his hands behind his back, put a towel over his head and tied his whole head with duct tape, leaving a little breathing hole. Rowan was then placed in a passenger seat in his own minivan, which had been parked inside the garage. Rowan testified that he thought there were about six people in the garage, including defendant and Booker.

¶ 7 Meanwhile, Booker, Williams, and two other men left the garage and traveled back to Rowan's house to search for money and drugs. Williams testified that Rowan was a drug dealer and that his house was a drug house. Williams claimed that on prior occasions he had obtained drugs from the house.

¶ 8 Williams testified that when they arrived at Rowan's house, he stayed in the van and acted as a lookout while the others went inside the house. Hayden testified that when she returned home from the store, no one was at home. Hayden was watching television when she heard what she

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believed to be Rowan entering the house.

¶ 9 Several men entered the home and put a gun to Hayden's head. The men dragged Hayden into the kitchen, put a plastic bag over her head, tied her hands and legs, and forced her to lay face-down on the floor. Hayden heard multiple voices but could not see anyone. She testified that someone kept asking her, "where's the money." Hayden heard someone run upstairs after another voice said they thought money was upstairs.

¶ 10 As the men left the house, they warned Hayden not to call the police or they would kill her. The men told Hayden to call Rowan's brother. Williams testified that Booker and the two other men were inside the house for about six minutes.

¶ 11 Hayden eventually freed herself. She called Rowan and one of his brothers, but received no answers. Hayden then called her mother and Grayland Smith, the father of her baby. Hayden received a call on her cell phone from a private number. The caller demanded money for Rowan's safe return or they were going to take him to the lake. She subsequently received about four similar phone calls. Hayden went to the police station where she made a report.

¶ 12 Williams testified that after he, Booker, and the two other men returned to the garage, they sifted through the items taken from Rowan's house, which included several thousand dollars, half a "key" of cocaine, and about five or six firearms. Williams testified that the group split the proceeds evenly, "so it wouldn't be no problem."

¶ 13 Later that evening, Torianto Riley, one of Rowan's brothers, received a phone call from another brother, Rashad Rowan, informing him that Rowan's house had been robbed and that Rowan had been abducted. A short time later, Riley received a phone call from Rowan's cell phone.

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According to Riley, a male African-American voice said, "Bitch, we got your brother." The caller made a ransom demand of \$100,000. Riley testified that he subsequently received several more phone calls from the same man and that during one of the calls, there was a discussion about raising \$3,000.

¶ 14 Riley eventually went to a police station where he made a report and spoke with Chicago Police detectives as well as agents from the Federal Bureau of Investigation (FBI). Riley agreed to have his cell phone tapped so that the authorities could listen in on incoming calls.

¶ 15 Williams testified that after all of the ransom phone calls had been made, the group decided to call it a day and "do this thing tomorrow." Defendant removed Rowan's shoes, tied his feet together, bound his hands behind his back, and placed a towel over his head secured by duct-tape. Williams testified that Rowan was duct taped around his legs, arms, and over his face, and a small hole was cut in the tape to allow him to breathe. Rowan was placed in a passenger seat in his minivan, which had been parked inside the garage. Rowan testified that he could not tell if any of the men remained in the garage because he could not see.

¶ 16 Rowan testified that when he heard birds chirping, he figured it was around 5 or 6 a.m. He was able to free his hands. He peeled the tape from his eyes and saw that no one else was in the garage. Rowan escaped the garage through a side door.

¶ 17 Rowan ran southbound down an alley and realized where he was once he saw the street signs. Rowan ran through the alley to Hayden's mother's house. Rowan called his brother Riley and told him he was safe. FBI agent Wallschlaeger and his partner met with Rowan at Hayden's mother's house.

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¶ 18 Later that morning, defendant and Booker drove over to Williams' house to pick him up. Booker was driving his green Cadillac and defendant was in the front passenger seat making more ransom phone calls. At the same time, Riley was driving around with the FBI taking the ransom phone calls, even though he knew Rowan had already escaped from the garage. They set up a time and place to drop the money in exchange for Rowan.

¶ 19 When defendant, Booker, and Williams arrived at the garage that morning they discovered that Rowan had escaped from the garage. They gave a "random guy," later identified as Jesse McClure, ten or twenty dollars to drive Rowan's minivan out of the garage and they followed behind in Booker's green Cadillac. Williams testified that they wanted to take Rowan's minivan "somewhere far off that we can go on about our business."

¶ 20 As Rowan was driving around with the FBI agents to show them the location of the garage he had been held in, he noticed a green Cadillac driving southbound in an alley followed by his own minivan. Agent Wallschlaeger drove southbound down the street, paralleling the two vehicles which continued southbound down the alley. Agent Wallschlaeger radioed other FBI and Chicago Police units and alerted them that they were in the area following Rowan's minivan.

¶ 21 While Agent Wallschlaeger paralled the two vehicles, a marked Chicago Police squad car stoped the minivan. Defendant, realizing he still had Rowan's cell phone, threw it out the window of the Cadillac. The Cadillac proceeded down various streets before it was cut off by Agent Wallschlaeger's vehicle. Defendant and Williams fled from the Cadillac. Booker put the Cadillac in reverse and sped down the street.

¶ 22 Booker was apprehended after he crashed his Cadillac. Defendant and Williams were both

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apprehended in the area. Rowan's cell phone was recovered in the street. In show-up identifications, Rowan identified defendant, Booker, and Williams as being involved in his kidnaping. The parties stipulated that DNA (deoxyribonucleic acid) found on a brown glove recovered from the floor of the garage matched Booker's profile.

¶ 23 Detective William Davis, who had interviewed Rowan the day of the offense, was called as a defense witness to impeach the credibility of Rowan's testimony regarding his account of the kidnaping, such as the number of offenders he saw in the garage, the manner in which he was duct-taped, the point at which his personal items were taken from his person, and whether the abductors ever identified themselves as FBI agents. The defense also elicited testimony from the detective in an attempt to impeach the credibility of Hayden's testimony regarding whom she called and where she went immediately after the home invasion.

¶ 24 The State cross-examined Detective Davis and elicited testimony from him regarding some of the statements Rowan and Hayden made to him during the course of his investigation. Defense counsel for Booker objected as beyond the scope of direct examination. The trial court overruled that objection. Defense counsel for defendant later objected to the testimony on the ground of improper prior consistent statements. That objection was sustained.

¶ 25 The trial court found defendant guilty of aggravated kidnaping, home invasion, and two counts of armed robbery. Defendant was sentenced as a Class X offender to 60 years' imprisonment for each of the armed robberies and the home invasion, and was given 35 years for aggravated kidnaping, with all sentences to be served concurrently. Defendant now brings this direct appeal.

¶ 26

ANALYSIS

¶ 27 Defendant first contends the trial court erred in denying his pretrial motion to suppress Rowan's show-up identification of him. A show-up identification is a pretrial identification procedure in which a criminal suspect is confronted by a witness or a victim of the crime. Defendant maintains the show-up identification of him conducted in the field moments after he was arrested should have been suppressed because it was unduly suggestive and unreliable.

¶ 28 We must disagree. However, as an initial matter, we reject the State's suggestion that this issue was forfeited. Our examination of the record reveals that the issue was properly preserved for our review. Moreover, courts have been reluctant to apply the waiver rule to this issue. See *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005).

¶ 29 On appeal, the standard of review for a trial court's denial of a motion to suppress a show-up identification is whether the court's decision was manifestly erroneous. *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994). A decision is manifestly erroneous only if it contains error that is " 'clearly evident, plain, and indisputable.' " *People v. Frieberg*, 305 Ill. App. 3d 840, 847 (1999) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 30 Our courts have determined that under certain circumstances a prompt show-up identification can aid police in determining whether a suspect may be guilty or whether police should continue searching for a fleeing culprit while the trail is still fresh. *People v. Lippert*, 89 Ill. 2d 171, 188 (1982); *People v. Rodriguez*, 387 Ill. App. 3d 812, 830 (2008). However, because show-up identification procedures are generally deemed to be inherently suggestive (*People v. Carrero*, 345 Ill. App. 3d 1, 10 (2003)), show-up identifications derived from such procedures violate a defendant's

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due process rights if the identification is found to be unreliable under the totality of the circumstances. *Moore*, 266 Ill. App. 3d at 797.

¶ 31 Due process requires that in order to admit evidence of a show-up identification, the identification must be reliable under the totality of the circumstances. *People v. Brackett*, 288 Ill. App. 3d 12, 20 (1997). The follow factors are used to evaluate whether a show-up identification is reliable and therefore admissible under the totality of the circumstances: " 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.' " *People v. Manion*, 67 Ill. 2d 564, 571 (1977) (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

¶ 32 Applying these factors to the present case, we find that Rowan's show-up identification of defendant was reliable. Rowan had ample opportunity to observe defendant up close. Rowan observed defendant after he was forced into the van whereupon defendant patted him down, took his money and other items out of his pockets, and told him that he was with the FBI and that they were taking him downtown. Rowan further observed defendant before defendant tied his feet, arms, and head with the duct tape.

¶ 33 As for the level of certainty, the record shows that Rowan made a positive identification of defendant minutes after his arrest and only a few short hours after Rowan escaped from the garage. The totality of the circumstances demonstrate that Rowan's show-up identification of defendant was sufficiently reliable to be admitted as evidence.

¶ 34 Defendant next contends the trial judge violated his due process rights by failing to ensure

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that he received a behavioral clinical examination (BCX) to determine his fitness to stand trial. Again, we must disagree.

¶ 35 The due process clauses of the Illinois and United States Constitutions prohibit the prosecution of a defendant who is unfit to stand trial. Ill. Const. 1970, art. I, § 2; U.S. Const., amends. VI, XIV; *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). Fitness refers to an individual's ability to function in the context of a trial and does not refer to sanity or competence in other areas. *People v. Tursios*, 349 Ill. App. 3d 126, 130 (2004). In Illinois, a defendant is presumed fit to stand trial and is considered unfit only if his mental or physical condition prevents him from understanding the nature and purpose of the proceedings against him or in assisting in his own defense. *People v. Hill*, 345 Ill. App. 3d 620, 625 (2003).

¶ 36 A defendant is entitled to a fitness hearing only when a *bona fide* doubt arises about the defendant's fitness. *Tursios*, 349 Ill. App. 3d at 130. The issue " 'is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.' " *People v. Easley*, 192 Ill. 2d 307, 319 (2000) (quoting *Drope v. Missouri*, 420 U.S. 162, 180 (1975)). And although there are "no fixed or immutable signs which invariably indicate" the presence of a *bona fide* doubt concerning fitness, there are several factors a trial court may consider when assessing the issue, including a defendant's irrational behavior, his demeanor in court proceedings, and any prior medical opinions regarding defendant's competence to stand trial. *Id.*

¶ 37 When a *bona fide* doubt of the defendant's fitness exists, the trial court must order a fitness hearing so that the question of fitness may be resolved before the matter proceeds any further. *People v. Williams*, 364 Ill. App. 3d 1017, 1023 (2006); 725 ILCS 5/104-11(a) (West 2006). "A trial

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continued after a *bona fide* doubt of defendant's fitness is raised but not resolved is in violation of due process of law." *People v. Johnson*, 121 Ill. App. 3d 859, 860 (1984). Whether a *bona fide* doubt as to a defendant's fitness has arisen is generally a matter within the discretion of the trial court. *People v. Sandham*, 174 Ill. 2d 379, 382 (1996).

¶ 38 The record in this case reveals that on October 10, 2008, at a hearing occurring more than a year prior to defendant's bench trial, defense counsel informed Judge James B. Linn that defendant's file revealed he had some prior mental health issues and had been prescribed the antipsychotic medication Risperidone. In response, Judge Linn ordered a BCX to determine defendant's fitness to stand trial.

¶ 39 In the interim, the case was transferred to Judge Timothy Joyce who eventually presided over defendant's bench trial. Defense trial counsel admittedly failed to follow through with Judge Linn's pretrial order to have defendant undergo a psychiatric evaluation to ascertain his fitness to stand trial and no such evaluation was ever conducted prior to or during trial.

¶ 40 Defendant now argues that by requesting a psychiatric evaluation, Judge Linn expressed a *bona fide* doubt of the defendant's competency to stand trial. Defendant is incorrect. The mere fact that Judge Linn ordered defendant to undergo a psychiatric evaluation to determine his fitness to stand trial, did not, in and of itself, establish that the judge held a *bona fide* doubt of the defendant's competency to stand trial. See, e.g., *People v. Franklin*, 48 Ill. 2d 254, 257 (1971) ("referral to the Behavior Clinic does not of itself raise a *Bona Fide* doubt as to the competency of the accused requiring a competency hearing"); *People v. Hanson*, 212 Ill. 2d 212, 222 (2004) (same finding).

¶ 41 In addition, as previously noted, our courts have set forth several factors to consider when

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assessing whether a *bona fide* doubt of the defendant's fitness exists, including the defendant's irrational behavior, demeanor at trial, any prior medical opinion on the defendant's competence, and any representations by defense counsel on the defendant's competence. *People v. Moore*, 408 Ill. App. 3d 706, 711 (2011). None of these factors are present in the instant case.

¶ 42 We also point out that prior to sentencing, Judge Joyce requested a presentence investigation report (PSI) and ordered defendant to undergo a behavioral clinical examination on the issue of fitness for sentencing. The PSI noted that when defendant was 11 years old, his foster mother sent him to a psychiatrist due to alleged paranoia and hearing voices. Defendant was diagnosed with schizophrenia and prescribed a daily medication. At the time the PSI was prepared, defendant reported that he had been prescribed the antipsychotic medication Risperidone.

¶ 43 Doctor Susan Messina, a licensed clinical psychologist with Forensic Clinical Services, evaluated defendant and opined in a letter dated June 30, 2010, that to a reasonable degree of psychological and scientific certainty that defendant was fit for sentencing. Thereafter, doctor Fidel Echevarria, a forensic psychiatrist with Forensic Clinical Services, evaluated defendant and opined in a letter dated July 13, 2010, that to a reasonable degree of medical and psychiatric certainty that defendant was fit for sentencing.

¶ 44 In his letter, doctor Echevarria noted that defendant had been prescribed 2mg of the drug Risperidone at bedtime, but he added that based upon his review of defendant's report and other available records, the justification for the administration of this drug was not clear to him. The doctor stated that defendant denied experiencing any side effects from the drug, nor were any evident during the clinical assessment. The doctor opined that the drug did not compromise the defendant's

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ability to proceed in court.

¶ 45 At a subsequent hearing on the matter, the assistant state's attorney and defense counsel both stipulated that the doctors' reports did not give the defense a *bona fide* doubt as to the defendant's fitness for sentencing. Defense counsel also stated that she engaged in numerous discussions with defendant concerning the case and she was able to communicate with him and she saw no evidence that defendant did not understand the nature of the proceedings, her role in the proceedings, or the court's role. However, defense counsel further stated that she did not wish to waive any argument defendant may have on appeal concerning the fact that, prior to trial, he never underwent an examination to determine his fitness to stand trial.

¶ 46 Judge Joyce then stated that he believed defendant had been continually fit throughout the trial. The judge stated that based upon his own observations and interactions with defendant over the course of the trial, he had no doubt that defendant had been continually fit for trial. Judge Joyce concluded that defendant was fit to proceed.

¶ 47 A trial court's determination regarding fitness will not be disturbed on review unless it is against the manifest weight of the evidence. *People v. Cortes*, 181 Ill. 2d 249, 276-77 (1998). Based upon our review of the evidence, we cannot say that Judge Joyce's decision that defendant was fit for trial, was against the manifest weight of the evidence.

¶ 48 As a result, defendant's assertions of ineffective assistance of counsel on this basis must also fail. In order for a defendant to establish that his trial counsel's failure to request a fitness hearing prejudiced him within the meaning of *Strickland*, the defendant must show that facts existed at trial that would have raised a *bona fide* doubt of his ability to " understand the nature and purpose of the

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proceedings against him or to assist in his defense.' " *People v. Sprind*, 403 Ill. App. 3d 772, 778 (2010) (quoting *People v. Harris*, 206 Ill. 2d 293, 304 (2002)). Therefore, a defendant is entitled to relief " 'only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered.' " *Harris*, 206 Ill. 2d at 304 (quoting *People v. Easley*, 192 Ill. 2d 307, 319 (2000)). Defendant has failed to make such a showing.

¶ 49 Finally, we reject defendant's contention that his 60-year sentence was excessive. Imposition of a sentence is a matter of judicial discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977). Where a defendant's sentence is within statutory limits, a reviewing court will not alter the sentence absent an abuse of that discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987).

¶ 50 In the instant case, defendant's sentence was within the applicable statutory range. Defendant was convicted of home invasion, armed robbery, and aggravated kidnapping, all Class X felonies with sentencing ranges from 6 to 30 years, with an extended term being 30 to 60 years. 720 ILCS 5/12-11(A)(3) and 18-2(a)(2), 10-2 (West 2000); 730 ILCS 5/5-4.5-25 (West 2000).

¶ 51 Where an imposed sentence is within the statutory range, it will not be found excessive unless there is an affirmative showing that the sentence varies greatly from the spirit and purpose of the law or manifestly violates constitutional guidelines; the spirit and purpose of the law are promoted when a sentence reflects the seriousness of the crime and gives adequate consideration to defendant's rehabilitative potential. *People v. BoClair*, 225 Ill. App. 3d 331, 335 (1992).

¶ 52 In the present case, there is nothing in the record which indicates that the trial judge ignored defendant's rehabilitative potential or any mitigating factors before he imposed his sentence. The

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record indicates that at defendant's sentencing, the trial judge acknowledged the presentence investigation report, which raises the presumption that the trial court took into account defendant's potential for rehabilitation. See *People v. Wilburn*, 263 Ill. App. 3d 170, 185 (1994). Our review of the record shows that the trial judge considered both mitigating and aggravating factors and arrived at a balance between society's need for protection and defendant's rehabilitative potential.

¶ 53 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 54 Affirmed.