

No. 1-11-1038

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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. 10 CR 8931         |
|                                      | ) |                        |
| RAY ARMOUR,                          | ) | Honorable              |
|                                      | ) | Shelley Sutker-Dermer, |
| Defendant-Appellant.                 | ) | Judge Presiding.       |

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Lampkin and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where two victims of a robbery observed the defendant for only a matter of seconds, they were positively sure that the defendant was the offender and described him to the police, and within 48 hours one of the victims observed the offender on the street and called the police, and in total their testimony was sufficient for a positive identification and a conviction.

¶ 2 On October 19, 2010, defendant Ray Armour was convicted by a jury of two counts of robbery: (1) the robbery of Ryan Fitzpatrick; and (2) the robbery of Chelsea Stevens. After hearing factors in aggravation and mitigation, the trial court sentenced defendant to two concurrent terms of 20 years in the Illinois Department of Corrections. On this direct appeal,

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defendant claims: (1) that there was insufficient identification evidence to convict him because two witnesses had only a very brief opportunity to observe his face, (2) that defendant was denied his right to effective assistance of counsel because trial counsel failed to file a motion to suppress the show-up identification by one of the two eyewitnesses, and (3) that the trial court incorrectly imposed a \$200 DNA fee. The State agrees that the \$200 DNA fee should be vacated. For the following reasons, we affirm defendant's conviction and vacate the \$200 DNA fee.

¶ 3

### BACKGROUND

¶ 4 Defendant was convicted of two counts of robbery in violation of section 18-1 of the Criminal Code of 1961 (720 ILCS 5/18-1 (West 2010)), one for the robbery of Ryan Fitzpatrick and one for the robbery of Chelsea Stevens, both of which occurred at the same time and place.

¶ 5

#### I. Trial

¶ 6 The State's evidence at trial consisted of the testimony of three witnesses: (1) Ryan Fitzpatrick, who identified defendant as the person who had robbed both him and Chelsea Stevens; (2) Chelsea Stevens, the other victim, who identified defendant during a subsequent show-up; and (3) police officer Jason Parizanski, who testified that Chelsea Stevens had identified defendant even before the show-up. Since we are called upon in this appeal to assess the sufficiency of the evidence, we provide a detailed description of the testimony and the evidence presented at trial.

¶ 7

#### A. Testimony of Victim, Ryan Fitzpatrick

¶ 8 Ryan Fitzpatrick testified that he was 22 years old and lived with Chelsea Stevens in Lincoln Park. He testified that on May 1, 2010, at 11:30 p.m., the two of them walked to a

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Mexican restaurant. After finishing their dinner, the two began to walk home on the sidewalk adjacent to an “adequately lit” street, Arlington Place. Fitzpatrick heard Stevens gasp, turned toward her, and observed Stevens in a chokehold by defendant. He testified that, at that point, he was 2 to 3 feet from defendant with an unobstructed view of defendant’s face. Fitzpatrick then identified defendant in court. Fitzpatrick next testified that defendant demanded his wallet and said nobody would be hurt as long as Fitzpatrick complied, which he did. Next, defendant took Stevens’ purse, and in the process, released Stevens. As Stevens and Fitzpatrick started walking away, defendant said, “[t]urn your head around, keep walking.”

¶ 9 Fitzpatrick testified that he had an unobstructed view of defendant’s face for 40 seconds during the robbery. Defendant was wearing a “dark gray hooded sweatshirt and a New York Yankees cap.” Defendant walked backwards, still facing Fitzpatrick, for approximately 20 feet when defendant turned and jogged away. Fitzpatrick, while walking in the opposite direction as defendant, kept his focus on defendant the entire time as defendant moved in the opposite direction.

¶ 10 Fitzpatrick testified that, after defendant turned and started jogging, Fitzpatrick called the police on his cellular phone. Fitzpatrick and Stevens walked to Clark Street to wait for the police to arrive. When the police arrived, Fitzpatrick told the police they were robbed by a man with a snowy goatee in a hooded gray sweatshirt with a New York Yankees baseball cap.

¶ 11 Fitzpatrick testified that the next evening, on May 2, 2010, he was working at a pizza restaurant on Clark Street. After work, between 9 and 9:30 p.m., he began to walk home. When he arrived at Clark and Belden, he observed defendant sitting on the street corner. Fitzpatrick

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identified defendant in court as the man on the street corner. Fitzpatrick testified that he recognized defendant's snowy white goatee, weathered features, hooded gray sweatshirt, and New York Yankees cap from the night of the robbery. Fitzpatrick then called the police.

¶ 12 Fitzpatrick testified that, when the police arrived, they first apprehended defendant, and then talked with Fitzpatrick who told the police officer that the man in custody was the man that had robbed him the night before. The officers shined a police spotlight on defendant and asked Fitzpatrick if defendant was the man who robbed him and Stevens, and Fitzpatrick responded "yes."

¶ 13 Fitzpatrick testified that the police officers asked for a police report number, but Fitzpatrick did not know it, so he went home to retrieve a copy of the report. Stevens was home when Fitzpatrick arrived, and Fitzpatrick brought both Stevens and the police report back to Belden and Clark.

¶ 14 Fitzpatrick next identified a photograph as a fair and accurate representation of the scene during the robbery and indicated where the robbery took place. Fitzpatrick next identified another photograph of Arlington Place where he identified six street lights, including one directly across the street from the place of the robbery. Next, Fitzpatrick identified the gray hooded sweatshirt and Yankees cap that defendant was wearing during the robbery.

¶ 15 During cross-examination, Fitzpatrick testified that the time that elapsed between defendant grabbing Stevens, to Fitzpatrick and Stevens giving their wallet and purse to him, was around 10 seconds. Fitzpatrick also testified that, at a preliminary hearing, he said he observed defendant's face for approximately 30 seconds. Fitzpatrick acknowledged that the ordeal was

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extremely upsetting and fairly traumatic.

¶ 16 During cross-examination, Fitzpatrick testified that he recognized defendant at the intersection of Belden and Clark when he was approximately seven feet from defendant. Fitzpatrick had a direct view of defendant's face, but they never made eye contact. After observing defendant, Fitzpatrick walked past him, rounded the street corner, and then called the police. Fitzpatrick provided the police with defendant's description and location. When the police arrived, they placed defendant into custody, and Fitzpatrick identified defendant as the offender.

¶ 17 When defense counsel questioned whether he asked Stevens to come to identify defendant, Fitzpatrick testified, "I did not ask her to come with me to identify him. I asked her to come with me." He testified that he told Stevens that he had identified the offender and asked Stevens, "do you want to go over there and deal with the police?" Fitzpatrick and Stevens then proceeded to where the police had defendant in custody. While walking, Fitzpatrick and Stevens talked about being relieved that the offender was arrested and about what they were going to do next.

¶ 18 During cross-examination, Fitzpatrick testified that the police said, "they should do the identifications because she had seen [defendant] in the police car." The police then removed defendant from the vehicle, illuminated his face, and asked Stevens if she could identify defendant, which she did without hesitation.

¶ 19 B. Testimony of Victim, Chelsea Stevens

¶ 20 Chelsea Stevens testified that she is 22 years old and that on May 1, 2010, she resided on

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North Lincoln Park West in Chicago with Ryan Fitzpatrick, her boyfriend. On April 30, 2010<sup>1</sup>, at approximately 11:30 p.m., Stevens and Fitzpatrick left their residence and walked to a Mexican restaurant. After finishing dinner, at approximately 2:20 a.m. on May 1, Stevens and Fitzpatrick were walking home on Arlington Place when Stevens felt someone behind her. Stevens testified that, before she could react, she felt someone choking her by using the bend of an elbow. At that time, Stevens was unable to observe defendant's face. Stevens felt a hard object pressed against her back that she assumed was a gun, although she never actually observed a gun or heard defendant mention that he had a gun. Stevens testified that defendant demanded Fitzpatrick to give him his wallet and said that no one would be hurt if Fitzpatrick complied, which he did. Defendant next took Stevens' purse and released her. Stevens testified that the street was well-illuminated at this time, and that she had an unobstructed view of defendant's face for approximately 5 seconds at a distance of one, to one and a half feet. Stevens also observed a "goatee and a gray beard" on defendants' face. Stevens also identified defendant in court as the person who had robbed her.

¶ 21 Stevens testified that defendant then told Stevens and Fitzpatrick to turn around and walk away. Stevens testified that she observed defendant wearing a "black" hooded sweatshirt and a New York Yankees baseball cap, and although the hood of the sweatshirt was up, it did not obstruct her view of defendant's face. Defendant started to walk backwards from Stevens and

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<sup>1</sup> Stevens originally testified that she left her house at 11:30 p.m. on May 1, 2010, but corrected herself on cross-examination. When Stevens left her house at 11:30 p.m., it was still April 30, 2010.

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Fitzpatrick, and then Stevens turned around, and Stevens and Fitzpatrick began to walk in the opposite direction from defendant.

¶ 22 Stevens testified that she and Fitzpatrick walked to Clark Street where Fitzpatrick called the police. When the police arrived, Stevens reported the robbery.

¶ 23 Stevens testified that the next day, May 2, 2010, around 9:30 or 10 p.m., she was at home when Fitzpatrick arrived and asked her to accompany him to the intersection of Belden and Clark. Stevens testified that Belden and Clark was one to two blocks from her home and three to four blocks from where she was robbed the day before.

¶ 24 Stevens testified as follows:

“ASSISTANT STATE’S ATTORNEY [ASA]: When you got to Belden and Clark, what did you see?

STEVENS: There were police officers there, and they had a man in the back of their car.

ASA: Did you ever see the person in the back of the police car step out of the car?

STEVENS: Yes. The police officers brought him out.

\* \* \*

ASA: Did you recognize the man who stepped out of the squad car?

STEVENS: Yes.

ASA: Who was the man who stepped out of the squad car?

STEVENS. It was the exact same man as the night before that had robbed us.’<sup>2</sup>

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<sup>2</sup> Stevens was not asked whether she identified defendant before he exited the police

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¶ 25 Stevens testified that the police illuminated defendant's face in order for her to make an identification. Stevens observed defendant wearing the "exact same hooded sweatshirt and Yankees cap." Stevens testified that she had not observed defendant before the night she was robbed.

¶ 26 Next, Stevens was shown a photograph of Arlington Place that she identified as the place that she was standing when she was robbed and that it fairly and accurately depicted how the area appeared the night that she was robbed. Stevens marked the place on the photo where she was robbed and identified a streetlight across the street from the place of the robbery.

¶ 27 Stevens next identified the gray hooded sweatshirt and Yankees cap that she had observed defendant wearing both during the robbery and when she identified him the following day.

¶ 28 During cross-examination, Stevens testified that she gasped during the robbery and that she was extremely frightened throughout the whole incident, partially because she thought defendant might have a gun.

¶ 29 During cross-examination, Stevens described her initial conversation with the police officer who responded to their call on May 1. She testified that it took approximately 10 minutes for the police officer to arrive, and that she told the officer that the offender was wearing dark clothing, a hoodie, and a baseball cap. She also testified that she told the police that the offender

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vehicle; however, Officer Parizanski testified that Stevens did identify defendant while defendant was still seated in the police vehicle and before he was taken out of the vehicle. Also, Fitzpatrick testified that a police officer said they should perform a show-up with Stevens since she had already observed defendant in the police vehicle.

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was “approximately 30 to 40” years old, over 6 feet tall, weighed 200 pounds, had a goatee, with eyes that appeared bloodshot, and that she thought the robber had a weapon. Stevens further testified that she also heard Fitzpatrick tell the officer that the offender had a goatee and was wearing a baseball cap.

¶ 30 During cross-examination, Stevens testified that it was less than 48 hours from the robbery to when Fitzpatrick asked her to accompany him to Belden and Clark on May 2. Stevens testified that he said, “the police were there, \*\*\* they were going to ask me to identify and see if the person they had was the same as the man who robbed us.” Stevens testified that, once at Belden and Clark, she talked with the officer for five minutes, then the officer said, “I would need to make sure I was 100 percent positive that this was the person.” Stevens then identified defendant as the offender.

¶ 31 C. Testimony of Arresting Officer

¶ 32 Chicago police officer Jason Parizanski testified that on May 2, 2010, at 10 p.m., he was on a routine vehicle patrol with his partner, Officer Jose Torres. Officer Parizanski received a “person wanted” call with a description of a male in his 40s wearing a dark-colored jacket and a dark baseball cap at the intersection of Clark and Belden. The call indicated that the victim was waiting nearby to talk to the police when they arrived. When Parizanski arrived, he noticed a male sitting on a large concrete flower bed that matched the description of the “person wanted” call. Parizanski testified that the man appeared to be in his forties, was wearing a dark blue Yankees cap and a dark collared sweatshirt. Officer Parizanski then identified defendant in the courtroom as the man he had observed on the street corner. Officer Parizanski and his partner

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conducted a field interview and a “Terry stop” of defendant. After this, Officer Parizanski looked around for the person who had called the police, and observed Fitzpatrick.

¶ 33 Parizanski testified that he asked Fitzpatrick if the police had stopped the right person, which Fitzpatrick confirmed. Fitzpatrick told Parizanski that he was 100% sure it was the same individual who had robbed him. Parizanski then had Fitzpatrick view defendant in a show-up. Fitzpatrick identified defendant as the offender, saying he was “100 percent sure” and that defendant was still wearing the same clothes as he had during the robbery.

¶ 34 Parizanski testified that, when Stevens arrived, she identified defendant from a distance of 15 to 20 feet away while defendant was in the back of the police vehicle. Stevens stated, “that’s the same guy.” Parizanski then removed defendant from the vehicle, shined a light on him, and asked Stevens if she was sure this man who robbed her and Stevens said “yes, absolutely.”

¶ 35 On cross-examination, Parizanski testified that his only knowledge of the robbery was from the “person wanted” call and from the information Fitzpatrick had provided at the arrest scene. Parizanski testified that Fitzpatrick stated that he had recognized defendant before the police arrived when he observed defendant on the street corner.

¶ 36 Parizanski’s testimony concerning the arrival of Stevens was as follows:

“PARIZANSKI: Once [Stevens] was already on [the] scene, it was too late to do a lineup.

ASSISTANT PUBLIC DEFENDER [APD]: Well, why was that?

PARIZANSKI: Because she’s [sic] already observed the defendant in the vehicle.

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APD: So you allowed her to observe Ray Armour in the vehicle? That's what you're saying?

PARIZANSKI: I didn't allow her to- -

APD: Just she just did it?

PARIZANSKI: - - it was outside of my control."

¶ 37 Responding to why he had asked Stevens to identify defendant in a show-up, Parizanski stated that, "[s]he had already seen the individual in the squad car before I had any opportunity to intervene, intercept, or stop that from happening. That event had already taken place before I could have taken control of that." Parizanski further testified that Stevens was 15 to 20 feet from the vehicle when she made this observation, and that the interior lights of the police vehicle were off. After Stevens' initial identification, Parizanski asked Stevens, "would you like to take a closer look at him with a light on so you can be sure?" Parizanski then performed a show-up and Stevens identified defendant as the person who had robbed her when he took defendant out of the vehicle.

¶ 38 Parizanski testified that he then arrested defendant and found no property on defendant's person that was identifiable as belonging to Fitzpatrick or Stevens. During processing, Parizanski later determined defendant was 55 years old, 5 foot 11 inches, and weighed 185 pounds.

¶ 39 At the close of the State's case, the parties stipulated that the gray hooded sweatshirt and Yankees cap belonged to defendant and that the police had followed proper procedure in the chain of custody of these items.

¶ 40 Defendant moved for a directed verdict, which the trial court denied.

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¶ 41 Defendant then called one witness in his defense, police officer Gniedziejko<sup>3</sup>, who testified that he was the responding officer immediately following the robbery.

¶ 42 Officer Gniedziejko testified that on May 1, 2010, at 12:30 a.m., he was on patrol alone when he interviewed Stevens and Fitzpatrick concerning the robbery. They gave him a “partial description” of the robbery suspect, stating that the suspect was male, between 30 and 40 years old, approximately 200 pounds, and was wearing dark clothing and a hooded sweatshirt. The following testimony concerning Fitzpatrick’s and Steven’s description occurred at trial:

"APD: Any other description?

GNIEDZIEJKO: No. If there was any other description, I would have imputed [sic] in the report.

\* \* \*

APD: So other than those identifiers, there was nothing else that they told you; correct?

GNIEDZIEJKO: No. I told them that [if] anything comes back to refresh your recollection on the case to advise the follow-up detective when he interviews them to provide for the information."

¶ 43 Gniedziejko further testified that, after searching the area, he did not find a person meeting the description provided by Fitzpatrick and Stevens.

¶ 44 On cross-examination, Gniedziejko testified that he briefly discussed the hard object being pressed into Stevens’ back in order to determine if a weapon was involved. Stevens

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<sup>3</sup> Officer Gniedziejko’s first name does not appear in the record.

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informed Gniedziejko that she thought it was a gun even though she did not observe it, but Gniedziejko “couldn’t determine [if there was a weapon] from her giving the information.” Gniedziejko did not indicate a weapon in his case report because there was not enough information to determine if there was a weapon. He testified that he was taking notes while Stevens and Fitzpatrick were talking and that, after he finished the interview, he used his notes to write up the case report.

¶ 45 Defendant did not testify and the defense rested. During closing arguments, defense counsel attempted to raise the issue of the difficulty of cross-racial identification, but the trial court sustained the State’s objection on the ground that “there’s been no testimony regarding that whatsoever.” Defense counsel also argued that being certain an identification is correct does not make it true and accurate.

¶ 46 After closing arguments, the jury found defendant guilty of the robbery of Fitzpatrick and Stevens, and the trial court entered judgment on the verdict.

¶ 47 **II. Posttrial Proceedings**

¶ 48 Defendant filed a posttrial motion for a new trial, arguing, among other claimed errors, that the State failed to prove defendant guilty of robbery beyond a reasonable doubt.

¶ 49 On December 3, 2010, defendant was sentenced to two concurrent 20-year sentences in the Illinois Department of Corrections. The trial court imposed various fees, including a \$200 assessment for State DNA ID System pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)). Defendant filed a motion to reconsider this sentence, which the trial court denied.

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¶ 50 Defendant then filed a timely notice of appeal on December 3, 2010, and this appeal followed.

¶ 51 ANALYSIS

¶ 52 On this direct appeal, defendant claims (1) that the trial court erred in entering judgment on the jury verdict because it was based on two witnesses' fleeting observations of defendant's face, (2) that defendant was denied his right to effective assistance of counsel when trial counsel failed to file a motion to suppress Stevens' show-up identification of defendant, and (3) that the trial court incorrectly assessed a \$200 DNA fee. The State agrees that the \$200 DNA fee should be vacated. For the following reasons, we affirm defendant's conviction and order the \$200 DNA fee vacated.

¶ 53 I. Sufficiency of the Evidence

¶ 54 Defendant first claims that the State failed to prove defendant guilty of robbery beyond a reasonable doubt because it failed to meet its burden of proving that defendant was the man who robbed Stevens and Fitzpatrick.

¶ 55 A. Standard of Review

¶ 56 When reviewing a sufficiency of the evidence claim in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). We will not reverse a criminal conviction, "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106

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Ill. 2d 237, 261 (1985). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009); *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 57 B. The Victims' Identifications

¶ 58 Defendant claims that the victims' identifications were insufficient to prove him guilty beyond a reasonable doubt.

¶ 59 Although the State "has the burden of proving beyond reasonable doubt the identity of the person who committed the crime" (*People v. Slim*, 127 Ill. 2d 302, 307 (1989)), "identification of the accused by a single eyewitness is sufficient to sustain a conviction," (*People v. Johnson*, 114 Ill. 2d 170, 189 (1986)).

¶ 60 Defendant claims that misidentification is a frequent problem in criminal cases, and that the identification of strangers is particularly untrustworthy. Defendant lists the five factors used by both Illinois and federal courts to evaluate the reliability of an identification: (1) the witness' opportunity to view the suspect during the offense; (2) the witness' degree of attention; (3) the accuracy of prior descriptions provided; (4) the witness' level of certainty at the time of the identification procedure; (5) the length of time between the crime and the identification. *Neil v. Biggers*, 409 U. S. 188, 199 (1972); *People v. McTush*, 81 Ill. 2d 513, 521 (1980). These five factors are often referred to as the *Biggers* factors. *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007). In addition, there is a sixth factor sometimes used by the courts. It is whether there was any prior acquaintance with the identified person which would enhance the witness' ability to

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recognize him. *McTush*, 81 Ill. 2d at 521.

¶ 61 1. First *Biggers* Factor: Opportunity to View

¶ 62 With respect to the first *Biggers* factor, defendant argues that neither Stevens nor Fitzpatrick had a “good opportunity” to observe the offender. When considering whether a witness had the opportunity to view the offender at the time of the offense, courts look to “whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation.” *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979). Stevens and Fitzpatrick both testified that they had sufficient opportunity to view the offender during the robbery. Stevens testified that she observed defendant’s face from a distance of one to one and a half feet for 5 seconds. Her testimony was uncontroverted. Fitzpatrick testified that he observed defendant’s face for 40 seconds. Although defense counsel elicited on cross-examination that the length of time Fitzpatrick observed defendant’s face *might* have been slightly shorter, courts have held that a witness had sufficient opportunity to view the offender when he observed the offender “for a matter of seconds” while the offender walked past the witness. *People v. Carlton*, 78 Ill. App. 3d 1098, 1101, 1106 (1979).

¶ 63 Furthermore, both the testimony of Stevens and Fitzpatrick indicated that the street was well-illuminated by streetlights and that the view of defendant’s face was unobstructed. *People v. Harrell*, Ill. App. 3d 138, 146 (1982) (finding that a street light a few vehicles away, plus a dome light in a vehicle was enough light to provide sufficient opportunity to view the robber); *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979) (finding where there was no evidence in the record that the witness’ view was obstructed or that the witness was ever at a great distance from



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reliability of the victims' identifications when defendant was actually 55 years old, five foot eleven inches tall, and 185 pounds. The physical description provided of the offender was considered by the jury and it was their decision to give that description whatever weight they felt it deserved. The jury also considered the victims' description of the clothing defendant wore as a dark hooded sweatshirt and a Yankees baseball cap, and their description of defendant's face showing weathered features and bloodshot eyes. Our supreme court has held that "a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness' positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made." *People v. Slim*, 127 Ill. 2d 302, 308-09 (1989). Here, although there were differences in degree, both Stevens and Fitzpatrick did distinguish individual and separate features of defendant, strengthening the reliability of their identifications. Furthermore, while their initial description did differ from defendant's actual appearance, the jury had the opportunity to assess the reliability of their testimony. We cannot say, when viewed in the light most favorable to the State, the discrepancies between the victims' initial identification and defendant's appearance fatally undermine the reliability of the victim's identification. Issues of witness reliability are for the finder of fact to determine, and we will not substitute our judgment for that of the jury with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *Jackson*, 232 Ill. 2d at 281.

¶ 68 4. Fourth *Biggers* Factor: Witness' Level of Certainty

¶ 69 With respect to the fourth *Biggers* factor, the witness' level of certainty, the defense

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argues that, although the victims expressed certainty in their identification of defendant, this factor should be given little weight. Defendant argues that prior Illinois appellate courts have stated that a witnesses' faith in their identification is equally positive whether or not the identification is correct. *People v. Allen*, 376 Ill. App. 3d 511, 524 (2007). However, *Allen* is factually distinguishable from this case. In *Allen*, we found that the trial court committed reversible error when it refused to allow an expert to testify to an individual's ability to identify another individual. *Allen*, 376 Ill. App. 3d at 513. Here, the trial court did not refuse to allow an expert witness to testify. Defendant did not attempt to call an expert to testify about eyewitness identification research. We have previously stated that "a trial court may omit one of the Biggers factors \*\*\* based on the 'evidence,' and the 'evidence' may include the kind of social science evidence proposed in *Allen*." *People v. Rodriguez*, 387 Ill. App. 3d 812, 824 (2008). "For example, if the defendant in the case at bar had introduced into evidence the testimony of an expert in eyewitness identification research, the trial court may have [then] chosen, based on the evidence presented in the case, to omit one of the listed factors." *Rodriguez*, 387 Ill. App. 3d at 824. However, in the case at bar, as we have explained, no such expert evidence was offered at trial. During closing arguments, defense counsel did argue to the jury that "[b]eing sure or positive about your identification as I said in opening statements doesn't make it true and accurate." Thus, the jury was asked to assess the weight given to Stevens' and Fitzpatrick's testimony, despite the fact that they were positive defendant was the man who robbed them.

¶ 70 Defendant also argues that *Newsome v. McCabe*, 319 F.3d 301, 305 (7th Cir. 2003), supports the theory that a witnesses' faith in their positive identification is equally strong whether



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*Putnam*, 379 Ill. App. 3d 807, 826 (2008); see also Ill. S. Ct. R. 341(h)(7) (eff. May 24, 2006).

Furthermore, *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), relied upon in other arguments, found that “a lapse of seven months between the rape and the confrontation” was not fatal to a witness’ reliability in the identification process.

¶ 73 6. Additional Factor: Prior Acquaintance

¶ 74 Sixth, defendant argues that, where the witnesses had no prior acquaintance with the defendant, the five *Biggers* factors should receive less weight. Defendant argues that there is an inherent difficulty in identifying strangers. The Illinois Supreme Court has stated that, when a witness had prior acquaintance with the defendant, this prior acquaintance rendered other factors less important. *People v. Brooks*, 187 Ill. 2d 91, 130 (1999). While there may be difficulty in identifying strangers in some circumstances, the Illinois Supreme Court has affirmed the use of the five-factor *Biggers* analysis for determining the reliability of an identification which identifies a stranger. *Slim*, 127 Ill. 2d at 307-08; *People v. McTush*, 81 Ill. 2d 513, 521 (1980); *Biggers*, 409 U.S. at 199-200. Here, neither Stevens nor Fitzpatrick had any prior acquaintance with defendant, therefore, the first five identification factors are persuasive.

¶ 75 Lastly, defendant argues that a cross-racial identification is more likely to be unreliable, which the State does not contest.<sup>4</sup> “[E]xperimental data has confirmed the unique difficulties that exist in recognizing faces of members of another race.” Radha Natarajan, *Radicalized Memory and Reliability: Due Process Applied to Cross-Racial Identifications*, 78 N.Y.U.L. Rev. 1821,

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<sup>4</sup> Defense counsel stated in closing arguments, over an objection by the State, that the victims, Stevens and Fitzpatrick, were white while defendant was black.

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1822-23 (2003). First, the reliability of cross-racial identification was raised as an issue in the trial court only during closing arguments, and the trial judge sustained the State's objection.

Defense counsel appears to have thought that the problem with cross-racial identification was common knowledge and that the testimony of an expert was not needed to raise the issue during closing arguments. E.g., *People v. Dixon*, 87 Ill. App. 3d 814 (1980) (holding that the trial court properly excluded expert testimony concerning the unreliability of cross-racial identifications, reasoning that the trustworthiness of eyewitness observation is not generally beyond the common knowledge and experience of an average juror).

¶ 76 First, defendant did not claim in a posttrial motion that the trial court erred by not allowing defense counsel to argue the problems with cross-racial identification during closing arguments, and thus the issue is forfeited. *People v. Wilkins*, 83 Ill. App. 3d 41, 44 (1980). The Illinois Supreme Court has held that a “defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review.” *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). When a defendant has failed to preserve an error for review, we may still review for plain error. *Piatkowski*, 225 Ill. 2d at 562–63; 134 Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999) (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.”). “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it

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affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *Piatkowski*, 225 Ill. 2d at 565; *Woods*, 214 Ill. 2d at 471. When a defendant fails to request this court to review a claim under plain error, he again forfeits the issue. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (“A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion.”). Here, defendant never raises the issue of reviewing cross-racial identification under the plain error doctrine, and therefore, he has forfeited the issue.

¶ 77 For the foregoing reasons, after viewing the evidence in the light most favorable to the State, we cannot say that a jury could not have found defendant as the offender who committed the robbery.

¶ 78 II. Ineffective Assistance of Counsel

¶ 79 Defendant next claims he was denied his fourth amendment constitutional right to the effective assistance of counsel because his trial counsel did not move to suppress Stevens’ show-up identification of defendant.

¶ 80 A. Standard of Review

¶ 81 The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984)) (adopting *Strickland*). Under *Strickland*, a defendant must prove both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill.

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2d 194, 219–20 (2004); *Strickland*, 466 U.S. at 687. This issue is reviewed *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127 (2008). A *de novo* appeal is defined as “ ‘[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings.’ ” *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 537 (2002) (quoting Black's Law Dictionary 94 (7th ed. 1999)).

¶ 82 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness “under prevailing professional norms.” *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220.

¶ 83 Under the second prong of the *Strickland* test, the defendant must show that, “but for” counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. “[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair.” *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220.

¶ 84 “[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient.” *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 85 B. Prejudice

¶ 86 Defendant asks us to find ineffectiveness on the limited ground that his counsel failed to

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challenge the Stevens' show-up identification. "In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed." *Bew*, 228 Ill. 2d at 128-29. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 681-82 (1984); *People v. Barrow*, 195 Ill. 2d 506, 520 (2001). Defendant claims that trial counsel's failure to move to suppress Stevens' show-up identification was prejudicial because there was a strong likelihood the motion would have been granted and there was a reasonable probability of a different outcome if the court had suppressed Stevens' show-up identification.

¶ 87 Ordinarily, the trier of fact determines the weight given to an identification; however, when the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," it violates the due process clause of the Constitution and the identification is excluded by law. *Biggers*, 409 U.S. at 196-197. "When ruling on a motion to suppress a show-up under the due process clause, a trial court conducts a two-part inquiry." *Rodriguez*, 387 Ill. App. 3d at 829. " 'First, the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law.' " *Rodriguez*, 387 Ill. App. 3d at 829 (quoting *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003)). "If the defendant satisfies this burden, then the burden switches to the State to prove that the identification was 'independently reliable.' " *Rodriguez*, 387 Ill. App. 3d at 829.

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¶ 88 Defendant claims that show-up identifications have been widely discredited in favor of lineup identifications because show-up identifications are inherently unreliable and suggestive. *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967); *People v. Blumenshine*, 42 Ill. 2d 508, 512 (1969); *People v. Graham*, 179 Ill. App. 3d 496, 504 (1989). Defendant claims that Stevens' show-up identification was "unnecessarily suggestive and conducive to irreparable mistaken identification" because prior to Stevens' show-up identification, Fitzpatrick told Stevens that the offender was in police custody and because defendant was in handcuffs during the show-up. Defendant argues that the police had no justification to perform a show-up identification with Stevens because Fitzpatrick had already identified defendant as the offender and thus probable cause for the arrest had already been established. Defendant argues that the correct police procedure would have been to perform a lineup for Stevens to view defendant with other people before selecting him as the offender. For the following reasons, we cannot say that the procedure used by the police in the show-up identification was unnecessarily suggestive.

¶ 89 Stevens testified that, immediately prior to the show-up, an officer told her "[she] would need to make sure [she] was 100 percent positive that this was the person," implying Stevens had already identified defendant

¶ 90 Second, the fact that a show-up identification was made with defendant in handcuffs does not automatically weaken the reliability of a witness' identification. *People v. Howard*, 376 Ill. App. 3d 322, 331, (2007). Where a witness identifies a defendant prior to a show-up, the issue of whether the show-up was unnecessarily suggestive becomes less important because the witness has already identified the offender. Also, the fact that Stevens made her identification after

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hearing that Fitzpatrick had identified defendant as the offender does not by itself weaken the reliability of her identification. For example, we previously held that where, prior to a show-up, one witness heard a second witness identify the defendant, the first witness' identification was not found to be unnecessarily suggestive. See *Ramos*, 339 Ill. App. 3d at 89. Moreover, when analyzing the suggestiveness of a lineup or show-up, courts focus on the actions of the police in relation to the procedure, not the outside parties' actions. See *People v. Johnson*, 149 Ill. 2d 118, 147 (1992); *People v. Thorne*, 352 Ill. App. 3d 1062 (2004). Here, there is no evidence that the police displayed unnecessarily suggestive actions, and the record does not indicate that the allegedly suggestive action of Fitzpatrick telling Stevens that the police had captured the offender was initiated or induced by the police. Also, “[a]lthough the United States Supreme Court has not considered a case of accidental pretrial encounter, Illinois courts which have considered this issue hold that 'an identification based upon an accidental encounter, where unprompted and positive, is not an impermissible show[-]up and does not taint the in-court identification by the witness where the police neither arranged the chance encounter or suggestive circumstances.'” *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994) (quoting *People v. Lutz*, 103 Ill. App. 3d 976, 981 (1982); *People v. Pardue*, 6 Ill. App. 3d 430, 432 (1972) (coincidental confrontation); *People v. Wright*, 124 Ill. App. 2d 223, 231 (1970) (coincidental).

¶ 91 For the foregoing reasons, we cannot find that the show-up was unnecessarily suggestive, and thus we do not need to proceed to the second step of the due process analysis. *Rodriguez*, 387 Ill. App. 3d at 832-33 (“Since defendant has failed to show that the show-up was ‘unnecessarily suggestive,[’] we do not need to proceed to the second step of the due process

analysis.”).

¶ 92 Also, we find unpersuasive the argument that there was a reasonable probability that the outcome of the trial would have been different if both Stevens’ first identification and her second, show-up identification were suppressed. Defendant argues where an identification is “reasonably vulnerable to attack,” failure to move to suppress that identification is ineffective assistance of counsel and creates a reasonable probability that the outcome of the trial would have been different. *People v. Brinson*, 80 Ill. App. 3d 388, 392-93 (1980). *Brinson* is factually distinguishable from the case at bar. In *Brinson*, the appellate court stated a photograph array identification “seem[ed] to have been reasonably vulnerable to attack by a motion to suppress,” and then listed the reasons for that conclusion: first, that the identification was never positive; second, that the photograph of the defendant was marked and part of the defendants’ name was visible on the photograph; third, that there were discrepancies between the witness’ initial description of the defendant and the defendant’s actual appearance; and fourth, that the witness did not recognize defendant as a guest of the witness’ hotel when the defendant had been staying at the hotel for over a month. *Brinson*, 80 Ill. App. 3d at 392. Other than the discrepancy between the initial description and defendant’s actual appearance, this case has none of the factors that would make it “reasonably vulnerable to attack by a motion to suppress” that were present in *Brinson*.

¶ 93 Finally, defendant argues that without Stevens’ corroborating identification, the jury “could have” given Fitzpatrick’s identification less weight. Fitzpatrick, the other victim, had a longer view of defendant during the robbery and independently and immediately identified

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defendant on the street less than 48 hours later. The Illinois Supreme Court held that a positive identification by a single eyewitness who had ample opportunity to view the defendant during the commission of the crime is sufficient to support a conviction. *Piatkowski*, 225 Ill. 2d at 566.

Because Fitzpatrick had ample opportunity to view the offender during the crime, his identification alone was sufficient to convict defendant. Thus, we find unpersuasive the argument that if the Stevens' show-up identification was suppressed there is a reasonable probability that the outcome of the trial would have been different.

¶ 94 For the foregoing reasons, we cannot find that trial counsel was ineffective by not moving to suppress Stevens' show-up identification.

¶ 95

### III. DNA Fee

¶ 96 Both defendant and the State agree that the \$200 DNA fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) should be vacated because defendant's DNA was previously taken for the DNA databank. The propriety of a trial court's imposition of fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). While defendant did not object to this fee at trial, a "sentence which does not conform to a statutory requirement is void." *People v. Thompson*, 209 Ill. 2d 19, 24 (2004). In *People v. Marshall*, 242 Ill. 2d 285 (2011), our supreme court held that section 5-4-3 authorizes a trial court to order a DNA fee only when defendant is not currently registered in the DNA database. Since defendant's DNA was previously registered in the DNA database, we vacate the DNA fee.

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¶ 97

CONCLUSION

¶ 98 For the foregoing reasons, we affirm defendant's conviction and order the \$200 DNA fee vacated.

¶ 99 Affirmed; fee vacated.