

No. 1-14-0082

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 9788
)	
RUBEN NAVARRO,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant was not denied effective assistance of counsel for his trial counsel’s failure to move before trial to suppress a lineup identification because there was no reasonable probability that the motion would have succeeded nor that it would have affected the trial’s outcome.

¶ 2 Following a bench trial, defendant Ruben Navarro was convicted on two counts of first-degree murder and was sentenced to 35 years in prison. On appeal, he contends his trial counsel was ineffective for failing to file a pretrial motion to suppress an allegedly suggestive lineup identification. He also asserts that the mittimus should be corrected to state he was convicted on only one count of murder and to award him three additional days of presentence credit. We

affirm one murder conviction, vacate the second conviction, and correct the presentence credit total.

¶ 3 Defendant was convicted of the murder of Jennifer Figueroa, who was fatally shot in an apparent gang-related shooting on the night of April 26, 2009, as she sat in a car on Chicago's north side. The trial testimony established that on that night, Joaquin Salazar was driving his Crown Victoria on Armitage Avenue. In the car with him and looking to buy marijuana were his girlfriend, 18-year-old Jennifer Figueroa; Jennifer's brother, Santiago Leon; and Jennifer's cousin, Pedro Robledo. Leon and Robledo were members of the Imperial Gangsters street gang. Salazar was then a member of the Insane 22 Boys, a gang from the area of California and 22nd Street; at the time of trial he was a member of the Imperial Gangsters. Salazar's car was confronted by members of the rival Latin Kings gang riding in a black Jeep Cherokee. The occupants of the two vehicles shouted gang slogans at each other, and Salazar briefly chased the Cherokee.

¶ 4 Salazar then drove to St. Louis Avenue, where he initially parked his car facing Cortland Street in a vacant lot near an apartment building at 1845 North St. Louis. Salazar saw Roberto Hernandez, an Imperial Gangster who was also known as "Demon," and asked him for some "weed." Hernandez got in Salazar's car to discuss a marijuana purchase. Salazar moved his car across the street to a place near the alley. Both Salazar and Hernandez exited the car and Hernandez went into the apartment building to get the marijuana. Leon also exited the car, while Robledo and Jennifer remained in the back seat.

¶ 5 As Salazar stood near the end of the alley, he saw the Cherokee in the alley with its headlights off, heading in his direction. The Cherokee tried to run him over, but he jumped out of the way and the Cherokee continued west down the alley. Salazar then noticed two persons in

the alley walking in his direction. One person was wearing a black shirt and the other was wearing a white shirt. The person in the white shirt had a gun in his waistband. Salazar asked Leon if he knew them. As the two persons got closer, a motion sensor light four or five feet from Salazar was activated. There was also an alley light nearby and a city streetlight six or seven feet away. Salazar saw the face of one of the approaching men and recognized him as “Blinky.” At trial, Salazar identified defendant as Blinky and testified he previously knew him because Blinky used to live next door to Jennifer’s family on Le Moyne. Defendant was a few feet in front of Salazar and said to him, “What’s up?” Then he pointed a gun at Salazar and shot at him twice. Salazar ran away from his car toward the empty lot near Cortland. He looked back and saw defendant standing four to five feet from Salazar’s car. Salazar saw the flash of the gun and observed the car windows shatter as defendant fired into the passenger side of the car. Salazar ran back toward his car, but defendant saw Salazar and shot at him two more times.

¶ 6 Robledo, sitting in the back seat behind the driver’s seat of Salazar’s car, heard the gunshots and saw the muzzle flash, and he ducked down. Leon entered the car on the passenger side and slid into the driver’s seat. As shots were fired into the car, Leon attempted to put the car in reverse, but one of the shots struck him in the elbow and he could not shift gears. He was finally able to shift the car in reverse with his left hand. He backed up the car and drove away with Jennifer and Robledo in the back seat. Leon observed blood on Jennifer’s face and Robledo saw that she had been shot in the head. Salazar saw his car being driven away north on St. Louis toward Armitage. Defendant fled from the scene of the shooting.

¶ 7 Hernandez, still in the apartment building, heard the gunshots. As he descended the stairs, he looked out and saw a man whom he described at trial as having a heavy build, fit and muscular, light skin, with very short hair like a “fade” haircut, wearing a white shirt, and running

east down the alley. Hernandez testified he did not see the man's face or notice anything in the man's hands. The man was halfway down the alley when Hernandez reached the bottom of the apartment stairs. Hernandez ran after the man but lost sight of him. Then Hernandez ran back to the front of the apartment and discovered that Salazar's car was gone.

¶ 8 Meanwhile, Leon circled the block in Salazar's car and found Salazar and Hernandez. Leon told them that he and Jennifer had been shot. Hernandez jumped into the back seat of the car. Salazar entered the driver's seat, pushed Leon to the passenger side, and drove the car to the hospital. Hernandez carried Jennifer into the emergency room. She was transferred to a trauma center where she died a few hours later. An autopsy determined she had been shot in the head, right hip, and left buttock, and the cause of her death was multiple gunshot wounds.

¶ 9 Leon was also brought into the hospital, treated for the gunshot wound to his elbow, and remained in the hospital for three days. At trial, Leon testified that he saw only one person, the man with a gun, whom Leon described as stocky, wearing dark clothing and a hoodie that was pulled up. Leon stated that just before 11 p.m., he saw the man approach in the alley and then saw the man lift a gun and start shooting. Leon did not identify defendant at trial as the shooter. Although he knew defendant on the date of the shooting, Leon testified he did not see the shooter's face; he saw only the shooter's silhouette and the muzzle flash. Leon did not recall having told police officers that the shooter was a Hispanic male with a heavy build. He denied telling police that the shooter was wearing a black or dark blue hat. The parties stipulated that Detective Tarasckiewicz would testify that Leon had described the shooter as a Hispanic male with a heavy build and wearing a black or blue hat and a dark shirt.

¶ 10 Chicago Police Officer William Mallek was at the district police station when at about 10:53 p.m. he heard a call from beat officers of "shots fired" at St. Louis and Cortland. At 11:07

p.m. he monitored another transmission that the shooter was a King named Blinky. Mallek's search of the police computer for information about "Blinky" yielded defendant's name, address, and a computer-generated photograph. Mallek transmitted over the police radio defendant's real name and his address. Mallek and his partner went to the hospital and spoke with Salazar at about 11:30 p.m. They showed him the photograph of defendant, and Salazar identified him as "the motherf****r that shot my girl." Salazar told Mallek he was certain Blinky (defendant) was the shooter because his brother-in-law had a case against Blinky.

¶ 11 At about 11:50 p.m., Detective McDermott also interviewed Salazar at the hospital and showed him the photograph of defendant. Salazar again identified defendant as the person who shot at him and shot into his car. Salazar circled defendant's likeness but declined to sign the photograph, telling McDermott he was scared. McDermott viewed Salazar's Ford Crown Victoria and observed that the entire rear windshield and the rear passenger side window had been shot out. He also saw several bullet holes in the auto and blood in the front and rear seats.

¶ 12 At 1:25 a.m. on April 27, defendant was arrested at his home. He was taken to the police station and placed in a lineup. Police searched defendant's home but did not recover a gun. No gunshot residue test was performed on defendant.

¶ 13 Salazar was taken to the police station early on April 27 where he gave a statement as to what had occurred. At about 5 a.m., Salazar viewed a lineup and positively identified defendant as the shooter. At trial, Salazar again identified defendant as the shooter. He testified that he recognized defendant's face when, as defendant approached him, defendant was illuminated by the motion sensor light that was activated in the alley.

¶ 14 On the night of April 27, the police picked up Hernandez and took him to the police station. Early on the morning of April 28, he viewed a lineup and positively identified defendant

as the person he saw running in the alley. At trial, he testified that he had not wanted to be at the police station and “didn’t really want to pick [defendant] out from the lineup.” After the lineup identification, Hernandez gave a written statement to a police detective and an assistant state’s attorney. He was shown a photograph and identified defendant as the man he saw running in the alley. Hernandez placed his signature at the bottom of the photograph. He testified at trial that he did not see the face of the person running in the alley, and he declined to identify defendant as the man he chased down the alley. He did not know defendant on April 26, 2009, but he admitted defendant was the person he had previously identified in a photograph and lineup. He testified he made the identifications and signed a written statement at the police station because he just wanted to go home and because Salazar and Leon were sure that “Blinky did it.” On the day of the shooting, Hernandez had started drinking hard liquor and beer after 8 or 9 p.m. and was highly intoxicated. He could not see things at a distance and needed glasses. He admitted to having two felony convictions and pending criminal charges.

¶ 15 On April 26, the night of the shooting, Johnathan Janda went out to his front porch at 1823 North Kimball shortly before 11 p.m. to smoke a cigarette. About a minute later he heard about five or six gunshots coming nearby from the area of Cortland and St. Louis. Janda called a friend who lived at 3501 West Cortland to find out if he knew what was going on. After hanging up the phone, Janda saw two men run out of the gangway directly across from his house and run toward him. At trial, he identified defendant as one of the two men. Defendant was heavy-set, wearing a white T-shirt and a pair of blue jeans, and his head was shaved. Defendant ran straight toward Janda, nearly onto his porch. Defendant looked “very frantic,” “just panicking.” Both men looked “very panicky and nervous.” The area was well lit with streetlights and front porch lights. Defendant ran almost straight up to Janda and made eye contact with him. Seeing Janda

startled defendant. He ran back to a truck parked directly in front of Janda's house, crouched behind it, and looked in the direction from where the gunshots had come. Janda did not see a weapon in defendant's hand. Janda saw the second man across the street. That man had a gun in his hand and was also looking in the direction where the shots had been fired.

¶ 16 A short time later Janda went to a police station and described defendant to police as a heavy-set Hispanic, about 5 feet 10 to 11 inches tall, wearing a white t-shirt and blue jeans and having a shaved head. The police initially showed Janda a photo array containing a picture of defendant. He told the police he would not point out anyone from what might be old photos, but that he would look at a lineup. At about 4:30 a.m. on April 27, Janda viewed a lineup and positively identified defendant as the person he saw crouched next to the vehicle in front of his home. Janda testified that defendant was the only person in the lineup who fit the description of a heavy-set male Hispanic with a shaved head.

¶ 17 Pedro Robledo testified as a defense witness at trial. He was in the back seat of Salazar's car behind the driver's seat when the shots were fired. His cousin Jennifer was sitting next to him. When he heard the gunshots and saw the flash, he ducked down. He did not see the shooter. However, he provided a description of the shooter to the police because his cousin, Santiago Leon, told him defendant was the shooter. Robledo told the police that the shooter wore black clothing and a dark hoodie. Robledo did not want to appear in court because a year earlier, Latin Kings beat him with a bat and told him they would kill his family if he appeared in court. The parties stipulated that Detective Szwedo would testify that Robledo described the shooter to police as a Hispanic male with a heavy build and wearing all black with a black hoodie.

¶ 18 Defendant also presented two alibi witnesses: Carmen Lopez and her husband Lorenzo Lopez. Carmen testified that on April 26, 2009, defendant ate dinner at her home between 9 and 9:30 p.m. After dinner, she did not see or hear defendant, but between 10:30 and 11 p.m., she heard defendant who was on the front porch with her husband Lorenzo. At 1 a.m., Lorenzo drove defendant home. On cross-examination, Carmen stated she gave a written statement to a detective and an assistant state's attorney that defendant had arrived at her house at about 6 p.m. Defendant left her home at some point because when dinner was ready she was informed he had gone to the store. Defendant ate dinner at her home at 9:30 p.m. and then went outside. She did not see him again until 1 a.m. when he came inside again.

¶ 19 Lorenzo Lopez testified that he and defendant had been friends for over five years. On April 26, 2009, between 10 and 11 p.m., defendant was drinking with Lorenzo on the front porch of the Lopez house. Defendant did not leave the Lopez house after dinner. At about 1 a.m., Lorenzo drove defendant to his home about one block away. Lorenzo denied any gang affiliation, but the State offered a photograph of him in a shirt with the word "king" on it. Lorenzo denied telling the police that defendant left the Lopez residence after dinner.

¶ 20 In rebuttal, Detective Tim McDermott testified he interviewed Lorenzo on April 27, 2009. Lorenzo told him that on the previous evening defendant left the Lorenzo residence on three occasions, including after dinner, and returned before Lorenzo drove him home. On cross-examination, McDermott testified that the police report memorializing Lorenzo's interview stated that defendant left the Lopez home several times but did not specifically include Lorenzo's statement that defendant left the residence after dinner.

¶ 21 The trial court found defendant guilty on count 1 of first-degree murder with intent to kill, pursuant to section 9-1(a)(1) of the Criminal Code of 1961 (the Code) (720 ILCS 5/9-1(a)(1))

(West 2008)), guilty on count 8 of first-degree murder with a strong probability of death, pursuant to section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2008)), and guilty of felony murder, attempted murder, and aggravated discharge of a firearm. The court found that, although Salazar was an admitted gang member, “he is not nearly sophisticated enough or crafty enough to just decide to frame somebody he knows for something that they didn’t do.” The court determined that Janda’s testimony was compelling and convincing beyond a reasonable doubt. The court also found that Janda was “very careful and conscientious” in refusing to identify defendant in a photo array that might contain old photos and insisting on confronting the suspect in person.

¶ 22 Defendant subsequently filed a motion for a new trial, arguing, *inter alia*, that the State did not prove him guilty beyond a reasonable doubt because no physical evidence linking defendant to the crime was produced at trial, Hernandez’s identification of defendant as the shooter was the result of police coercion, and Janda identified defendant in a lineup where defendant was the only participant who remotely fit the description Janda originally gave police. The trial court denied the motion and sentenced defendant only on two first-degree murder counts. “So as to Counts 1 and 8, which will merge -- it will be one sentence -- it will be 35 years in the penitentiary. That will run concurrently.” Defendant received credit for 616 days of time served while in pretrial custody.

¶ 23 On appeal, defendant first contends that his defense counsel performed deficiently in failing to file a pretrial motion to suppress the lineup identification of him by Janda because the lineup was improper and suggestive and had no independent reliability. The State responds that defendant’s trial counsel made a proper strategic decision in referencing the lineup identification at trial to discredit Janda’s observation of defendant as a whole where a pretrial motion to

suppress the identification would have been futile; an independent basis of reliability existed for Janda's identification; and defendant was not prejudiced where Salazar identified defendant as the shooter.

¶ 24 A claim of ineffective trial counsel is judged under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, the defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards, and (2) a reasonable probability existed that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 690; *People v. Patterson*, 2014 IL 115102, ¶ 81. Satisfying the prejudice prong of Strickland requires a showing of actual prejudice and not simply speculation that the defendant may have been prejudiced. *Id.* The failure to satisfy either prong of the Strickland test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 25 On a motion to suppress an identification, a defendant bears the burden of establishing that, under the totality of the circumstances, the pretrial identification procedure was so unnecessarily suggestive that it gave rise to a substantial likelihood of an unreliable identification. *People v. Jones*, 2012 IL App (1st) 100527, ¶ 24. An attorney's decision of whether to file a motion to suppress evidence is a matter of trial strategy and gives counsel great deference in that choice. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). If a motion to suppress would be futile, counsel is not ineffective for his failure to file it. *Id.* To prevail on a claim that his trial counsel was ineffective in failing to file a motion to suppress identification, a defendant bears the burden of showing both that the motion would have been granted and that the trial outcome would have been different if the evidence had been suppressed. *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008). In deciding whether a witness's identification was so tainted by a

suggestive identification procedure that its admission at trial violated due process, the court must first determine whether the procedure was suggestive and, if it was, whether the identification testimony was so tainted as to be rendered unreliable. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). The defendant has the burden of proving that the identification procedure was so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable mis-identification. *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005).

¶ 26 Defendant asserts that the lineup Janda viewed was improperly suggestive because it contained only one person matching the description Janda had given to the police and the lineup participants were positioned in a manner to draw attention to defendant's singular appearance, with the result that the lineup procedure tainted Janda's in-court identification testimony. Defendant's argument lacks merit, as the record does not clearly establish that the lineup was unnecessarily suggestive. Both Janda and Salazar viewed the same lineup, though they viewed it separately. Defendant was positioned in the middle, the third of the five lineup participants. The trial exhibits that have been made part of the record on appeal include People's Exhibits 4, 5, and 21. Exhibits 4 and 5 are photographs of the lineup as Salazar viewed it. Exhibit 4 shows all of the participants with their heads turned looking to the left. Exhibit 5 shows them with their heads turned looking to the right. Exhibit 21, the lineup as Janda viewed it, shows all five men looking straight ahead at the camera. The participants and their positions in the lineup are identical in all the exhibits. All five men appear to be Hispanic. As all five are seated, there is no appreciable difference in height. All five men have their hands resting palms-down on their thighs. All are dressed in short-sleeved tee-shirts and casual pants and shoes. The tee-shirts of defendant and of the men in the first and fifth positions are dark in color; the tee-shirts of the second and fourth men are light. Defendant and the men in the first and fifth positions have a

stocky build; a fourth man (second position) is less stocky; and the fifth man (fourth position) is of medium build. Four of the men, including defendant, are clean-shaven, while the man in the fifth position has a short beard and moustache. All five men have dark hair. Defendant and the man in position two have shaved haircuts with the hair growing back; the hair of the man in position one is long on top and shaved on the sides; and two of the men (positions four and five) have a full head of hair in a short haircut.

¶ 27 There is no requirement that all the participants in a lineup be physically identical. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). Differences in appearance affect the weight to be given the identification testimony, not its admissibility. *People v. Allen*, 376 Ill. App. 3d 511, 520 (2007). In *Allen*, this court held that where the persons in a photo array all had otherwise similar characteristics, the fact that the defendant was the only bald individual did not alone render the array overly suggestive. *Id.* at 521. In other cases, we have found lineups to be non-suggestive and have affirmed the convictions where the difference in a physical characteristic between the defendant and other participants was equally or more pronounced than in the instant case. In *People v. Peterson*, 311 Ill. App. 3d 38, 46-48 (1999), defendant was the only lineup participant with long hair and wearing a gray sweatshirt matching the victim's description. In *People v. Hartzol*, 222 Ill. App. 3d 631, 643-44 (1991), *People v. Washington*, 182 Ill. App. 3d 168, 175 (1989), and *People v. Trass*, 136 Ill. App. 3d 455, 463 (1985), defendant was the only man in the lineup with braided hair. In *People v. Johnson*, 104 Ill. App. 3d 572, 578 (1982), defendant was the only bearded and bald person in the lineup. In *People v. Tucker*, 118 Ill. App. 2d 136 (1969), defendant was the tallest man in the lineup and the only man with red hair and a muscular build.

¶ 28 Defendant argues he was the only person in the lineup matching the description Janda had given to the police. However, Janda's description to the police was that of a heavy-set Hispanic, about 5 feet 10 to 11 inches tall, with a shaved head and wearing a white t-shirt and jeans. When arrested and placed in the lineup, defendant was wearing a black t-shirt. The man to defendant's right in the lineup, though not as stocky as defendant, fit Janda's description, including a white t-shirt. Defendant also claims that his position in the middle of the lineup was suggestive. He contends the lineup was "arranged" in such a way that the positions of the participants drew attention to him. However, the record is silent as to whether defendant selected his own position in the lineup or whether it was determined by the police.

¶ 29 Based on our review of the photos of the lineup viewed by Janda, we reject defendant's contention that the lineup was impermissibly suggestive. We cannot conclude there was anything so different about defendant in the lineup that would lead the witnesses to pick him out. Having found that the lineup Janda viewed was not unnecessarily suggestive, we need not examine the independent reliability of his in-court identification of defendant. *People v. Ramos*, 339 Ill. App. 3d 891, 899 (2003). We conclude that defendant has not shown that a pretrial motion to suppress the lineup identification would have succeeded.

¶ 30 Moreover, while Janda's identification testimony served to put defendant and the second assailant in the neighborhood of the shooting and contradicted defendant's alibi, Janda did not witness the shooting. The prime witness against defendant for the murder of Jennifer Figueroa was Joaquin Salazar, who testified that he saw defendant shoot at him and into his car and whom the court found to be a credible witness. The court was aware of Salazar's rival gang affiliation but discounted it as a motive to lie, finding that Salazar was "not nearly sophisticated enough or crafty enough" to frame defendant. At the time of the shooting, Salazar viewed defendant at

close range and under excellent lighting conditions. Salazar's testimony alone was sufficient to convict defendant. The testimony of a single credible witness who had ample opportunity to make a positive identification is sufficient evidence to convict. *People v. Morales*, 339 Ill. App. 3d 554, 563 (2003). The credibility of the identification witness and the weight to be accorded his testimony rests with the trier of fact. *People v. Tabb*, 374 Ill. App. 3d 680, 692 (2007). Additionally, defendant was known to Salazar before the shooting incident. When a witness knows the defendant prior to the event, the credibility of that witness's identification is enhanced. *People v. Sutton*, 252 Ill. App. 3d 172, 181 (1993). Consequently, defendant has not shown that the trial outcome would have been different if his counsel had moved before trial to suppress Janda's identification of defendant in the allegedly suggestive lineup.

¶ 31 Defendant contends, however, that the identification of him as the shooter by Janda and Salazar was undermined by two reliable alibi witnesses. He also asserts that the State proffered no physical evidence linking him to the crime. However, the weight to be given alibi evidence is a question of credibility for the fact finder, which has no obligation to believe alibi evidence over positive identification. *People v. Mullen*, 313 Ill. App. 3d 718, 729 (2000). This court will not disturb the trial court's findings regarding credibility because a rational trier of fact could have found that Janda and Salazar presented credible testimony, while the defense alibi witnesses did not. See *Gabriel*, 398 Ill. App. 3d at 342. Likewise, the lack of physical evidence does not raise a reasonable doubt where an eyewitness has positively identified defendant as the perpetrator of the crime. *People v. Clarke*, 391 Ill. App. 3d 596, 610 (2009).

¶ 32 Defendant also contends, and the State agrees, that the mittimus erroneously states defendant was convicted on two counts of murder. Both count 1 (intentional) and count 8 (strong probability) alleged defendant committed first-degree murder in that he "shot and killed

Jennifer Figueroa while armed with a firearm.” Where only one person has been murdered, the defendant can be convicted of only one murder. *People v. Fuller*, 205 Ill. 2d 308, 346 (2002). Defendant’s one physical act of shooting Jennifer Figueroa was the basis of both convictions. A defendant cannot be convicted and sentenced for multiple offenses based on the same physical act. *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 46, citing *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). Under the one-act, one-crime rule, only the more serious version of the offense, intentional murder, should have survived. *Fuller*, 205 Ill. 2d at 346-47. The conviction on count 8 under section 9-1(a)(2) is vacated. *People v. Cortes*, 181 Ill. 2d 249, 281-82 (1998).

¶ 33 Finally, defendant argues, and the State concurs, that he is entitled to three additional days of credit for presentence custody. Defendant was arrested on April 27, 2009, and was sentenced on January 6, 2011. He was awarded 616 days of credit for time served in custody. We agree with defendant’s calculation that he spent 619 days in custody excluding the sentencing date.

¶ 34 For the reasons stated above, and in the exercise of our authority under Supreme Court Rule 615(b)(1) (see Ill. S. Ct. R. 615(b)(1)) to modify a judgment, we affirm defendant’s conviction for first-degree murder on count 1 and vacate defendant’s murder conviction on count 8; and we direct the clerk of the circuit court to correct the mittimus to reflect that defendant was convicted of first-degree murder only on count 1 (section 9-1(a)(1) and to credit defendant with 3 additional days of presentence credit for a total credit of 619 days.

¶ 35 Affirmed in part and vacated in part; mittimus corrected.