

No. 1-12-1856

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> JOHN O., a Minor)	Appeal from the Circuit Court
)	of Cook County
(THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	No. 11 JD 3510
)	
v.)	Honorable Carol Kelly, Judge
)	Presiding.
JOHN O.,)	
)	
Minor Respondent-Appellant).)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* The adjudication of delinquency is affirmed. Where testimony was elicited at trial regarding the identification of witnesses and police procedure, the trial court's denial of respondent's motion to suppress identification was not manifestly erroneous. The trial court did not abuse its discretion when it denied respondent's motion for a continuance after trial had commenced. The State set forth sufficient evidence to prove the essential elements of the crime of aggravated assault beyond a reasonable doubt.

¶ 2 Respondent John O., a 17-year old minor, was determined to be delinquent and adjudicated a ward of the State. Following a bench trial, the trial court found respondent guilty of three counts of aggravated assault against Roman F. 720 ILCS 5/12-4(a), 12-4(b)(1), 12-4(b)(8) (West 2010). At a post-adjudication hearing, the trial court sentenced respondent to 17 months in the Illinois Department of Juvenile Justice. On appeal, respondent contends: (1) the trial court's denial of his motion to suppress identification was in error, as the trial court improperly limited the scope of his examination of the witnesses; (2) the trial court abused its discretion when it denied his motion for continuance so co-respondent Daniel M. could testify as an alibi witness; and (3) the State failed to prove beyond a reasonable doubt his guilt, as the eyewitness testimony presented at trial was unreliable.¹ For the reasons which follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On April 24, 2012, following a bench trial, the trial court adjudicated respondent to be delinquent for the aggravated assault of Roman F. The State's evidence established on May 22, 2011, Roman F. was attacked by four individuals with baseball bats while walking to the grocery store. Respondent was identified as one of the four perpetrators by the victim, Roman F., and

¹Respondent's brief on appeal contained a fourth argument, that the trial court improperly imposed a longer sentence against him as compared to his co-respondent. Respondent, however, asserts in his reply brief this contention is moot, as the expiration of his confinement in the Illinois Department of Juvenile Justice occurred on April 17, 2013. Therefore, we will not consider this argument.

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Donald Pierson (Pierson), an eyewitness. Roman F. suffered extensive injuries to his head and body as a result of the incident. After respondent was identified in a photo array and two lineups (viewed separately by each of the eyewitnesses), he was arrested and charged with three counts of aggravated assault pursuant to sections 12-4(a), 12-4(b)(1), and 12-4(b)(8) of the Criminal Code of 1961 (720 ILCS 5/12-4(a), 12-4(b)(1), 12-4(b)(8) (West 2010)).

¶ 5

I. Pre-trial Proceedings

¶ 6 On January 19, 2012, respondent filed two motions to suppress the identifications rendered by Roman F. and Pierson. The motions similarly asserted the identifications should be suppressed because they were conducted in an impermissibly suggestive manner. The primary investigator in the matter, detective David Salazar (Salazar), conducted the photo array and each of the lineups. The motions also asserted the lineups were impermissibly suggestive because respondent's appearance differed from many of the other men in the lineup, as the "fillers" were between five feet six inches and five feet eleven inches, and respondent was five feet three inches at the time of the incident.

¶ 7 On February 17, 2012, the trial court conducted a hearing on respondent's motions to suppress identifications. Prior to the commencement of the hearing, the State presented a motion to exclude the victim and eyewitness from testifying at the suppression hearing. The trial court denied the motion and allowed them to testify. The trial court, however, stated the testimony would be limited to the procedures utilized by police officers during the identification process. The following testimony was elicited at the suppression hearing.

¶ 8 Salazar testified he is employed as a detective with the Chicago Police Department and

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was assigned as the primary investigator for Roman F.'s case. Salazar telephoned Pierson and inquired if he could come to the police station to view photo arrays of possible suspects in the crime. Salazar did not inform Pierson of the status of the case.

¶ 9 On May 29, 2011, Pierson arrived at the police station to view the photo array. Salazar presented Pierson with an advisory form and requested he read the document. Pierson signed the form and Salazar conducted the photo array. Salazar testified he and Pierson were alone in a room as he informed Pierson that the suspects may or may not be in the photo array. Salazar requested Pierson circle, sign, and date the photograph of any individual he identified. Pierson identified two individuals out of the photo arrays and "said these are the guys." The heights and weights of the individuals in the photo array were not provided to Pierson. Salazar had no further discussions with Pierson regarding his selections after the photo array was completed.

¶ 10 Salazar further testified he conducted a lineup on August 10, 2011, with Roman F. Salazar informed Roman F. and his mother, "that we had possible suspects in custody and that they may or may not be in the lineup he is going to view. And if he was willing to come and look at the lineup, and he agreed." When Roman F. and his mother arrived at the police station, Salazar presented Roman F. with an advisory form and requested he read and sign it. Salazar testified the standard procedure for a lineup was for the witness or victim to view the individuals in an adjoining room through the one-way mirror. If the witnesses recognized anyone, they were to notify the officers immediately. Roman F. informed Salazar immediately that he recognized respondent. After the lineup, Salazar informed Roman F. he would contact the State's Attorney's office and the State's Attorney's office would contact him.

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¶ 11 Pierson testified Salazar contacted him by telephone a week after the incident and identified himself as the lead investigator in Roman F.'s case. Salazar informed Pierson that the police had no suspects at that point but invited Pierson to the police station to view photo arrays.

¶ 12 On May 29, 2011, Pierson met Salazar at the police station to view the photo arrays. Salazar placed him in a room and sat across from him. Salazar requested Pierson "look through some pictures" to see if he could identify anyone. One at a time, Salazar presented Pierson with four or five photo arrays with six photographs in each array. Pierson identified respondent and another individual. Pierson testified he did not remember how Salazar reacted when he made the identifications. Additionally, Salazar did not indicate to him whether any of the individuals he identified were suspects, nor did Salazar inquire as to what he observed on the day of the assault.

¶ 13 Pierson further testified Salazar invited him to view a lineup on August 10, 2011. After arriving at the police station, Salazar escorted Pierson to a room and instructed him to wait while police searched for individuals to fill the lineup. Pierson inquired of Salazar how long the lineup would take and Salazar responded that he was not certain. Salazar did not indicate to Pierson that they had a suspect in custody.

¶ 14 It took officers seven hours to locate individuals to participate in the lineup. Salazar then escorted Pierson to another room where the lineup was already assembled. When Pierson entered the room with the one-way mirror, the individuals in the lineup were seated in another room. Pierson and Salazar were alone in the identification room. Pierson could not remember whether Salazar issued any instructions for the lineup, but "he may have." Pierson testified when he entered the room, he immediately recognized two individuals and wanted to inform Salazar he

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recognized them. Salazar, however, "said just wait until we have them stand up and things like that." Salazar issued each of the seven individuals in the lineup a number and instructed each of them to approach the mirror one by one. Pierson identified respondent and another individual.

¶ 15 On cross examination, Pierson testified Salazar read to him the photo array advisory form verbatim prior to his identification of the individuals. Pierson stated Salazar informed him that he was not required to make an identification. He further testified Salazar never informed him whom to select in the photo arrays or the lineup. Pierson also stated he never observed anyone walking through the police station in handcuffs on the day of the lineup.

¶ 16 Roman F. testified Salazar telephoned his mother regarding a lineup which occurred in August, though he could not recall the exact date. Roman F. and his mother arrived at the police station and were seated in Salazar's office along with Salazar's partner. Roman F. waited "a long time" for the lineup to occur and was informed that the reason for the delay was due to the officers obtaining men for "a line up [sic] for me and a line up [sic] for the separate witness." While Roman F. was waiting for the lineup to occur he did not observe anyone in handcuffs.

¶ 17 Salazar escorted Roman F. to view the lineup and informed Roman F. to identify anyone he recognized. Salazar did not state there was a suspect in the lineup. Only Salazar and Roman F. were in the identification room. Roman F.'s mother waited outside. When Roman F. walked into the room, the men in the lineup were seated. Roman F. identified one of the individuals as they were getting up. Roman F. asked Salazar to have the men walk around "not just to see height but like to see how they were." Roman F. informed Salazar he recognized respondent as a person he had seen before in the neighborhood who "jumped" him. After the identification,

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Salazar "banged on the glass" and then had Roman F. wait in a nearby room.

¶ 18 Roman F. further testified in May 2011 Salazar "told me that the witness had viewed some pictures and identified several men." Salazar did not relate any details regarding the individuals identified.

¶ 19 Arlene Padilla (Padilla), Roman F.'s mother, testified that on May 24, 2011, Roman F. identified Daniel M. as one of his attackers. Padilla testified that months later Salazar telephoned her to see if Roman F. could identify anyone in a lineup. Salazar informed Padilla a suspect may have been located if her son could identify him. Padilla accompanied her son to the police station to view the lineup. Padilla and Roman F. waited for eight hours because the police officers "had to pick up different people from different areas."

¶ 20 The trial court denied respondent's motion to suppress identification, finding "neither the victim nor the witness was told in any way whatsoever or it was never indicated to them who to pick out of the lineup." Further, the victim and eyewitness were given instructions contained in the photo array and lineup advisory forms, which stated they were not required to make an identification. Additionally, they were informed not to assume the individual administering the lineup knew which person was the suspect. The trial court also found the photo arrays "contain 18 photographs of young men who all appear of similar ethnicity and similar age and other similar characteristics." The lineups which were conducted "were fair," the suspects were "similar in appearance, age, et cetera," and the "procedure was done correctly." The matter was continued to April 5, 2012, for trial.

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¶ 21

II. Trial

¶ 22 Donald Pierson testified that on May 22, 2011, he was driving his vehicle west on 28th Street in Chicago around 5:50 p.m. It was a clear, sunny day. While stopped at a stop sign at 28th Street and Hamlin Avenue, Pierson observed a beige minivan execute a right turn in front of him onto 28th Street. Pierson continued driving behind the vehicle until it came to a stop at a 45 degree angle facing the northwest corner of Avers Avenue and 28th Street. Pierson observed Roman F. approach the vehicle. A passenger slid the door open and an individual with wire frame glasses stepped out of the vehicle with a baseball bat and swung the bat at Roman F. who was approximately eight to ten feet away from the van when the doors opened. Pierson observed Roman F. jump back, turn around, and start running eastbound on 28th Street. The individual with the wire framed glasses commenced chasing Roman F. and three other men exited the vehicle. Pierson observed the individual with the wire framed glasses throw a baseball bat at Roman F., but Pierson did not observe whether the baseball bat struck Roman F. Pierson heard the individual with the wire framed glasses yell, "pick up my bat, pick up the bat." The man who was directed to retrieve the bat already possessed a baseball bat and was now carrying two baseball bats as he proceeded down the sidewalk just to the right of Pierson's vehicle. Pierson identified respondent in court as the individual who was carrying two baseball bats. Pierson observed a third individual run past his vehicle, detain Roman F. at the mouth of the alley, and commence kicking and punching him. Thereafter, the individual with the wire framed glasses reached Roman F. and began hitting him while respondent and another individual struck Roman F. with baseball bats. Respondent continued hitting Roman F. with two baseball bats in a

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"hammer like motion."

¶ 23 Pierson reversed his vehicle approximately 15 to 20 feet down the one-way street toward the attack to obtain a better view. When Pierson was about 30 to 35 feet from the mouth of the alley, he turned around and looked out of his unobstructed rear window to observe the four men attacking Roman F. Pierson heard the four men say "kill the mother ***". Pierson observed respondent hitting Roman F. on the head and chest with the baseball bats. After about four to five seconds, Pierson heard a screech, looked ahead and observed the minivan make a right turn going northbound on Avers Avenue.

¶ 24 Pierson testified he followed the vehicle around the block to obtain a license plate number. Approximately 20 to 25 seconds elapsed from the moment the four men exited their vehicle to when he commenced following the van. After the vehicle drove around the block, it came to a halt at the stop sign where Pierson initially observed the vehicle. Pierson stopped 20 to 30 feet from the rear of the vehicle and observed the same four men who attacked Roman F. coming around the corner. The four men, including respondent, entered the vehicle and "took off."

¶ 25 Pierson parked his vehicle on 28th Street just west of the mouth of the alley. He exited his vehicle and instructed a young girl who was there to call the police. Pierson remained at the scene until the police officers arrived. Pierson testified Roman F. was "in very bad shape" and he "didn't think he was going to live." Pierson provided the police officers with a description of the vehicle and the license plate number.

¶ 26 Pierson's testimony regarding the photo array and lineup was substantially similar to his

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testimony during the suppression hearing.

¶ 27 On cross-examination, Pierson testified he was surprised to observe men jumping out of the vehicle. He viewed the entire attack from the windows of his two-door Nissan Sentra sedan. Pierson's focus was on respondent because he was the individual holding two baseball bats. Pierson was "pretty sure" he informed police he observed an individual with two bats hitting Roman F. When Pierson first noticed Roman F. being thrown to the ground, he observed this through his rear-view mirror from 20 to 25 feet away, then turned around and viewed the attack out of his rear window. Pierson had never seen those four men prior to the attack.

¶ 28 Pierson further testified that during a telephone call with Salazar on May 26, 2011, he provided descriptions of the four men who participated in the attack. He described one man as being five feet eleven with glasses, another as being 180 to 200 pounds, and another as five feet eight inches and 150 pounds. Pierson testified the four men were average size. Pierson did, however, describe two of the men as being "big" to investigator Cynthia Estes. He further described one of the men as being six feet and 180 pounds. Pierson could not remember whether he described one of the attackers as being shorter than five feet eight inches or weighing 120 pounds. Pierson did not observe Roman F. lose consciousness, but did notice Roman F. lifting his head and moaning. Additionally, Pierson testified that while he was driving during the course of the attack the passenger side mirror of his Nissan struck another vehicle's mirror.

¶ 29 On re-direct examination, Pierson testified he provided Salazar with approximations of the heights and weights of the four men. Additionally, he informed Salazar the four men were Hispanic and between the ages of 14 and 16 years old.

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¶ 30 Roman F. testified that on May 22, 2011, at 5:50 p.m. he was walking south on Avers Avenue in Chicago on his way to the grocery store to purchase a bag of chips. As he approached 28th Street, a minivan came to a complete stop approximately six or seven feet away from him. Roman F. heard Daniel M. call his name from inside the vehicle. He recognized Daniel M. as a former classmate from elementary school. Roman F. approached the vehicle; as he got closer, four men with metal baseball bats exited from the right-hand side of the vehicle. Roman F. turned and ran east on 28th Street. While he was running, he turned around to see if he recognized anyone. Roman F. observed the four men for about five seconds and saw Daniel M. and respondent. Respondent was approximately four to five feet behind Roman F. and nothing was obstructing the view of respondent's face. Roman F. turned to face forward and felt a baseball bat hit him on the back of the head. He continued to run until someone grabbed him by the back of his collar and threw him on the ground at the mouth of an alley. Roman F. lost consciousness. When he regained consciousness he was in his uncle's arms, lying on the ground at the mouth of the alley. Roman F.'s vision was blurry, but he could hear screaming and sirens. He again lost consciousness. When he came to, he was inside an ambulance, but again lost consciousness. While in the hospital, Roman F. regained consciousness but had no feeling in his body and was unable to open his right eye, and observed that his left knee cap was badly injured.

¶ 31 Roman F. testified he was released from the hospital on May 23, 2011. He was unable to open his right eye for four to five days. When his eye did open, his vision was blurry. He was not able to recover full vision in his right eye until August 2011.

¶ 32 Roman F.'s testimony regarding his identification of respondent during the August 10,

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2011, lineup was substantially similar to his testimony at the suppression hearing. Some additional testimony was elicited at trial such as the fact it took Roman F. "several seconds" to identify respondent as one of his attackers.

¶ 33 On cross-examination, Roman F. testified he was not familiar with respondent prior to the attack. He further testified Salazar visited him to discuss the investigation several days after he was released from the hospital. Salazar informed him there was an eyewitness to the incident who viewed some photographs and identified several men. No officer asked Roman F. for a description of his attackers. When Roman F. arrived at the police station on August 10, 2011, to view the lineup he knew some suspects had already been identified.

¶ 34 On April 6, 2012, after one day of trial, respondent's counsel informed the court he served a subpoena on Daniel M. on April 5, 2012, due to the fact he pled guilty in the attack on Roman F. and could now testify in the present case.² Respondent's counsel argued that due to the guilty plea, Daniel M.'s fifth amendment rights would expire 30 days after either the plea was entered or sentencing occurred. Respondent's counsel suggested the court proceed with the presentation of the State's case, but continue the rest of the trial until a hearing could be held to determine whether Daniel M. could testify in respondent's case. Respondent's counsel informed the court Daniel M. would testify that respondent was not present during the attack. Respondent's counsel, however, did not submit a written motion for continuance nor did he make an offer of proof, nor support his motion with an affidavit.

²No subpoena for Daniel M. is included in the record.

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¶ 35 Daniel M.'s counsel responded that given the nature of juvenile proceedings, Daniel M. would be brought back into court for the process review of his sentencing, and therefore his fifth amendment right could extend up until he is 21 years old. The trial court agreed with Daniel M.'s counsel and determined it retained jurisdiction over Daniel M. due to the unique nature of juvenile court proceedings and Daniel M.'s case could be brought back indefinitely. The trial court denied respondent's motion and did not allow Daniel M. to testify.

¶ 36 The State continued with its evidence. Salazar testified he was assigned to investigate Roman F.'s case. Four or five days after the attack, Salazar met with Roman F. and his mother at Roman F.'s home. Salazar observed Roman F.'s head to be very swollen and his eyes were "just like little slits." Thereafter, Salazar telephoned Pierson, provided a general description of the offenders and what he had observed during the incident. Salazar checked the license plate number of the minivan, identified the vehicle's owner, obtained the owner's photo and photo of his "associates" to create the four photo arrays.

¶ 37 Salazar testified his "basic, standard routine" is to place six photographs in an array, three on top and three on bottom and he did so in this case. On May 29, 2011, Pierson visited the police station to view two photo arrays. Pierson read and signed a photo advisory form. Salazar testified he presented each of the photo arrays separately by handing them to Pierson and requesting he examine each to determine if he could identify any of the offenders. There was nothing written on the photo arrays which identified the subjects. Salazar further testified he was present for the administration of the photo arrays and one of his partners could also have been present. Pierson identified two individuals. His identification of respondent was done "pretty

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quickly." Salazar testified Pierson "stated this is definitely him, and I asked him, are you sure, are you 100 percent positive? And he said yes." Salazar then had Pierson circle the individual he identified and sign his initials next to the photo. Salazar identified respondent in court as one of the individuals he included in the May 29, 2011, photo arrays.

¶ 38 Additionally, Salazar testified after he receives a positive identification and locates the subjects, detectives will ask the victim and the witnesses to come in for a lineup.

¶ 39 Salazar testified on August 10, 2011, he conducted two lineups; the first was viewed by Roman F. and the second was viewed by Pierson. Salazar informed Roman F. "that he was going to view a live lineup of suspects, that the suspect involved in his case might be there or might not be there, and to identify the offender if he was positive that it's one of the offenders that was striking him." The lineup was administered "the same way we always do lineups." Salazar stated "the suspects are all placed in one room, and the adjacent room is divided by a window, which is basically a one-way mirror. From one side you can see to the other side, but not from the other side. So basically it's a black mirror on one side." Roman F. identified respondent in the lineup "almost immediately" as "one of the four offenders that beat him with bats." Salazar described Roman F.'s demeanor as "pretty shaken [sic] up" and "pretty excited" and "he was really sure."

¶ 40 Salazar testified Pierson's lineup was conducted in the same manner, except this lineup included five fillers and two suspects.³ Pierson identified respondent and another offender in the

³Roman F.'s lineup did not include the other suspect as Roman F. had previously

lineup "pretty quick." Salazar further testified Pierson was "excited that he was able to identify them so quickly."

¶ 41 On cross-examination, Salazar testified that on May 26, 2011, Roman F. informed him Daniel M. was involved in the attack. Roman F. also related to Salazar the perpetrators called him to the vehicle and as soon as he locked eyes with Daniel M. the door of the vehicle flew open and the four offenders exited the van with bats in their hands. Salazar further testified his general progress notes did not include everything Roman F. stated to him; when writing the report, he kept notes only to refresh his memory. The report did not include the fact that Roman F. looked back at his attackers while attempting to escape.

¶ 42 Regarding Salazar's May 26, 2011, interview with Roman F., he testified Roman F. provided him with a general description of his attackers as being "male Hispanics that were around his age or [a] little older." Salazar also testified Pierson did not inform him that one of the attackers was beating the victim with two bats at the same time. After Pierson identified respondent, no warrant or investigative alert was issued. It was not until August 4, 2011, that an investigative alert was issued for respondent. Respondent was arrested on August 9, 2011.

¶ 43 Regarding the lineup viewed by Pierson, Salazar stated the reason the two suspects were seated next to each other was because they selected their own seats. Salazar also testified that, when feasible, only one suspect is supposed to be in a lineup at a time. On August 10, 2011, the eyewitnesses waited seven hours to view the lineup and due to the time constraints he placed two

identified him in a different lineup.

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suspects in the same lineup. Furthermore, Salazar's supervisors were aware of the configuration of the lineups he was conducting.

¶ 44 The State rested their case and respondent moved for a directed finding. The trial court denied the motion for directed finding.

¶ 45 Respondent called his first witness, Heather Lyster a legal assistant at Bluhm Legal Clinic, to measure the height of respondent. Respondent's height was measured at 64 inches, or five feet four inches.

¶ 46 Thereafter, respondent's counsel made an oral motion for continuance based on the unavailability of Daniel M. Respondent's counsel requested the trial court continue the case until 30 days after Daniel M.'s juvenile case was concluded. In support of the motion, respondent presented an affidavit of Alejandra O., respondent's sister. Alejandra O. averred prior to respondent's arrest for aggravated battery she had never met Daniel M. In late February 2012, Daniel M. approached her and "he told me that my brother was not there. *** He said that my brother should not go to jail if he wasn't there." On March 29, 2012, Daniel M. approached her a second time. Alejandra O. attested "he told me that he had talked to his PD and told his PD the truth, which was that he was involved in the battery, but John was not."

¶ 47 The State responded that at this time respondent did not know exactly what Daniel M. would state should he testify. Respondent's counsel stated Daniel M.'s counsel refused to let him speak with Daniel M. Counsel for Daniel M. informed the court he advised his client not to testify in respondent's case.

¶ 48 The trial court denied the motion, stating "we don't know what will happen, what's going

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to come out on cross-examination, and I think his attorney is correct in advising his client not to testify while this case is - - while his case is basically still pending because of the bring back order, the fact he will be on probation, and things like that." Respondent's counsel, however, continued arguing his motion and the trial court allowed respondent to supplement his motion with case law and provided the State with an opportunity to respond.

¶ 49 After respondent filed a supplemental motion in support of his request to continue, the trial court denied respondent's motion for a continuance, stating Daniel M. retained his fifth amendment rights until his case became final. The trial court referenced Daniel M.'s right to withdraw his guilty plea and then file a notice of appeal. The trial court found the time frame under which Daniel M.'s fifth amendment rights would expire was uncertain and therefore it was within the court's discretion not to delay the case further.

¶ 50 Respondent rested his case. After hearing closing arguments, the trial court issued its ruling:

"Taking into consideration the credibility of the witnesses, Roman [F.], there is no question that he was the victim of the horrible aggravated battery on the date in question, May 22, 2011. He was, I found, to be a very credible witness. He testified - - he had a very short opportunity to view the minor respondent, but he did make a positive identification of him. He viewed a lineup. He identified him in the lineup and he identified him in court. Would that have been - - just his testimony alone have been enough to get beyond a reasonable doubt? I'm not sure.

But his testimony, together with the testimony of Donald Pearson [sic], who I

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found to be an excellent witness, who stayed at the scene of this horrendous crime as it was unfolding, made - - he was changing positions to get a look at what was going on without drawing attention to himself. He testifies that he had 20 to 25 seconds during the attack itself. That didn't include his driving around the block to get the license plate number of the van in question. He said he saw the minor respondent and he saw him with two bats. He said he focussed [sic] on him because he was the one that had two bats and was beating the victim in question. I believe he had plenty of opportunity to observe on this clear day during daylight hours when he was in his car on the street right across from where this was happening. He saw the people get out of the van. He saw them attack the minor respondent. And he specifically said that he focused on this minor respondent because he was - - he indicated on the stand, he was almost directly across from him and he watched him as he was beating the victim.

I believe the State has proven their case beyond a reasonable doubt. I believe they have proved all the elements of all three of the aggravated batteries."

¶ 51 On May 23, 2012, respondent presented his motion for a new trial. Respondent's counsel argued Daniel M. should have been allowed to testify. Respondent stated, "[h]ad we been allowed to call Mr. [M.], Judge, we believe that Mr. [O.]'s innocence would have been clearly established especially in light of the fact that the testimony of the victim, I think even as your Honor observed, was not perhaps even sufficient alone to convict him. There was a second witness, who your Honor did site [sic] as a credible witness." The trial court denied respondent's motion for a new trial and clarified its prior ruling stating, "[a]nd just for the record, the one

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statement you made about I didn't find the one witness credible, it's not that I didn't find him credible, I just recognize the fact that he did have a limited amount of time to observe the minor respondent. So that's why - - it's not that I didn't find him credible. I did say that that alone may not have been enough. But he was a credible witness." After a sentencing hearing was conducted, the trial court sentenced respondent to 17 months in the Illinois Department of Juvenile Justice with credit for the six months he previously spent in Cook County Jail. This appeal timely followed.

¶ 52

DISCUSSION

¶ 53 On appeal, respondent contends: (1) the trial court's denial of his motion to suppress identification was in error, as the trial court improperly limited the scope of his examination of the witnesses; (2) the trial court abused its discretion when it denied his motion for continuance so an alibi witness, co-respondent Daniel M., could testify; and (3) the State failed to prove beyond a reasonable doubt his guilt, as the identification testimony presented at trial was unreliable. Accordingly, we first turn to address respondent's contentions regarding the motion to suppress identification.

¶ 54

I. Motion to Suppress Identification

¶ 55 Respondent maintains the trial court improperly denied him a full and fair opportunity to establish that the pretrial identification procedures conducted by police were impermissibly suggestive. Specifically, respondent contends the trial court denied defense counsel the opportunity to establish the impropriety of the investigative police procedures and pretrial identification, by limiting the scope of the testimony during the suppression hearing. Respondent

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asserts the identifications were suggestive as the interviews, photo array, and lineups were conducted by the same detective and the lineups occurred two and half months after the incident occurred.

¶ 56 On a motion to suppress, the defendant bears the burden of establishing, within the totality of the circumstances, the pretrial identification was so unnecessarily suggestive that it gave rise to a substantial likelihood of an unreliable identification. *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002). Individuals selected for a photo array lineup need not be physically identical. *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). Differences in their appearance goes to the weight of the identification, not to its admissibility. *People v. Kelley*, 304 Ill. App. 3d 628, 638 (1999). "Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identifications excluded by operation of law ***." *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003), quoting *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994).

¶ 57 If the defendant meets his or her burden, the State then has the burden of establishing the identification is nonetheless independently reliable. *Ramos*, 339 Ill. App. 3d at 897. In order to determine whether the identifications were reliable, the court performs a totality of the circumstances analysis. See *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977). Factors relevant to the reliability of an identification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the

identification confrontation; and (5) the length of time between the crime and the confrontation. *Id.* at 114; *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). These five factors are referred to as the *Biggers* factors and are viewed in the light most favorable to the prosecution. *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007); *People v. Malone*, 2012 IL App (1st) 110517, ¶ 37. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson*, 432 U.S. at 114. "[W]hether the court's decision was supported by sufficient evidence at the suppression hearing becomes irrelevant when evidence to support the trial court's decision is introduced at trial." *People v. Brooks*, 187 Ill. 2d 91, 127 (1999). This is because a pretrial ruling on a motion to suppress is not final and may be changed at any time prior to final judgment. *Id.* The trial court's ruling on a motion to suppress will not be overturned on review unless it is manifestly erroneous. *People v. Allen*, 376 Ill. App. 3d 511, 520 (2007).

¶ 58 Respondent asserts the identifications were suggestive as the interviews, photo array, and lineups were conducted by the same detective and the lineups occurred two and half months after the incident occurred. Respondent cites no controlling case law in support of this portion of his argument, but instead argues that he was prevented from meeting his burden because the trial court erroneously limited questioning at the suppression hearing.

¶ 59 Before turning to whether the trial court manifestly erred in denying the motion to suppress, we address respondent's argument that the trial court improperly prohibited respondent's counsel from probing into certain aspects of the identification process at the suppression hearing. The respondent, however, was permitted to ask at trial the questions to

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which objections had been sustained at the suppression hearing. We may consider this evidence from trial in considering whether to affirm the ruling on the motion to suppress. See *Brooks*, 187 Ill. 2d at 127-28 (holding the defendant could not rely on evidence produced at trial to overturn a trial court's denial of a motion to suppress). As respondent was not permitted to make certain inquiries into the identification process at the suppression hearing, but was allowed to do so at trial, we will consider all relevant evidence introduced. Accordingly, we first consider whether the pretrial identification was so unnecessarily suggestive that it gave rise to a substantial likelihood of an unreliable identification. *Denton*, 329 Ill. App. 3d at 250.

¶ 60 Based on our review of the record, we affirm the trial court's findings that the photo lineups and physical lineups were not impermissibly suggestive. There is no indication in the record that Salazar influenced either eyewitness in making an identification. Salazar testified he followed standard procedures in conducting both the photo lineups and the physical lineups. Pierson and Roman F. testified they signed the photo array advisory forms. The trial court noted each of the photo array and physical lineup participants were of similar age and appearance. The fact respondent was of smaller stature than the other individuals included in the lineup was of no consequence due to the fact everyone participating in the physical lineups were initially seated when the lineups occurred. Furthermore, no evidence was introduced indicating respondent stood out in the lineup based on his age, size, or appearance. In addition, there is also no indication or evidence that respondent was not presented neutrally. The record reflects Salazar made no comments or gestures to direct the attentions of the witnesses. The record, therefore, fails to disclose the lineup and photo arrays were conducted in a suggestive manner.

¶ 61 We find that the identifications made from the physical lineups and photo arrays were not tainted. We conclude that the trial court's denial of defendant's motion to suppress lineup identifications was not manifestly erroneous and the identification testimony was reliable and sufficient to sustain the conviction.

¶ 62 Even if respondent had met his burden of proving that the pretrial identifications were impermissibly suggestive, the identifications were independently reliable and admissible under the factors set forth in *Biggers*. The first *Biggers* factor we consider is the eyewitnesses' opportunity to view the offender at the time of the offense. *Slim*, 127 Ill. 2d at 307-308. Respondent contends Roman F. only had a few seconds to view his attackers while running from them. Respondent further contends Pierson viewed most of the attack from his rear-view mirror and, therefore, did not adequately view the attack.

¶ 63 When considering whether an eyewitness had an opportunity to view the offender, 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). An eyewitness is capable of making a reliable identification even if the perpetrator was only observed for a few seconds. See *People v. Negron*, 297 Ill. App. 3d 519, 530-31 (1998); *People v. Wallace*, 210 Ill. App. 3d 325, 339 (1991). In the instant case, Roman F. viewed his attackers for four to five seconds from a distance of five feet. Pierson viewed the attack for 20 to 25 seconds and watched as respondent picked up a baseball bat a few feet from his vehicle. Pierson also positioned his vehicle to obtain a better view of the attack and testified his view was unobstructed. Moreover, the incident occurred under a clear sky during daylight hours. This

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testimony, demonstrates the eyewitnesses had a sufficient opportunity to view respondent during the commission of the crime.

¶ 64 Second, we will consider the eyewitnesses' degree of attention at the time of the offense. *Slim*, 127 Ill. 2d at 307-308. Respondent contends Roman F. was frightened and running at the time of the offense, and therefore his observations are not reliable. Respondent further contends the fact Pierson ran into a parked vehicle while the events of the offense transpired demonstrates he lacked the degree of attention to make his identification reliable. In the present case, the trial court found Roman F. to be a "very credible witness" and he had a "very short opportunity to view the minor respondent, but he did make a positive identification of him." The trial court further determined Pierson was "focused" on the attack. We will not substitute our judgment for that of the trier of fact. *Negron*, 297 Ill. App. 3d at 530.

¶ 65 Third, we consider the accuracy of the eyewitnesses' prior descriptions. "The presence of discrepancies or omissions in a witness' description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *Slim*, 127 Ill. 2d at 309. Salazar testified Roman F. stated his attackers were Hispanic males approximately 14 to 16 years of age. This description did not conflict or rule out respondent as the attacker. See *Negron*, 297 Ill. App. 3d at 530. Pierson testified his description of the height and weight of respondent as five feet eight inches and 180 pounds was an approximation. Although Pierson's description of the attackers two days after the incident differed from respondent's actual height and weight at the time of trial, the difference was not substantial. Moreover, "[c]ourts typically have not considered discrepancies as to height and weight alone as decisive factors on review

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because few persons are capable of making accurate estimations of such characteristics." *Slim*, 127 Ill. 2d at 312; see also *People v. Johnson*, 114 Ill. 2d 170, 189 (1986) (Difference in height and weight alone does not create reasonable doubt as a matter of law.). Additionally, when Pierson viewed the lineup, he initially recognized respondent while he was seated and, therefore, Pierson did not identify him based on height alone. The trial court found Pierson and Roman F. to be credible in their identifications, and, therefore, we will not substitute our judgment for the trial court. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 66 Fourth, we consider the level of accuracy of the eyewitnesses' identifications. A limited opportunity to view the perpetrators alone does not render the identifications unreliable. *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006). An encounter as abbreviated as five to ten seconds has been held sufficient to support a conviction. *People v. Parks*, 50 Ill. App. 3d 929, 933 (1977). Roman F. testified he observed respondent for four to five seconds. Pierson testified he viewed the respondent a few feet away from the door of his vehicle as he obtained the second baseball bat, then observed respondent attack Roman F. for 20 to 25 seconds. Pierson and Roman F.'s identifications are reliable because both separately provided similar descriptions of respondent and confidently identified him for police. See *People v. Adams*, 394 Ill. App. 3d 217, 233 (2009). The witnesses clearly and unequivocally identified respondent as the attacker in the photo array, lineups, and in court. Salazar testified both Roman F. and Pierson provided almost immediate identifications of respondent during the August 10, 2011, lineup and that they were certain respondent was one of the attackers. Roman F. testified it took several seconds for him to identify respondent as one of his attackers. At the suppression hearing, Pierson testified he

immediately recognized respondent when he entered the room to view the lineup.

¶ 67 Lastly, we consider the length of time which elapsed between the crime and the identifications. Respondent contends this factor weighs in his favor as the lineups occurred two and a half months after the attack. Pierson, however, identified respondent in a photo array a week after the incident. The witnesses' identifications of respondent during the lineups which transpired two and a half months after the occurrence, however, are not too far removed to render them unreliable since the other *Biggers* factors are satisfied and support the reliability of the identification. See *Adams*, 394 Ill. App. 3d at 233; *Malone*, 2012 IL App (1st) 110517, ¶ 36 (an identification made one year and four months after the offense was sufficient to support a finding of guilt). Furthermore, in *Biggers* the time frame in which the identifications occurred was approximately eight months after the incident had transpired. *Biggers*, 409 U.S. at 195-96. In short, weighing all of the *Biggers* factors, and viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Pierson and Roman F. observed respondent under circumstances permitting a positive identification. See *Malone*, 2012 IL App (1st) 110517, ¶ 37.

¶ 68 Nevertheless, respondent relies on *People v. McGhee*, 2012 IL App (1st) 093404, to support his contention that current approaches used to determine the reliability of eyewitness identification testimony do not sufficiently safeguard defendants from improper convictions. In *McGhee*, defendant asserted his trial counsel was ineffective for failing to present expert testimony on the reliability of eyewitness identification. *Id.* at ¶ 52. We noted "the trend in Illinois is to preclude expert testimony on the reliability of eyewitness identification on the

ground that it invades the province of the jury as the trier of fact." *Id.* at ¶ 54. *McGhee* does not support respondent's argument as there was no attempt by respondent to present expert testimony regarding the reliability of eyewitness identifications.

¶ 69 Respondent asks us to consider *State of New Jersey v. Henderson*, 27 A. 3d 872 (2011), wherein the New Jersey Supreme Court rejected the approach set forth in *Manson* and set forth a new rule to take into consideration the wealth of scientific studies conducted on eyewitness testimony in the 30 years since *Manson* came down. We declined to follow *Henderson* in *McGhee*, as our supreme court has yet to address the impact of these new eyewitness studies and "current law in Illinois is clear ***." *McGhee*, 2012 IL App (1st) 093404, ¶ 55. Furthermore, the facts in *Henderson* are totally dissimilar to the case at bar. In *Henderson*, the witness was shown eight photographs and was able to eliminate five. When he was not sure whether the defendant was represented in the remaining images the investigator came in to speak with him and then the witness recognized the defendant. *Henderson*, 27 A. 3d at 223-24. For these reasons, we will follow the law as it currently stands in Illinois.

¶ 70 II. Motion to Continue Trial

¶ 71 Respondent next contends the trial court erred in denying his motion to continue his trial until Daniel M. would be available to testify. Respondent asserts: (1) he was diligent in attempting to secure Daniel M. for trial because he subpoenaed him immediately after Daniel M. entered a guilty plea; (2) Daniel M.'s testimony was material and could have affected the verdict; (3) defense counsel presented the trial court with an affidavit of respondent's sister which swore Daniel M. had twice informed her respondent was not present during the attack; and (4) Daniel

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M.'s right against self-incrimination would expire once he had been sentenced and the 30-day deadline for plea withdrawal passed.

¶ 72 The question here is whether the trial court abused its discretion when it denied respondent's motion to continue. *In re K.O.*, 336 Ill. App. 3d 98, 104 (2002). A litigant does not have an absolute right to a continuance. *Id.* Unless the complaining party has been prejudiced, the denial of a motion to continue is not grounds for reversal. *Id.* The denial of a continuance is not an abuse of discretion if there is no reasonable expectation that the witness will be available in the foreseeable future (*People v. Curtis*, 141 Ill. App. 3d 827, 833 (1986)), or when the missing witness's testimony is merely cumulative (*People v. Watts*, 195 Ill. App. 3d 899, 917 (1990)). In reviewing the trial court's denial of respondent's motion, we must consider: (1) whether the defendant was diligent in attempting to secure the presence of the witness; (2) whether the defendant has shown the testimony of the witness was material and might have affected the verdict; and (3) whether the defendant was prejudiced by the exclusion of the testimony. *People v. Ward*, 154 Ill. 2d 272, 307 (1992).

¶ 73 Moreover, a juvenile's request for a continuance must follow the proper procedure. In juvenile proceedings, "minors shall have all the procedural rights of adults in criminal proceedings." 705 ILCS 405/5-105 (West 2010). When a minor's liberty is at issue the Code of Criminal Procedure of 1963 applies. *In re R.G.*, 283 Ill. App. 3d 183, 187 (1996). Furthermore, the speedy trial provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-601(8) (West 2010)) recognizes the applicability of section 114-4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-4 (West 2010)) in juvenile delinquency proceedings. Under section

114-4 of the Code, if a defendant moves for a continuance more than 30 days after arraignment the court shall require the motion be in writing and supported by affidavit. 725 ILCS 5/114-4 (West 2010); see also *People v. Martinez*, 2013 IL 113475, ¶ 19 (noting the State did not properly file a written motion for a continuance under section 114-4). "A trial court can inquire into the sufficiency of the evidence in support of a motion to continue and deny the motion on that basis." *People v. Young*, 352 Ill. App. 3d 906, 910-11 (2004). "Moreover, without the substance of the witness' proposed testimony, [the court is] unable to determine whether the evidence would have been material or whether defendant would have been prejudiced without it." *People v. Thurmond*, 262 Ill. App. 3d 200, 205 (1994).

¶ 74 For example, in *People v. Sargent*, 184 Ill. App. 3d 1016 (1989), the defendant made an oral request for continuance in order to secure the presence of an alibi witness but did not submit an affidavit in support of his motion. *Id.* at 1020, n. 1. The reviewing court stated "a defendant seeking a continuance seeking to secure the presence of a witness must make an offer of proof of that witness' proposed testimony." *Id.* at 1022. This is because without an offer of proof of the witness' proposed testimony, the trial court "has no way of knowing the materiality of the testimony sought to be introduced ***." *Id.* at 1022-23; see *People v. Brown*, 104 Ill. App. 3d 1110, 1119 (1982) ("In making an offer of proof, counsel must explicitly state what [the] excluded testimony would reveal and not merely allude as to what might be divulged by such testimony.").

¶ 75 In the case at bar, respondent's first motion for a continuance was oral and not supported with either an offer of proof or an affidavit. After conducting a hearing on the motion, the trial

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court denied the motion for continuance. We find the trial court's determination was proper, as respondent did not comply with the statutory requirements of section 114-4. See 725 ILCS 5/114-4 (West 2010); *People v. McClain*, 343 Ill. App. 3d 1122, 1132 (2003) ("it would be within the trial court's discretion to deny defendant's motion for a continuance based on the defendant's failure to comply procedurally with the statute, even if the trial court issued its ruling without relying upon that ground.").

¶ 76 We note that respondent's second motion to continue was also oral and, therefore, once again failed to comply with statutory requirements. *Id.* However, the trial court allowed respondent to file a written motion in support of his request for a continuance. As respondent's written motion is included in the record on appeal and the issues regarding the motion have been fully briefed, we will consider respondent's arguments related to this motion.

¶ 77 Respondent's second motion was supported by an affidavit of respondent's sister, Alejandra O. The affiant stated Daniel M. informed her twice that respondent was not involved in the attack on Roman F. The affidavit set forth what respondent's sister would state if she were called to testify, but did not explicitly inform the court as to what Daniel M. would testify, thereby denying the trial court the ability to determine the materiality of the witness' testimony. See *Sargent*, 184 Ill. App. 3d at 1022-23 (to support a motion for a continuance to present an alibi witness the court must be "explicitly informed the court what her testimony would reveal."). In fact, respondent submitted the affidavit to prove the truth of the matter asserted, that respondent was not present during the incident. However, Alejandra O. did not have personal knowledge of the attack. Generally, the trial court cannot accept hearsay statements such as the

ones included in Alejandra O.'s affidavit as true for the purpose of the motion to continue. See also *People v. Martin*, 112 Ill. App. 3d 486, 494 (1983) (Noting the trial court correctly found an affiant's statements as to what another individual said to her constituted inadmissible hearsay.). For these reasons, the trial court was not provided with a sufficient affidavit in support of respondent's motion to continue. See *Martinez*, 2013 IL 113475, ¶ 19.

¶ 78 Respondent further argues the trial court erred when it found that it was uncertain when Daniel M. would be able to testify. Respondent argues, as he did in the trial court, that Daniel M. would be available to testify after he had been sentenced and the 30-day deadlines for plea withdrawal and appeal had passed. As previously noted, the denial of a continuance is not an abuse of discretion when there is no reasonable expectation that the witness will be available in the foreseeable future. See *Curtis*, 141 Ill. App. 3d at 833 (1986). "It is the trial judge who must balance the conflicting demands of court administration with the rights of the accused, conscious, however, that when he considers the rights of those accused of crime, he must consider not only those involved in the case immediately before him but also those of other defendants awaiting trial whose rights may be affected by the consequences of trial delay." *People v. Elder*, 73 Ill. App. 3d 192, 197 (1979).

¶ 79 In order for Daniel M. to testify on behalf of respondent in the present case he must waive his fifth amendment right against self-incrimination. The fifth amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. "The fifth amendment permits a person to refuse to testify against himself during the criminal trial in which he is a defendant and allows him to

refuse to answer questions put to him in any other civil or criminal proceedings, 'where the answers might tend to incriminate her in future criminal proceedings.' " *In re D.P.*, 327 Ill. App. 3d 153, 159 (2001) quoting, *In re L.F.*, 306 Ill. App. 3d 748, 753 (1999).⁴

¶ 80 Generally, once a defendant enters a plea of guilty, he waives his privilege against compulsory self-incrimination. *People v. Ousley*, 235 Ill. 2d 299, 306 (2009). A defendant, however, may assert his rights under the fifth amendment until his conviction has become final. *Id.* Therefore, the privilege against compulsory self-incrimination is not waived at the moment the plea is made, but at the expiration of the period in which the defendant can withdraw the plea. *People v. Morales*, 102 Ill. App. 3d 900, 904 (1981). Evidence of a juvenile adjudication of a witness other than the defendant may be employed in a criminal case. See *People v. Summers*, 353 Ill. App. 3d 367, 374 (2004) (allowing evidence of a juvenile adjudication of a witness for the purpose of attacking the witness' credibility).

¶ 81 In the present case, Daniel M. pled guilty on April 5, 2012. The State and Daniel M.'s counsel contended, however, that Daniel M.'s case would not be final until 30 days after his sentence was imposed and then another six months thereafter to allow for filing a late appeal. On appeal, the State cites *Ousley* for the proposition that the mere fact a defendant pleads guilty does not render his conviction final. *Ousley*, 235 Ill. 2d at 305. There, the State appealed the trial

⁴ "This provision of the fifth amendment applies to the states through the fourteenth amendment." *In re L.F.*, 306 Ill. App. 3d at 753, citing to *Allen v. Illinois*, 478 U.S. 364, 368 (1986).

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court's order denying its motion to allow use immunity to compel a codefendant to testify against the defendant. *Id.* at 302. The relevant question addressed was whether the codefendant's guilty plea rendered the appeal moot. *Id.* at 305. Our supreme court stated because there was no evidence or information presented establishing the codefendant's conviction was final, the danger of self-incrimination still remained and thus the appeal was not moot. *Id.* at 306. Furthermore, the codefendant's right against self-incrimination had not expired because his guilty plea was only as to one out of the three crimes for which he was charged. Therefore, the codefendant could be subject to prosecution for the charges which were dropped and his privilege against self-incrimination remained. *Id.* at 307-308.

¶ 82 Of course, *Ousley* was not a juvenile case, thus, the question here is whether the waiver of the privilege against compulsory self-incrimination applies to a juvenile case.⁵ Our supreme court has stated the dispositional order in a juvenile delinquency proceeding will be considered a final order. *In re J.N.*, 91 Ill. 2d 122 (1982). Furthermore, we look to Supreme Court Rule 660(a) which provides that “[a]ppeals from final judgments in delinquent minor proceedings, except as otherwise specifically provided, shall be governed by the rules applicable to criminal cases.” Ill. S. Ct. R. 660(a) (eff. Oct. 1, 2001). Applying the rules applicable to criminal cases,

⁵Neither party addresses this question in their respective briefs. This court has consistently held a party waives a point by failing to provide supporting legal authority. See *People v. Ward*, 215 Ill. 2d 317, 332 (2005). We will, however, consider the issue despite the violation.

the notice of appeal from final judgments in delinquent minor proceedings must be filed with the clerk of the court within 30 days after the entry of the final judgment appealed from, or, if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of that motion. See *In re J.T.*, 221 Ill. 2d 338, 346 (2006); Ill. S. Ct. R. 604(d) (eff. July 1, 2006). In such cases, the notice of appeal must be filed within 30 days of the denial of that motion. Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001). The appellate court may also allow the filing of a late notice of appeal. Ill. S. Ct. R. 606(c) (eff. Oct. 1, 2001).

¶ 83 In the present case, Daniel M. did not waive his privilege against self-incrimination by entering a guilty plea. At the time the trial court was informed that Daniel M. had entered a guilty plea, his guilty plea was not yet final and non-appealable. See *Ousley*, 235 Ill. 2d at 306. The trial court correctly noted the expiration of Daniel M.'s right against self-incrimination was not readily ascertainable, as Daniel M. could file a motion to reconsider his sentence or a motion to withdraw his guilty plea within 30 days of the final order. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Further, if Daniel M. chose to file a postsentencing motion, the trial court would have to enter another order and thereafter Daniel M. would have 30 days to file a notice of appeal. See Ill. S. Ct. R. 606(b) (eff. Oct. 1, 2001). The State also correctly contended in the trial court that Supreme Court Rule 606(c) would allow Daniel M. to have up to six months to file a request to file a late appeal. Ill. S. Ct. R. 606(c) (eff. Oct. 1, 2001). The possibilities of postsentencing motions and late appeals make determining when Daniel M. would be available to testify even more unpredictable and, therefore, Daniel M.'s guilty plea was not final and non-appealable at the time the trial court considered respondent's motion to continue. Therefore, the trial court could

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not determine whether the continuance would be for a reasonable amount of time and, thus, did not abuse its discretion. *Curtis*, 141 Ill. App. 3d at 833.

¶ 84 Moreover, even assuming that the trial court had abused its discretion, we could not say that the defendant suffered prejudice as a result. *Ward*, 154 Ill. 2d at 307. Respondent first presented Daniel M. as a potential witness after trial had commenced. Further, respondent presented no evidence of the materiality of Daniel M.'s testimony. Assuming, however, that Daniel M. was allowed to testify, the fact he had participated in and was adjudicated guilty of this offense would have been before the trial court. See *Summers*, 353 Ill. App. 3d at 374 (allowing evidence of the witness' prior juvenile adjudication to be employed in a criminal case for the purposes of attacking the credibility of the witness). The trial court would have had to weigh the credibility of Daniel M. against the credibility of Pierson and Roman F. The trial court found the eyewitnesses' testimony highly credible. The substantial evidence presented at trial which supports a finding of guilty also precludes a finding of prejudice. See *People v. Flores*, 269 Ill. App. 3d 196, 203 (1995). Here, we cannot say the trial court abused its discretion in denying respondent's motion to continue.

¶ 85 III. Reasonable Doubt

¶ 86 Respondent contends the evidence presented at trial was insufficient to prove him guilty of aggravated battery beyond a reasonable doubt because the State failed to present reliable eyewitness testimony.

¶ 87 When reviewing a claim of insufficient evidence 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. Lloyd*, 2013 IL 113510, ¶ 42. We will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). 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. *Jackson*, 232 Ill. 2d at 281. Rather, we "carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be given to the fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011).

¶ 88 A single eyewitness identification can support a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). In assessing identification testimony we look to the factors set out in *Biggers. Malone*, 2012 IL App (1st) 110517, ¶ 27; *Biggers*, 409 U.S. at 199-200.

¶ 89 As previously addressed, when viewed in the light most favorable to the prosecution, the eyewitness testimony in this case satisfies the five factors enumerated in *Biggers*. Moreover, the trial court found Roman F.'s testimony to be credible and that Pierson was an "excellent witness." The trial court is in the best position to judge the credibility of the witnesses, and as such we cannot substitute our judgment for that of the trial court. *Herman*, 407 Ill. App. 3d at 704. Accordingly, we conclude a rational trier of fact could have adjudicated respondent delinquent for aggravated assault beyond a reasonable doubt.

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¶ 90

CONCLUSION

¶ 91 For the reasons set forth above, we affirm the decision of the trial court.

¶ 92 Affirmed.