FIRST DIVISION
March 14, 2016

No. 1-14-0045

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. 12 CR 13687
	)	
TABARI EVANS,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's convictions for robbery and aggravated battery where defense counsel was not ineffective for declining to file a meritless motion to suppress and no prejudice resulted to defendant. Fines and fees order corrected.

¶ 2 Following a bench trial, defendant Tabari Evans was convicted of robbery and two counts of aggravated battery, and sentenced to concurrent prison terms of five years, five years, and four years, respectively. On appeal, defendant contends that defense counsel was ineffective for failing to move to suppress photo array identifications made by the two victims. Defendant also

challenges certain fines and fees imposed by the trial court. We affirm defendant's convictions and correct the fines and fees order.

¶ 3 The evidence at trial established that three men attacked the victims, Rebecca Barker and Gregory Bultema, in Chicago on June 24, 2012. Both victims separately identified defendant in a photo array, and a week later, in a physical lineup. Defense counsel filed a motion to suppress the physical lineup because defendant wore a red shirt while the other individuals wore white shirts. During the hearing on the motion, defense counsel told the court that he did not seek to exclude the photo array. The court ruled that "the lineup identification and any subsequent identification will be suppressed," and stated, "that would include in court identification." Subsequently, the State filed a motion to reconsider and a motion for admission of in-court identification testimony. The court held an attenuation hearing, at which Barker and Bultema both testified.

¶ 4 Barker testified that she attended the Gay Pride Parade in Chicago on June 24, 2012, and consumed around 10 beers in 12 hours. About 8:30 p.m., she and Bultema were walking beneath the Red Line tracks near the intersection of Waveland and Sheffield Avenues. It was still light outside and the area beneath the tracks was well-lit. Three individuals, including defendant, walked beside and behind her. Barker saw defendant over her right shoulder, with nothing obscuring his face. As she looked at him, he struck her twice on the back right side of her head and she fell down. Defendant pulled off her purse, turning her body so that she saw his face again before blacking out. Barker next remembered Bultema running up to her as the men fled with her purse, which contained her phone, keys, and wallet. When police arrived, Barker described defendant as being between six feet and six feet two inches tall, with a wide nose, a

goatee, and shorter, finely cut hair. He wore a short-sleeved shirt with Hawaiian or flowery print. On July 9, 2012, Barker went to the police station, signed an advisory form, and identified defendant in a physical lineup.

¶ 5 Bultema testified that he was walking with Barker beneath the Red Line tracks about 8:30 p.m. on June 24, 2012 after consuming around 10 beers at the parade. It was starting to get dark, but the sun was still up and the area beneath the tracks was brightly lit. He stopped to light a cigarette and saw defendant and two other men attack Barker. Bultema pushed defendant off Barker and defendant spun around. Bultema saw defendant's face, unobstructed, from a few feet away. Bultema tried to strike defendant, but defendant hit him in the face with a blunt object, knocking him down. Bultema stated that "everything [went] black" but denied losing consciousness. Bultema and Barker called police and paramedics arrived, but Bultema refused treatment out of concern for Barker, who "wasn't quite herself." He told police that defendant was a black male, between six feet and six feet four inches tall, wearing a brightly colored, short sleeved, button down t-shirt. Bultema and Barker looked for Barker's purse for about an hour and then sought medical attention when Bultema noticed blood soaking through Barker's hair. On July 9, 2012, Bultema went to the police station, signed an advisory form, and identified defendant in a physical lineup.

¶ 6 After the hearing, the court affirmed that the physical lineup would be suppressed but permitted the victims to identify defendant at trial. The court noted that the victims had an adequate opportunity to view defendant before he struck them, and could describe his height, hair, and clothing. The court stated:

"I believe that there is a very independent basis here for the identification of both of these witnesses. I think they both were paying a particular degree of attention, [and] the descriptions were sufficiently accurate. I'm impressed by both witnesses['] level of certainty when they did, in fact, see Mr. Evans in that line-up, [and] even though I'm suppressing the results of that line-up, both did describe their identification as having been immediate.

This is where I would have appreciated the benefit of having heard evidence regarding the photographic identification that occurred before the line-up[,] before the defendant was ever in custody, but that was not put forth.

Also, the length of time between the crime and identification procedures, I think it also does not offend myself that there is this independent basis for identifying the defendant in this case. Certainly some of the things that were brought out by [defense counsel] at this hearing and was brought out at the prior hearing would go to the weight of the identification of the witnesses. But the initial photograph identification, no one has sought to suppress that, so that will go in, and ultimately presumably the in-court identification of the defendant by both witnesses will be allowed."

¶ 7 The case proceeded to bench trial. The parties stipulated that Barker and Bultema's testimony from the hearing would be evidence at trial, except for testimony pertaining to the physical lineup.

¶ 8 At trial, Barker identified defendant as the person who attacked her and stole her iPhone. As a result of the attack, she sustained a concussion, bruising, and a gash on the back right side of her head. Barker testified that, on June 25, 2012 she set up an application to locate her phone

and related the information to Detective Foria. On June 26, 2012, she went to the police station, signed an advisory form, and viewed a photo array, but it did not contain defendant's photo. That night, she had two more conversations with Foria regarding her phone. On July 2, 2012, she signed another advisory form, viewed a photo array, and identified defendant by signing her name under his picture. The advisory form and signed photo array were admitted into evidence. Barker later saw Foria at a preliminary hearing, where he told her to "have a seat" without further conversation.

¶ 9 In court, Bultema identified defendant as the offender. He testified that defendant broke his nose, but did not recall telling police that defendant struck him with a blunt object. On June 26, 2012, he went to the police station to view a photo array. On July 2, 2012, he signed an advisory form, viewed a photo array, and identified defendant. The advisory form and photo array, with Bultema's signature under defendant's picture, were admitted into evidence.

¶ 10 Detective Foria testified that he administered separate photo arrays for Barker and Bultema on June 26, 2012. Each signed a lineup advisory form before viewing the photo array, but neither made an identification. Afterwards, Foria went to a residence in Streamwood and met with Emma Donald, later identified as defendant's mother.[1] Foria then prepared a new photo array for Barker and Bultema. Each signed a lineup advisory form, separately viewed the photo array, and identified defendant.

¶ 11 The parties stipulated that defendant was arrested on July 8, 2012, in Elgin. The State rested and defendant's motion for directed verdict was denied.

[1] Throughout the record, Emma Donald is also identified as Emma Evans.

¶ 12 Donald testified that on June 24, 2012, she picked up defendant from his home in Elgin and drove him to her house in Streamwood between 1 and 2 p.m. Defendant was still at the house at 7 or 8 p.m., when Donald hosted eight or nine relatives for dinner. Defendant stayed overnight with his son and left about 12 p.m. the next day. Sometime later, two detectives visited Donald but she denied telling them that defendant had a black iPhone in the house. She eventually learned that defendant had been arrested, but she never told the police that he was at her house on June 24, 2012. Donald and her daughter attended a preliminary hearing in defendant's case, but only her daughter, who was at the house on June 24, 2012, spoke with the public defender. Donald drove to the trial with defendant, Janel Rhodes, and Cerilyn Bonds, but she denied discussing her testimony with them.

¶ 13 Rhodes, the mother of defendant's son, testified that she brought their son to Donald's house at 9 a.m. on June 24, 2012 and saw defendant there. Afterwards, she went with friends to the parade in Chicago and stayed until 8 p.m. While walking under the Red Line at Belmont at about 6 p.m., she saw a man and woman, both white, fighting "three young black boys." The woman removed her purse and flung it away as she ran to help the man. Rhodes was around five feet away and saw a phone and other items fall out of the purse. She took the phone and later gave it to a friend. The fight lasted about three minutes but Rhodes did not call 911 because the man and woman ran toward police officers who were across the street.

¶ 14 Rhodes further testified that she attended a preliminary hearing in defendant's case and saw the woman sitting by a detective in the next row of the gallery. The woman told the detective that she "didn't feel comfortable sending an innocent man to jail." The detective responded "[i]t's going to be okay. Don't worry about it." After the hearing, Rhodes spoke with a

public defender and indicated she had the stolen phone. The public defender told her "not to talk to anybody." She did not recall the date, courthouse, or courtroom where these events occurred. Rhodes further testified that she and defendant shared custody of their son and discussed the case on several occasions.

¶ 15 Bonds testified that she went to the parade with Rhodes and other friends. At 5:30 or 6 p.m., she saw a "white lady and her boyfriend" fighting with "three black guys." Defendant was not present. During the fight, the woman swung her purse to the ground and Rhodes picked up an iPhone. Bonds knew defendant since she was little and discussed the case with him prior to trial, but never spoke to police.

¶ 16 Defendant testified that he did not commit the charged offenses. According to defendant, his mother picked him up from his home in Elgin and drove him to her house in Streamwood at about 1 or 2 p.m. on June 24, 2012, as he did not have a car. He attended the family dinner and stayed until noon or 1 p.m. the next day. Defendant acknowledged having a child with Rhodes and stated that Bonds was "like a sister" to him.

¶ 17 The defense rested and the State recalled Detective Foria. Foria testified that when he met with Donald on June 26, 2012, she told him there was a black iPhone in her residence earlier that day and that defendant had the phone. Foria never saw the phone and did not know whether it was stolen, but stated that the iPhone taken from Barker was also black. Foria denied that Barker told him that she did not want to testify because she did not want to send an innocent man to jail.

¶ 18 The court found defendant guilty of one count of robbery and three counts of aggravated battery. In its findings, the court stated:

"The issue in this case is the identification of Mr. Tabari Evans as being the perpetrator of those acts. To that end, the defendant is identified both by Miss Barker and by Mr. Bultema. This initially took place when the detective prepared a photo array and displayed it to both of those individuals. He did it separately. He did it after advising them of the warnings about [how] the person might or might not be in the group, he might or might not know who the person was, and was certainly not obligated to identify anybody in the photo arrays the detective displayed.

Apparently both victims in this particular case identified Tabari Evans as being the perpetrator of the robbery and aggravated battery. Identification is always a major issue in cases.

Taking the *** fact that [the victims] had been consuming alcohol that particular day, taking into consideration also what occurred to them in that they were both injured, those are *** considered by the court in determining the validity of the in court identifications. I take into account the credibility of the witnesses when they testify.

***

I found certainly both the complaining witnesses *** to be credible witnesses, [and] that there was no motive on any of their parts to lie about what occurred here or their identification."

¶ 19 The court also reviewed defendant's alibi evidence, noting that only defendant and his mother testified that he had been at the family dinner despite the large number people attending. Additionally, the court rejected Rhodes and Bonds' testimony as implausible for suggesting that "out of all the people in our community, 3.2 million in the city of Chicago *** [they] happened

to witness Miss Barker's assault." It found "[t]his was no coincidence that the phone was picked up by the mother of the defendant's child," and "if she was even there, it didn't happen the way she said." The court concluded that defendant's guilt was established by "overwhelming evidence put forth, the strongest of which came from the mother of his child and the other family friend."

¶ 20 Defendant filed a motion for new trial, arguing, *inter alia*, that the victims' in-court identification was unreliable because they had previously viewed defendant in a physical lineup that the court had determined was unduly suggestive. The court denied defendant's motion, stating:

> "[A]t the time of the trial I certainly heard that there was a photographic identification done.
>
> I had an opportunity to view the photographic spread that was used and displayed to the complaining witnesses in this particular case. Each [was] shown that photographic spread separately.
>
> Both *** identified [defendant] as the perpetrator of the robbery and the aggravated battery. The in court identification *** also came from the credible witnesses."

¶ 21 The court merged two of the counts of aggravated battery and sentenced defendant to concurrent prison terms of five years for robbery, and five years and four years, respectively, for the remaining counts of aggravated battery.

¶ 22 Defendant raises two arguments on appeal. He first contends that defense counsel was ineffective for failing to move to suppress the photo array identifications made by the victims. According to defendant, this motion would have had merit because his photo is clearer and

darker than the filler photos and he was the only person in the photo array who matched the description of the offender. Defendant argues that the suppression of both the physical lineup and photo array would have rendered the victims' in-court identification baseless as they identified him in court more than one year after the attack and had been drinking at the time of the attack, viewed the offender briefly, and blacked out after being struck on the head. In view of the alibi evidence, defendant submits there is a reasonable probability the outcome of his trial would have been different had the photo array been suppressed.

¶ 23 The State responds that the photo array identification was properly admitted at trial, and moreover, the victims could identify defendant independently of the photo array and physical lineup. The State also argues that other evidence implicated defendant, and that his alibi evidence was properly rejected by the trial court.

¶ 24 As an initial matter, the parties dispute the standard of review that applies to claims for ineffective assistance of counsel. Defendant urges that we review this issue *de novo*, while the State contends that a more deferential standard of review applies. Whether defense counsel provided ineffective assistance is subject to a bifurcated standard of review, in which a reviewing court defers to the trial court's findings of fact unless they are against the manifest weight of the evidence but assesses *de novo* the ultimate legal issue of whether counsel's omission establishes an ineffective-assistance claim. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009).

¶ 25 A claim for ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. Under this test, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Id*. Where a defendant alleges that counsel was ineffective for failing to file a motion to suppress evidence, the defendant must overcome the "strong presumption" that counsel's decision was the result of sound trial strategy. *People v. Little*, 322 Ill. App. 3d 607, 611 (2001) (whether to file a motion to suppress is matter of trial strategy). Additionally, the defendant must show there was a reasonable probability that the motion would have been granted and the outcome of the proceedings would have been different had the evidence been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). Counsel is not incompetent for failing to file a futile motion to suppress. *Id*.

¶ 26 When challenging the propriety of a pretrial identification procedure, the defendant bears the burden of proving that the procedure was unnecessarily suggestive and created a substantial likelihood of misidentification. *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 39. The State may rebut defendant's showing by "clear and convincing evidence that the witness is identifying the defendant based on his or her independent recollection of the incident." *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). Courts look to the totality of the circumstances when reviewing a claim of an unnecessarily suggestive identification. *Lawson*, 2015 IL App (1st) 120751, ¶ 39. Where the challenged identification procedure is a photo array, individuals selected for the array lineup need not be physically identical. *People v. Allen*, 376 Ill. App. 3d 511, 521 (2007).

¶ 27 Turning to the present case, defense counsel was not ineffective for failing to challenge the victims' identification of defendant in the photo array. We have viewed the array, which contains five black and white images of African American men. Defendant has a goatee and

short hair. Among the other men, the first has slightly longer hair than defendant and a moustache, the second is bald and lacks facial hair, the third has slightly longer hair than defendant but no moustache, and the fourth has a moustache but is bald. These differences in appearance did not render the array improper, as arrays depicting more pronounced physical differences between the defendant and the fillers have been found acceptable. *People v. Kubat*, 94 Ill. 2d 437, 472 (1983) (only the defendant wore glasses); *People v. Smith*, 160 Ill. App. 3d 89, 92 (1987) (only the defendant had blonde hair and was depicted without a shirt); *People v. Harrell*, 104 Ill. App. 3d 138, 144-45 (1982) (defendant had longer hair than the fillers).

¶ 28 Further, although defendant's image does appear somewhat clearer and has a darker background than the other images, we do not find defendant "simply stands out" as he claims. To the contrary, this court has determined that photo arrays were proper where the defendant's photo had a different background (*Harrell*, 104 Ill. App. 3d at 144-45) or was "noticeably darker" than the filler photos (*People v. Summers*, 49 Ill. App. 3d 70, 74-75 (1977)). As the photo array in this case was not unnecessarily suggestive, a motion to suppress the array would not have been successful. Consequently, defense counsel was not deficient for failing to bring the motion and defendant's claim of ineffective assistance is without merit. *Patterson*, 217 Ill. 2d at 438.

¶ 29 Moreover, even if we assume *arguendo* that defense counsel's performance was deficient, the suppression of the photo array would not have changed the outcome of defendant's trial where the victims had an independent basis for identifying defendant, apart from the photo array and physical lineup. *Brooks*, 187 Ill. 2d at 126. The reliability of an identification reflects (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions provided; (4) the witness's level of certainty at the time

of the identification procedure; and (5) the length of time between the crime and the identification. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

¶ 30 In this case, Barker testified that she saw defendant's face in a well-lit area while he struck her and took her purse. Soon afterwards, she spoke with police and described defendant's height, nose, facial hair, haircut, and shirt. Bultema testified that he saw defendant's face in bright lighting and subsequently described defendant's height and clothing to police. Notably, neither victim waivered in identifying defendant at any stage of proceedings, and the trial court found that the victims paid attention to defendant, accurately described him, and were not discredited by the length of time between the crime and subsequent identifications. The court was also aware that Barker and Bultema consumed alcohol and blacked out after sustaining blows to the head, but had discretion to judge their credibility against the alibi witnesses. *People v. Brown*, 2013 IL 114196, ¶ 48 (credibility of witnesses is question for trier of fact); *People v. Rincon*, 387 Ill. App. 3d 708, 724 (2008) (rejecting alibi testimony of witnesses who were related to defendant or had close ties to him, but failed to come forward before trial). In this case, we do not believe the trial court abused its discretion in accepting the victims' testimony. As the victims had an independent basis for making their identifications, defendant was not prejudiced by trial counsel's failure to move to suppress the photo array identification and defendant's claim for ineffective assistance of counsel fails.

¶ 31 Defendant next contends that four charges imposed against him are actually fines and should be offset by monetary credit for his presentence incarceration. The State correctly concedes that two of these charges, namely, the $50 court system fee and the $15 state police

operations fee, are fines subject to offset. 55 ILCS 5/5-1101(c)(1) (West 2012); 705 ILCS 105/27.3a(1.5) (West Supp. 2011); *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30 ("the court systems fee *** was actually a fine"); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 ("the State Police operations assistance fee is also a fine"). Both charges should therefore be offset by defendant's presentence incarceration credit. *Ackerman*, 2014 IL App (3d) 120585, ¶ 31; *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 15-16. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order accordingly.

¶ 32 We also find, contrary to defendant's argument, that neither the $2 State's Attorney records automation fee nor the $2 Public Defender records automation fee constitutes a fine. 55 ILCS 5/4-2002.1(c) (West 2012); 55 ILCS 5/3-4012 (West 2012). This court has found the State's Attorney fee is not punitive in nature, but rather, "is intended to reimburse expenses related to automated record-keeping systems." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63. Using the same reasoning, we find the Public Defender records automation charge is also a fee. *Id*. ¶ 65 (due to similar statutory language, "both charges constitute fees"). Accordingly, as only fines are subject to offset (*People v. Jones*, 223 Ill. 2d 569, 580 (2006)), neither records automation fee is offset by defendant's presentence incarceration credit.

¶ 33 For the foregoing reasons, we affirm defendant's convictions for robbery and aggravated battery and order the clerk of the circuit court to correct the fines and fees order in accordance with this order.

¶ 34 Affirmed; fines and fees corrected.