

FIRST DIVISION  
JUNE 10, 2013

No. 1-11-0364

**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. 09 CR 11846
	)	
JAHAZIEL DURON,	)	Honorable
	)	John J. Scotillo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The ruling of the trial court is affirmed because trial counsel was not ineffective for failing to reopen the motion to suppress identification testimony and failing to preserve the issue for appellate review. The trial court did not err in denying the defendant's motion to quash arrest and suppress evidence.

¶ 2 This appeal arises from a November 29, 2010 judgment entered by the circuit court of Cook County which found defendant-appellant Jahaziel Duron (Duron) guilty of second-degree murder and aggravated battery. On appeal, Duron argues that: (1) trial counsel was ineffective for failing to either reopen his motion to suppress identification testimony or include the issue in his posttrial

motion because Duron's physical lineup was unduly suggestive; and (2) the trial court erred in denying his motion to quash arrest and suppress evidence because the State failed to establish that the police had probable cause to arrest him. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

### BACKGROUND

¶ 4 On June 5, 2009, Diontae Roberts (Roberts) was stabbed multiple times during a brawl at a graduation party in Hanover Park, Illinois (Hanover Park party). Roberts passed away as a result of his injuries. On that same night, Roberts' brother, Michael Cherry (Mike) also suffered non-fatal injuries as a result of being stabbed during the same brawl. On June 6, 2009, Duron was arrested in connection with the stabbings of Roberts and Mike. Duron was charged with two counts of first-degree murder of Roberts pursuant to sections 9-1(a)(1) and 9-1(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1), (2) (West 2008)); one count of attempted first-degree murder of Mike pursuant to section 8-4(a) of the Code (720 ILCS 5/8-4(a) (West 2008)) and section 9-1(a)(1) of the Code; and two counts of aggravated battery of Mike pursuant to sections 12-4(a) and 12-4(b)(1) of the Code (720 ILCS 5/8-4(a), (b)(1) (West 2008)).

¶ 5 On August 26, 2010, Duron filed a motion to quash arrest and suppress evidence based on the argument that his arrest violated his Fourth Amendment and Fourteenth Amendment rights. On August 31, 2010, a hearing was held on Duron's motion to quash arrest and suppress evidence in the circuit court of Cook County. At the hearing, Duron testified that on June 6, 2009, he was with his girlfriend in the basement of his parents' house in Hanover Park (Duron's residence). At 3:30 p.m., the police arrived at the house and Duron's girlfriend went upstairs to determine why the police were

there. Duron's girlfriend told him that the police wanted to speak to him. Duron stated that his mother was not at home when the police arrived, but that his stepfather was home. He testified that he walked upstairs and saw two male police officers and one female police officer. Duron stated that the female officer grabbed his arm and said "We need to speak to you." Duron told the female officer "You don't have to grab me like that." Duron testified that the female officer escorted him out of the house and into a police car without allowing him to change clothes. At that time, Duron was wearing a white T-shirt, a pair of shorts, and his girlfriend's slippers. Duron's girlfriend was placed in a separate police car. Duron testified that he did not volunteer to go with the police, but that he felt he had no other choice. Duron stated that his stepfather sat on the couch the entire time the police were in the house, and that his stepfather did not speak to the police. Duron also stated that the police did not contact his mother in his presence.

¶ 6 Duron testified that the police drove him to the Streamwood police station. Duron stated that he was not handcuffed while in the police car, and he was read his Miranda rights at the police station. Duron testified that while he was at the police station, he was photographed and participated in a physical lineup. Duron was 16 years old at the time he was taken to the police station.

¶ 7 Elk Grove Village police detective Michael Ryan (Detective Ryan) testified that he was assigned to assist the Hanover Park police in the investigation of the stabbing death of Roberts. Detective Ryan testified that early in the morning of June 6, 2009, he went to the Hanover Park police station and learned that Roberts and Mike had been stabbed; and that Roberts had died as a result of his stabbing. Detective Ryan stated that there were 40 to 50 witnesses at the police station when he arrived. Detective Ryan was asked to conduct interviews of people who attended the party

where the stabbings took place. Detective Ryan testified that he also read reports created by other detectives that interviewed witnesses. Detective Ryan stated that Efran Lopez (Efran), Arnulho LeChuga (LeChuga), and Erik Rodriguez, were present at the police station but he did not speak to them. Detective Ryan testified that other detectives interviewed Efran, LeChuga, and Erik Rodriguez, and that he read the reports of the detectives who conducted the interviews. Detective Ryan also spoke to the detectives who created the interview reports for Efran, LeChuga, and Erik Rodriguez. Detective Ryan testified that the reports indicated that Efran made statements to the police declaring that he and Duron were at a party on June 5, 2009. The reports stated that Efran said that after leaving the party, Duron and Efran rode in the same vehicle and Duron said that he stabbed someone. In the report, Efran identified Duron as "Trigger."

¶ 8 Detective Ryan testified that in a report created by Officer Reardon, Erik Rodriguez made statements to the police declaring that he was in close proximity to a fight between Roberts and a Hispanic male wearing a black T-shirt with a yellow T-shirt underneath. In the report, Erik Rodriguez stated that during the fight, Roberts asked "Did you stab me?" and the Hispanic male replied "Yes I did stab you." Detective Ryan testified that in a report created by Detective Rojtowicz, LeChuga stated that he worked with Mike in the past. In the report, LeChuga identified Duron as "Trigger." LeChuga stated that he informed Roberts and Mike that some of the people at the party were possibly members of the Latin Kings gang. LeChuga identified Efran, Eric Lopez<sup>1</sup>, Duron, and an individual known as "Champs," as people who attended the party. LeChuga stated

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<sup>1</sup> Efran and Eric Lopez are brothers.

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that Duron was wearing a black top with a gold colored shirt underneath.

¶ 9 Detective Ryan testified that around 3:30 p.m., he was asked to locate Duron. Detective Ryan, Detective Held, and Detective Fernandez then drove to Duron's residence in two unmarked police cars. Detective Ryan testified that when the detectives arrived at Duron's residence, they knocked on the front door and asked if Duron was home. Detective Ryan does not remember who answered the door. Detective Ryan testified that Duron's mother, stepfather and girlfriend were all present at Duron's residence when the detectives arrived, and Duron was in the basement of the house. Detective Ryan stated that the detectives met with Duron's mother and informed her that they wanted to speak to Duron at the police station in reference to an investigation, and that she could also come to the police station. Detective Ryan testified that Duron's mother said that the detectives could take Duron to the police station, but she did not want to go to the police station. The detectives were brought to the basement where Duron was present, and the detectives informed Duron that they were conducting an investigation. Detective Ryan testified that the detectives asked Duron if he was willing to go to the police station to speak with them. Detective Ryan stated that Duron said that he was willing to go to the police station. Detective Ryan testified that Duron was then placed in a police car without being handcuffed, and was transported to the Streamwood police station. Detective Ryan stated that Duron's girlfriend provided two sets of shoes for Duron to wear. Detective Ryan testified that Duron's girlfriend was also asked to go to the police station and she was transported in a separate police car. Duron was taken to the Streamwood police station because it had a separate juvenile facility that the Hanover Park police station did not have.

¶ 10 Detective Ryan testified that at the Streamwood police station, Duron was placed in the

"report taking" room. Detective Ryan stated that he stayed with Duron for approximately an hour to ensure that Duron would not leave. After Detective Ryan's testimony concluded, the trial court denied Duron's motion to quash arrest and suppress evidence.

¶ 11 On September 8, 2010, Duron filed a motion to suppress identification testimony. The motion alleged that the physical lineup in which Duron participated on June 6, 2009, was unduly suggestive. The motion also alleged that Duron was not advised of his right to counsel during the physical lineup. On September 28, 2010, the trial court held a hearing on Duron's motion to suppress identification testimony. Detective Steven Stotz (Detective Stotz) testified that he transported Duron to the DuPage County jail in order for a lineup to be conducted. Detective Stotz stated that Duron's mother was asked if she wanted to be present for the lineup and she replied that she did not wish to be present. When Duron arrived at the DuPage County jail, he was turned over to Major Knoll. Detective Stotz testified that Major Knoll allowed Duron to pick the other participants for the lineup from the jail's general population. Detective Stotz stated that it is common procedure to allow a suspect to pick his own lineup participants. According to Detective Stotz, the procedure was no different for minors. Detective Stotz testified that he was present for the lineup, but did not assist Duron in picking the lineup participants. Detective Stotz stated that he was aware that some of the lineup participants were more than 10 years older than Duron. Detective Stotz was also aware that Duron had close-cropped hair and the other participants had a full head of hair and facial hair. Detective Stotz testified that all of the lineup participants were Hispanic males; all participants wore a white T-shirt under an orange jumpsuit; all participants wore a blue wristband; all participants held number cards with two hands; and all participants were approximately the same height.

¶ 12 Duron testified that on June 7, 2009, he was in custody at the Hanover Park police station and was transported to the DuPage County jail. Duron stated that he did not know why he was being transported. Once he arrived at the DuPage County jail, Duron changed into an orange jumpsuit. Duron testified that a police officer then brought him into a hallway and the police officer volunteered to choose participants for Duron's lineup that benefitted him. Duron stated that he did not pick his own lineup participants. Duron testified that the police officer returned with four inmates and they were taken to participate in the lineup. Duron stated that a correctional officer held out five numbers, and that he picked the third number because he was third in line. Duron testified that the participants were then taken to another room where they were photographed. Duron stated that throughout the lineup process, he was not told that he could have an attorney present.

¶ 13 Major Knoll testified that he is the court liaison for the DuPage County jail. Major Knoll stated that on June 7, 2009, he received a call from Hanover Park requesting assistance with a lineup. Major Knoll testified that Duron was given a DuPage County inmate uniform and was offered the opportunity to choose his own number card. Major Knoll stated that the suspect is always given the opportunity to pick their number first. Major Knoll testified that Duron picked a card with the number three, and the rest of the numbers were handed out at random to the other participants. Major Knoll stated that the participants were then photographed individually and as a group. The participants were then taken to the lineup room. Major Knoll testified that suspects are usually walked around the jail and it is up to the suspect to pick their lineup participants. Major Knoll testified that he was present when Duron was instructed that he was going to be walked around the jail, but that he did not walk Duron around the jail. After Major Knoll's testimony concluded, the

trial court denied Duron's motion to suppress identification testimony.

¶ 14 On October 28, 2010, Duron's bench trial commenced in the circuit court of Cook County. Mike testified that on June 5, 2009, he went to a party in Hanover Park with Roberts, Harold Cherry<sup>2</sup> (Harold), Erik Rodriguez, Mark Barron (Mark), Jose Barron<sup>3</sup> (Jose), Jasmin Valdovinos (Valdovinos), Tiana Quarels (Quarels), Ciara Zamora<sup>4</sup> (Zamora), and other friends. The party took place in the backyard of a house in Hanover Park. After a short period of time, Mike, Roberts, Harold, Mark, Erik Rodriguez, Zamora, Quarels, and Valdovinos left the Hanover Park party and went to another party in Schaumburg, Illinois (Schaumburg party). Mike testified that after 30 to 35 minutes, the group decided to return to the party in Hanover Park. Mike stated that when he returned to the Hanover Park party, he walked into the party with Roberts and there was an "all-out brawl" taking place in the backyard involving 20 to 30 people. Mike testified that he saw a group of people "stomping" an individual near a fence. Mike was then hit by a Hispanic person and engaged in a fight. Mike stated that he was fighting with three people at once, and his brother Harold came over to help him. Mike testified that the parents of the girl who hosted the party came out of the house and began yelling that they were going to call the police. Mike stated that the fighting then began to calm down and people started to run out of the backyard toward their vehicles.

¶ 15 Mike testified that after the fighting began to calm down, he walked out of the backyard with

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<sup>2</sup> Harold Cherry is the brother of Mike and Roberts.

<sup>3</sup> Mark and Jose are brothers.

<sup>4</sup> Quarels and Zamora are sisters.

Roberts. As Mike was walking to his vehicle, he was hit from the side by a different Hispanic person. Mike testified that while he was fighting near his vehicle, he heard someone say that Roberts had been stabbed. Mike stated that he then heard a different person say "I'm going to stab." Mike testified that after he heard the phrase "I'm going to stab," he was stabbed from behind. Mike stated that he stopped fighting the Hispanic person and looked at the person who stabbed him "in the face." Mike identified Duron as the person who stabbed him. Mike testified that he was very close to Duron, and Duron stood still for approximately 10 seconds. Mike stated that Duron then ran and jumped into a vehicle.

¶ 16 Mike testified that after Duron ran away, a vehicle pulled up next to him containing Quarels and Roberts. Quarels was driving and Roberts was in the passenger seat. Mike testified that Quarels was panicked so she got in the backseat, and he drove the vehicle. Mike then drove Roberts to the hospital. Once they arrived at the hospital, Roberts was taken away to be treated. Mike stated that he went to the bathroom to wash his hands and began to feel pain from his stab wound. Mike noticed that he was stabbed under the left armpit and received stitches while at the hospital.

¶ 17 Mike testified that on June 6, 2009, he was shown photo spreads at the Hanover Park police station. Mike did not identify anyone in the photo spreads, however, he acknowledged at trial that Duron's photo was in the photo spreads. On June 7, 2009, Mike viewed a physical lineup at the DuPage County jail. Mike testified that he identified Duron in the physical lineup.

¶ 18 Quarels testified that on June 5, 2009, after leaving the Schaumburg party, she returned to the Hanover Park party and entered the backyard with Erik Rodriguez and Zamora. Quarels stated that there were people arguing and fighting in the backyard. Quarels testified that Erik Rodriguez

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got into an argument with another person, and Erik told the person that he did not want to fight. Quarels identified Duron as the person who argued with Erik Rodriguez. Quarels testified that Erik Rodriguez then noticed that Jose was engaged in a fight and went over to help Jose. Quarels stated that she ran to the front of the house to find Roberts because he "was like the big brother of the group. He kept everything in check. And when things went wrong, he would tell everybody to chill and let's go." Quarels testified that she saw Roberts fighting with Duron across the street. Roberts' back was facing Quarels and she could see Roberts swinging his arms and throwing punches. Quarels testified that she could not see what Duron was doing. Quarels stated that she began yelling Roberts' name, and Roberts turned around and said "He stabbed me. He just stabbed me." Quarels testified that Roberts then fell back while holding himself and Duron ran away. She did not see Roberts get stabbed and did not see that Duron had a weapon. Quarels then went over to assist Roberts. Quarels testified that Zamora came over to her, held onto Roberts, and gave her the keys to Zamora's vehicle. Quarels stated that she retrieved the vehicle a block away and drove the vehicle back to where Zamora and Roberts were located. Quarels testified that she and Zamora then told Mike that Roberts had been stabbed and that they were driving him to the hospital. Quarels stated that Roberts was placed in the passenger seat, Mike drove the vehicle, and she sat in the backseat because she did not want to drive. Quarels stated that once they arrived at the hospital, Mike took Roberts inside the hospital.

¶ 19 Quarels testified that on June 6, 2009, she viewed photo spreads with the police. She did not identify anyone in the photo spreads, however, she acknowledged at trial that Duron's photo was in the photo spreads. Quarels testified that on June 7, 2009, she viewed a physical lineup at the DuPage

County jail. Quarels stated that she identified Duron in the physical lineup.

¶ 20 Erik Rodriguez testified that on June 5, 2009, after leaving the Schaumburg party, he returned to the Hanover Park party in Zamora's vehicle. Erik Rodriguez stated that he, Quarels and Zamora walked along the side of the house toward the backyard and he noticed people fighting in the backyard. Erik Rodriguez identified Duron as one of the people fighting in the backyard. Erik Rodriguez testified that Duron approached him and they exchanged words. He and Duron were three feet away from each other. Erik Rodriguez stated that he told Duron that he did not want to fight, and Duron walked past him toward the front of the house. Erik Rodriguez testified that he saw his brother and Jose fighting with some of the people that were with Duron. At that point, someone hit Erik Rodriguez and he began fighting. Erik Rodriguez testified that he then began moving out of the backyard toward Zamora's vehicle because people were leaving. Erik Rodriguez stated that as he was leaving the backyard, he was still getting hit by people but he saw Duron fighting with Roberts across the street. Erik Rodriguez testified that he saw Roberts punching Duron. Erik Rodriguez stated that Duron was "holding something," and that Duron was not punching Roberts but was "doing something" to him. Erik Rodriguez testified that Roberts then turned while holding his stomach area and said "I think he stabbed me." Roberts was bleeding at this point. Erik Rodriguez testified that Duron backed away from Roberts and said "I stabbed that nigger. Now I'm going to stab that one." Erik Rodriguez stated that Duron then began "scuffling" with Mike. Duron and Mike then backed away from each other and Duron got in a vehicle with his friend.

¶ 21 At trial, the parties stipulated that on June 6, 2009, Erik Rodriguez viewed photo spreads with the police but did not identify anyone in the photo spreads. Duron's photo was included in the

photo spreads. On June 7, 2009, Erik Rodriguez viewed a physical lineup at the DuPage County jail. Erik Rodriguez identified Duron in the physical lineup.

¶ 22 Valdovinos testified that on June 5, 2009, she was at the Hanover Park party and saw Erik Rodriguez standing face-to-face with Duron. Valdovinos stated that Erik Rodriguez and Duron were not arguing, and that they separated and walked off in different directions. Valdovinos testified that she noticed approximately 20 people fighting in the backyard. Valdovinos stated that she went to the front of the house in an effort to locate her cousin. Valdovinos found her cousin in front of the house and they had a short conversation. Valdovinos testified that after she spoke with her cousin, Harold found her and they agreed that they should leave. Valdovinos stated that she and Harold began running to her vehicle, and then they saw Zamora's vehicle coming toward them at full speed. Zamora's vehicle stopped, and Valdovinos and Harold ran up to Zamora's vehicle. Valdovinos testified that she could not see inside Zamora's vehicle. Valdovinos testified that she and Harold then ran to her vehicle and she drove them to the hospital. Valdovinos testified that on June 7, 2009, she viewed a physical lineup at the DuPage County jail. Valdovinos identified Duron in the physical lineup.

¶ 23 Mark testified that on June 5, 2009, he and his brother Jose were at the Hanover Park party sitting on a trampoline in the backyard. Mark stated that he saw a group of people enter the backyard dressed in black and gold hoodies. Mark testified that a few of the people from the group dressed in black and gold hoodies, attacked another partygoer in the backyard. Mark identified Duron as one of the people who attacked the partygoer. Mark testified that after Duron's group attacked the partygoer, they began walking out of the backyard. Mark stated that he saw Duron talking to Erik

Rodriguez and then "all of a sudden chaos broke out." Mark testified that a large group of people began fighting and he went over to the fight to see if Erik Rodriguez was safe. Mark stated that he started fighting some of the people dressed in black and gold. During the fight, Mark got knocked down and then moved toward the front of the house. Mark testified that when he got to the front of the house, he saw Duron run up to Roberts near the street and they began to fight. Mark stated that Roberts was backing up and swinging at Duron while Duron was swinging in a "side roundhouse" motion at Roberts. Mark was 25 feet away from Duron and did not see anything in Duron's hands. Mark testified that Duron and Roberts separated, and Roberts grabbed his chest and said "He stabbed me." Mark stated that Duron said "Yeah I stab that nigger and I am gonna stab this nigger too." Mark testified that Duron then ran across the street and hit Mike in the back while Mike was fighting someone else. Mark stated that Mike fell to the ground and Duron ran to a vehicle and left the area.

¶ 24 Mark testified that on June 6, 2009, the police showed him photo spreads. Mark did not identify anyone in the photo spreads, however, at trial he acknowledged that Duron's photo was in the photo spreads. On June 7, 2009, he viewed a physical lineup at the DuPage County jail. Mark identified Duron in the physical lineup.

¶ 25 Jose testified that on June 5, 2009, he and his brother Mark were at the Hanover Park party sitting on a trampoline in the backyard. Jose stated that he saw of a group of six or seven people enter the backyard dressed mostly in black. Some of the people in the group were wearing hoodies with gold or yellow trimming. Jose stated that Duron was part of the group that was dressed in black. Jose testified that the entire group went inside the house for a few minutes, and then three or four of them came back outside to the backyard. Jose stated that he did not see Duron in the group

that came back outside to the backyard. Jose testified that the group that came back outside began attacking another partygoer. The group that attacked the partygoer then began to leave the backyard. Jose stated that as the group was leaving the backyard, he saw Erik Rodriguez talking to the group near the entrance of the backyard. Jose testified that a fight then broke out at the entrance to the backyard and he joined the fight. Jose stated that he was able to break free of the fight and began walking out toward the street. Jose testified that when he was walking toward the street, he saw Duron fighting with Roberts. Jose stated that Roberts was punching Duron in an effort to get Duron off of him. Also, Jose stated that Duron was swinging at Roberts in a "roundhouse" motion. Jose was 10 feet away from Duron and Roberts. Jose testified that Roberts then held his chest and screamed "He stabbed me. He stabbed me." Jose noticed that Roberts was bleeding. Jose testified that Duron stated "I stab this nigger, I'm gonna stab this nigger too." Jose stated that Duron then ran across the street and stabbed Mike in the side. Duron ran away down the street.

¶ 26 Jose testified that when he was questioned by police about the incident, they did not ask him if anyone was stabbed. He did not tell the police that anyone was stabbed. Also, Jose testified that he never saw Duron with a weapon. On June 6, 2009, Jose viewed photo spreads at a police station. He did not identify anyone in the photo spreads, however, at trial he acknowledged that Duron's photo was in the photo spreads. On June 7, 2009, Jose viewed a physical lineup at the DuPage County jail. He identified Duron in the physical lineup.

¶ 27 Harold testified that on June 5, 2009, after leaving the Schaumburg party, he returned to the Hanover Park party in Valdovinos' vehicle. As he was walking toward the backyard of the house from Valdovinos' vehicle, he noticed that a huge fight had started. Harold testified that he ran to the

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backyard to see if his brothers were involved in the fight and saw four people fighting his brother Mike on the side of the house. Harold stated that he joined the fight in order to protect Mike. Harold testified that eventually, he and Mike began to make their way to the front of the house. Harold stated that as he was moving toward the front of the house, another person struck him and began fighting with him. Harold testified that while he was still fighting he heard someone yell "I stabbed this nigger, so I am gonna stab this nigger too." Harold then turned around and saw Duron near the street. Harold stated that Duron was the person who made the statement that caused him to turn around. Harold testified that when Duron made the statement, Duron "flexed up his back." Harold stated that he was 30 feet away from Duron and that Duron had a scar on the back of his head. Harold did not see Duron with a weapon, but he stated that Duron was holding his hand as if he was holding something. Harold testified that he then began fighting again because someone punched him.

¶ 28 Harold testified that he gave a description of Duron to the police. Harold described Duron as a Hispanic male that was chunky and had marks on the back of his head. Harold testified that on June 6, 2009, the police had him view photo spreads. Harold did not identify Duron in the photo spreads, however, at trial Harold acknowledged that Duron's photo was in the photo spreads. On June 7, 2009, Harold viewed a physical lineup at the DuPage County jail. Harold identified Duron in the physical lineup.

¶ 29 Edgar Benitz (Benitz) testified that on June 5, 2009, he went to the Hanover Park party with a number of friends including Duron, Efran, and Eric Lopez. Benitz stated that during the party, a fight broke out but he was not sure who started the fight. Benitz testified that as he and his friends

were leaving the party, they got into an altercation with a group of black males. Benitz stated that the group of black males chased Benitz and his friends to their vehicle. The group of black males attempted to pull Benitz's brother out of the vehicle but he was able to kick them away. Benitz testified that he had seen one of the black males in the court building that day. Benitz identified a photo of Harold as the black male that he saw in the court building. Benitz stated that after he and his friends fought off the group of black males, they drove to a friend's house. Benitz testified that at the friend's house, Duron said that he stabbed someone at the party. Duron did not say who he stabbed or how many times he stabbed the person.

¶ 30 When questioned about his grand jury testimony, Benitz testified that he told the grand jury that Duron said that he stabbed two people a number of times. Benitz also told the grand jury that Duron stated that the people he stabbed said "you stabbed me," and Duron replied "I stabbed you." Benitz testified that on June 7, 2009, he gave a written statement to the police. Benitz acknowledged that his written statement did not mention an altercation with a group of black males.

¶ 31 Efran testified that on June 5, 2009, he went to the Hanover Park party with a group of friends, including Duron. Efran testified that when his group (including Duron) arrived at the party, they went inside the house for three to ten minutes and then went outside to the backyard. Efran stated that when they were in the backyard, one of his friends got in an argument with a partygoer. Efran testified that a fight then broke out. After the fighting started, Efran ran to the front of the house with his brother Eric Lopez and they started fighting other people. Efran stated that he did not see Duron when he ran to the front of the house. Efran testified that he engaged in a fight with two black males, and one of the black males hit him in the ribs with a pipe. After the fighting in the front

of the house ended, Efran met his group at a friend's vehicle. Efran testified that his group drove to a friend's house and Duron did not say anything about stabbing someone. Efran stated that he did not see any blood on Duron's clothes.

¶ 32 Efran testified that on June 6, 2009 he gave a handwritten statement to the police and an assistant State's Attorney. Efran acknowledged that his written statement stated that during the drive after the party, Duron said he stabbed someone a couple of times. The handwritten statement also stated that once Efran's group arrived at a friend's house after the party, Duron was quiet and did not say anything the rest of the night. Efran testified that the police told him what to say in his statement. When questioned about his grand jury testimony, Efran acknowledged that he told the grand jury that during the drive after the party, Duron said that he stabbed someone a couple of times. Efran told the grand jury that once his group arrived at a friend's house after the party, Duron had changed his clothes. Efran also told the grand jury that while the group was at the friend's house after the party, Duron said "I got that nigger. I stabbed him." Efran testified that the assistant State's Attorney told him how he should testify in front of the grand jury.

¶ 33 Assistant State's Attorney Shilpa Patel (ASA Patel) testified that prior to Efran's grand jury testimony, she reviewed Efran's statement with him but she did not tell him how to testify. ASA Patel stated that Efran told her that he had been treated "fine" by the police.

¶ 34 After the State rested, Brandon Puller (Puller) testified for the defense. Puller testified that on June 5, 2009, he was in the backyard at the Hanover Park party. Puller stated that a fight broke out in the backyard involving approximately eight people that were black and Hispanic. Puller testified that he saw a tall black male with short braids holding something in his hands. Puller could

not tell what the black male was holding. Puller testified that when the fight moved to the front of the house, he went inside the house and stayed there until the police arrived.

¶ 35 At the close of the evidence, the trial court found Duron guilty of second-degree murder in the stabbing death of Roberts, and guilty of aggravated battery in the stabbing of Mike. After the trial, Duron's counsel withdrew and substitute counsel appeared for Duron. On December 28, 2010, counsel filed a motion for a new trial which argued that the State failed to prove Duron guilty beyond a reasonable doubt, and that the statute under which Duron was convicted is unconstitutional. On January 27, 2011, the trial court denied Duron's motion for new trial. The state filed a motion which was granted, seeking to sentence Duron as an adult. The trial court sentenced Duron to consecutive terms of ten years' imprisonment for second-degree murder, and two years' imprisonment for aggravated battery. On that same day, Duron filed a motion to reconsider which was denied. Also, on January 27, 2011, Duron filed a timely notice of appeal. Therefore, this court has jurisdiction to consider Duron's arguments on appeal pursuant to Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013) and Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013).

¶ 36

#### ANALYSIS

¶ 37 We determine the following issues on appeal: (1) whether Duron's trial counsel was ineffective for failing to either reopen his motion to suppress identification testimony or include the issue in his posttrial motion because Duron's physical lineup was unduly suggestive; and (2) whether the trial court erred in denying Duron's motion to quash arrest and suppress evidence because the State failed to establish that the police had probable cause to arrest Duron.

¶ 38 We first determine whether Duron's trial counsel was ineffective for failing to either reopen

his motion to suppress identification testimony or include the issue in his posttrial motion because Duron's lineup was unduly suggestive.

¶ 39 Duron argues that trial counsel was ineffective in failing to properly advance his motion to suppress identification testimony, and failing to preserve the issue for appellate review, because Duron's physical lineup was unduly suggestive. Specifically, Duron argues that the lineup was unduly suggestive because Duron appeared substantially different from the other participants in the lineup. Duron contends that he was the only participant in the lineup with close-cropped hair as all the other participants had full heads of hair. Also, Duron argues that he was the only participant without facial hair. Further, Duron asserts that he appeared noticeably younger than the other lineup participants. Duron claims that as a result of these differences, he appeared grossly dissimilar to the other lineup participants. Duron also argues that the police identification procedures were unduly suggestive because he was the only person included in both the photo spreads and the physical lineup. Duron contends that even if he was allowed to pick his own lineup participants, the police would still not be absolved of the duty to present a fair lineup.

¶ 40 Additionally, Duron argues that the lineup was unduly suggestive because the State's witnesses were not able to identify him in the photo spreads. Duron contends that because the State's witnesses were not able to identify him in the photo spreads, the witnesses' identifications of him did not have an origin independent of the suggestive lineup. Duron points out that Illinois courts consider the following factors in determining whether a witness's identification testimony is reliable: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty

demonstrated by the witness at the time of the identification; and (5) the length of time between the incident and the identification. *People v. McTush*, 81 Ill. 2d 513, 521 (1980). Illinois courts also consider whether the witness has any prior acquaintance with the suspect. *Id.* Duron argues that the reliability factors show that the State's witnesses' identification testimony was tainted by the unduly suggestive lineup.

¶ 41 Duron asserts that because the physical lineup was unduly suggestive, trial counsel's failure to either reopen the motion to suppress identification testimony or preserve the issue for appellate review was objectively unreasonable. Duron argues that he was prejudiced by trial counsel's performance because there would have been a reasonable probability of success if counsel had reopened the motion to suppress identification testimony; and if the identification testimony was suppressed, there is a reasonable probability that the outcome of the trial would have been different.

¶ 42 In response, the State argues that Duron's trial counsel was not ineffective because the physical lineup was not unduly suggestive. Specifically, the State argues that Duron appeared substantially similar to the other lineup participants. The State contends that participants in a lineup do not need to be physically identical, and differences in appearance only influence the weight of the evidence and not admissibility. The State asserts that all the participants in the lineup were Hispanic; all participants wore a white T-shirt under an orange jumpsuit; all participants wore a blue wristband and white shoes; and all participants held a number card with two hands in the same manner. The State claims that even though there are some differences in the appearance of the lineup participants, there is nothing in the lineup photo that is suggestive.

¶ 43 Additionally, the State argues that this court should not be persuaded by Duron's argument

regarding the State's witnesses' failure to identify Duron in the photo spreads. The State claims that at trial, defense counsel referred to photo arrays that are labeled differently than the photo arrays that are contained in the record. Also, the State claims that the photo arrays in the record are incomplete. Thus, the State argues that the exhibits in the record should be construed against Duron because it is the defendant's duty to supply this court with an accurate record.

¶ 44 Further, the State argues that its witnesses' lineup identifications of Duron were based on independent recognition of Duron and not on any alleged suggestiveness of the lineup. The State contends that each witness's testimony shows that the identifications were reliable under the reliability factors that Illinois courts consider. Thus, the State argues that the trial court did not err in denying Duron's motion to suppress identification testimony because the witnesses' identifications were reliable and the lineup was fair. The State contends that any motion to reopen the motion to suppress identification testimony would have been baseless. Therefore, the State argues that trial counsel could not have been ineffective because the failure to either reopen the motion to suppress identification testimony or preserve the issue for appellate review, was not objectively unreasonable and did not prejudice Duron.

¶ 45 A defendant's claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In order for a defendant to prevail on a claim of ineffective assistance of counsel, the defendant must show that: (1) counsel's performance was deficient; and (2) counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Id.* at 688. In order for the defendant to be prejudiced by counsel's performance,

the defendant must show that counsel's errors were so serious that the defendant was denied a fair trial. *Id.* at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶ 46 Section 107A-5(c) of the Code of Criminal Procedure of 1963 sets forth the guidelines for the appearance of lineup participants:

"Suspects in a lineup or photo spread should not appear to be substantially different from 'fillers' or 'distracters' in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." 725 ILCS 5/107A-5(c) (West 2008).

Identification evidence will only be excluded at trial when a pretrial identification procedure is so unnecessarily suggestive that the procedure produced a substantial likelihood of irreparable misidentification. *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). "In a motion to suppress identification testimony, the defendant bears the burden of proving a pretrial identification was impermissibly suggestive." *Id.* Participants in a lineup do not need to be physically identical. *Id.* "Substantial differences in the age and appearance between the suspect and the other participants in a lineup do not, in themselves, establish that a lineup was unnecessarily suggestive." *People v. Saunders*, 220 Ill. App. 3d 647, 666 (1991) (citing *People v. Richardson*, 123 Ill. 2d 322 (1988); *People v. Trass*, 136 Ill. App. 3d 455 (1985); *People v. Johnson*, 104 Ill. App. 3d 572 (1982)). Any difference between the suspect's appearance and the appearance of the other lineup participants affects the weight of the evidence, not its admissibility. *Saunders*, 220 Ill. App. 3d at 665.

¶ 47 In this case, Duron argues that the physical lineup was unduly suggestive because he appeared substantially different from the other lineup participants. We do not agree. After examining the lineup photo, which is in the record on appeal, we see nothing to support Duron's argument that it was unduly suggestive. As the State points out, all the lineup participants were Hispanic males; all participants wore a white T-shirt underneath an orange jumpsuit; all participants wore a blue wristband on their right hand; and all participants held number cards with two hands in the same manner. Furthermore, all participants in the lineup were approximately the same height. While there are some differences in the physical appearances of the lineup participants, that is to be expected. However, these differences do not rise to the level of being unduly suggestive as Duron contends. We find Duron's argument that the physical lineup was unduly suggestive, to be without merit.

¶ 48 Next, Duron argues that the State's witnesses' identifications of Duron did not have an origin independent of the improperly suggestive lineup because the identifications were unreliable, and the witnesses were not able to identify Duron in the police photo spreads. Thus, Duron argues that trial counsel was ineffective because there is a reasonable probability that the motion to suppress identification testimony would have been successful had counsel reopened it. We do not agree.

¶ 49 The defendant has the burden of establishing that a lineup was impermissibly suggestive. *McTush*, 81 Ill. 2d at 520. Once the defendant has satisfied his burden, "the State may nevertheless overcome that obstacle, by a clear and convincing showing, based on the totality of the surrounding circumstances, that 'the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime.'" *Id.* (quoting *Manson v. Braithwaite*, 432 U.S. 98, 122 (1977)).

¶ 50 As the State points out, Illinois courts consider the following factors in determining whether a witness's identification testimony is reliable: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the incident and the identification. *McTush*, 81 Ill. 2d at 521. Illinois courts also consider whether the witness has any prior acquaintance with the suspect. *Id.* The reliability factors must then be weighed against the suggestiveness of the lineup procedure. *Braithwaite*, 432 U.S. at 114-15.

¶ 51 As previously discussed, we find that the physical lineup at issue in this case was not unduly suggestive. Therefore, Duron has not met his burden of establishing that the lineup was unduly suggestive, and thus we need not analyze the witnesses' identifications under the reliability factors set forth in *McTush*. However, we note that even if Duron was able to show that the lineup procedure was unduly suggestive, the witnesses' identifications were reliable according to the *McTush* reliability factors. Therefore, Duron's argument that the witnesses' identifications were unreliable is without merit.

¶ 52 We note that Duron makes much of the fact that the State's witnesses identified Duron in the physical lineup on June 7, 2009, but did not identify Duron in the photo spreads on June 6, 2009. Duron argues that the witnesses' inability to identify Duron in the photo spreads shows that the lineup was unduly suggestive, and that the witnesses' identifications did not have an origin independent of the suggestive lineup. However, Illinois courts have repeatedly held that a witness's failure to identify a defendant in a photo spread *does not* make the witness's later identification of

the defendant in a lineup incompetent or inadmissible. (Emphasis added.) *People v. Maloney*, 201 Ill. App. 3d 599, 609 (1990) (see also *People v. Flint*, 141 Ill. App. 3d 724, 729-30 (1986); *People v. Rosa*, 93 Ill. App. 3d 1010, 1014 (1981); *People v. Woods*, 114 Ill. App. 3d 348, 355 (1969)). This court explained the rationale behind this theory in *Woods*:

"The failure of the victim to identify defendant's photograph does not, of itself, affect the identification. The photograph may not have accurately portrayed defendant. Moreover, an identification ordinarily is based upon animate observation of a defendant in his entirety, rather than an inanimate portrayal of his face." *Woods*, 114 Ill. App. 3d at 355.

Under *Woods* and its progeny, the State's witnesses' reliable identifications of Duron in the physical lineup are not defeated because they did not identify Duron in the police photo spreads. Therefore, there is no reasonable probability that the motion to suppress identification testimony would have been successful if trial counsel had reopened it. We find that trial counsel's performance was not objectively unreasonable, and Duron was not prejudiced by counsel's performance. Thus, we hold that counsel was not ineffective for failing to either reopen the motion to suppress identification testimony or include the issue in his posttrial motion.

¶ 53 We next determine whether the trial court erred in denying Duron's motion to quash arrest and suppress evidence because the State failed to establish that the police had probable cause to arrest Duron.

¶ 54 Duron argues that the trial court should have granted his motion to quash arrest and suppress

evidence because the State failed to establish that the police had probable cause to arrest Duron. Specifically, Duron argues that the police did not have probable cause to arrest him because the State failed to present any evidence as to the reliability of the alleged statements contained in the reports that Detective Ryan relied upon in arresting Duron. Duron points out that at the hearing on the motion to quash arrest and suppress evidence, the sole witness to testify for the State was Detective Ryan. Duron claims that because Detective Ryan arrested Duron based on the reports created by other detectives, he did not have personal knowledge of the facts that would lead to probable cause. Additionally, Duron argues that the State did not present any evidence that the witnesses' statements contained in the police reports were reliable because none of the witnesses testified at the hearing. Duron contends that because the State failed to establish that the statements in the police reports were reliable, the police did not have probable cause to arrest Duron. Accordingly, Duron asserts that the lineup identifications of him should be suppressed because they were a result of an improper arrest.

¶ 55 In response, the State argues that Duron has forfeited his argument that the State failed to provide evidence as to the reliability of the information in the police reports because he did not raise the issue at any point during the pretrial motions and hearings, during trial, or in his posttrial motion for a new trial. Thus, the State argues that we should not address Duron's argument. Notwithstanding the forfeiture issue, the State argues that the police had probable cause to arrest Duron. Specifically, the State argues that in pretrial hearings, hearsay testimony is admissible. Thus, the State contends that it is of no issue that Detective Ryan testified at the hearing on the motion to quash arrest and suppress evidence instead of the detectives who created the reports that implicated

Duron. Moreover, the State argues that victims and eyewitnesses are considered by the court to be credible and reliable sources of information. Therefore, the State argues that it did not need to present any additional evidence to establish probable cause.

¶ 56 We note that Duron asks this court not to apply the forfeiture rule, relying on *People v. Heider*, 231 Ill. 2d 1 (2008). In *Heider*, the supreme court declined to apply the forfeiture rule where the trial court had the full opportunity to review a defendant's claim of error, and where the defendant did not assert on appeal a completely different objection from the one he raised before the trial court. *Heider*, 231 Ill. App. 3d at 18. However, unlike *Heider*, Duron does not provide any examples of the State's failure to establish the reliability of the information in the police reports, in the pretrial motions and hearings, during trial, or in the motion for new trial. Therefore, the trial court did not have the full opportunity to review this claim of error. Accordingly, we decline to apply *Heider* to the facts of this case. We hold that Duron has forfeited consideration of this issue.

¶ 57 In the alternative, Duron asks this court to review his argument under the plain error doctrine. The plain error doctrine allows a reviewing court to analyze a forfeited error that affects a substantial right if: (1) the evidence in a case is so closely balanced that the error alone resulted in the defendant's conviction; or (2) the error was so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). In both instances, the defendant bears the burden of persuasion. *Id.* at 187. The first step in a plain error analysis is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Thus, we determine whether the trial court erred in denying Duron's motion to quash arrest and suppress evidence.

¶ 58 When reviewing a trial court's ruling on a motion to quash arrest and suppress evidence, the reviewing court applies a two-part standard of review. *People v. Hopkins*, 253 Ill. 2d 453, 471 (2009). We give great deference to the trial court's findings of fact, and we will only reverse those findings if they are against the manifest weight of the evidence. *Id.* However, we review a trial court's ultimate ruling on a motion to suppress involving probable cause under the *de novo* standard of review. *Id.*

¶ 59 Probable cause requires more than mere suspicion, but does not require proof beyond a reasonable doubt. *People v. Arnold*, 349 Ill. App. 3d 668, 671-72 (2004). During a hearing on a motion to suppress, hearsay is admissible. *People v. Patterson*, 192 Ill. 2d 93, 111-12 (2000). The totality of the circumstances determines whether probable cause exists. *Arnold*, 349 Ill. App. 3d at 672. "Probable cause exists if the totality of the circumstances known to the police at the time of a suspect's arrest is sufficient to warrant a reasonably prudent person to believe the suspect has committed the crime." *Id.* "When officers are working in concert, probable cause can be established from all the information collectively received by the officers even if that information is not specifically known to the officer who makes the arrest." *People v. Bascom*, 286 Ill. App. 3d 124, 127 (1997). Furthermore, arresting officers can rely on the knowledge of fellow officers. *People v. Crowell*, 94 Ill. App. 3d 48, 50 (1981). However, the State must demonstrate that the circumstances known to the non-arresting officers, whose reports or directions were relied upon by the arresting officer, were sufficient to establish probable cause to arrest the defendant. *Id.*

¶ 60 Probable cause for a warrantless arrest can be based on information from a third-party. *Arnold*, 349 Ill. App. 3d at 672. "Third-party information, whether the source of the information is

identified or unidentified, an ordinary citizen or paid informant, a victim, an eyewitness or other witness, is reliable if it bears some indicia of reliability." *Id.* An indicia of reliability exists when a police investigation yields facts that independently verify a substantial part of the information learned from the informant. *Id.* "However, the reliability of the informant is only one of the factors to be considered in the totality of the circumstances approach." *Id.*

¶ 61 Detective Ryan testified that on June 6, 2009, he was assigned to investigate the stabbing of Roberts and Mike. Detective Ryan stated that when he arrived at the Hanover Park police station, there were 40 to 50 witnesses present. He began interviewing witnesses who had attended the party, as did his fellow police officers. Through reading the reports created by other detectives who were also working on the investigation, and by speaking with those detectives, Detective Ryan learned that Duron was a suspect. Clearly, all the officers working on the investigation were acting in concert. Thus, Detective Ryan had access to the information and knowledge of the non-arresting detectives who created the reports upon which Detective Ryan relied in arresting Duron. The witnesses who provided the statements contained in the non-arresting officers' reports included attendees at the party and eyewitnesses to the crime. In fact, two of the witnesses were friends of Duron, and one of Duron's friends indicated that Duron said that he stabbed someone at the party.

¶ 62 In this case, Detective Ryan had first hand knowledge about the investigation through his own work and learned more information from his fellow detectives. Based on the totality of circumstances in this case, Duron's argument that the trial court erred in denying his motion to quash arrest and suppress evidence is unpersuasive. Accordingly, because no error occurred, the plain error doctrine is not applicable to this issue.

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¶ 63 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 64 Affirmed.