2017 IL App (2d) 140875-U
No. 2-14-0875
Order filed March 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY MILLER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 13-CF-2720 Honorable Fernando L. Engelsma, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel was not ineffective for failing to challenge the substantive admission of a surveillance video: in light of the other evidence against defendant, there was no reasonable probability that, had counsel done so, the jury would have acquitted him; (2) defense counsel was not ineffective for failing to challenge evidence as hearsay, as the evidence was not necessarily hearsay and thus was not subject to attack as such.

¶ 2 After a jury trial, defendant, Anthony Miller, was convicted of armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)) and sentenced to eight years' imprisonment. On appeal, defendant claims that his counsel was ineffective for failing to object to (1) the substantive admission of a surveillance video recording and (2) a police officer's testimony about what defendant's

coworker said regarding when defendant went to lunch that day. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, Lincoln Schweizer testified that he was at the Road Ranger in South Beloit to fax his bill to the trucking company for which he worked. As he was waiting to get confirmation from his company, he decided to use the men's bathroom. While walking to the bathroom at about 12:42 p.m., Schweizer saw defendant, whom he described as an African-American in his twenties, taller than six feet, very skinny, and wearing black pants and a white tank top, walking from the bathroom. Schweizer, who is Caucasian, said "hey" to defendant. Schweizer, who testified that he got a "[p]retty good chance" to look at defendant, saw defendant for about five seconds. Right before Schweizer was going to walk out of the bathroom, defendant, whom Schweizer recognized as the man he saw earlier, came into the bathroom. Schweizer observed defendant for about five seconds before defendant kicked Schweizer's feet out from under him. Schweizer fell to the floor, and as he did, his glasses, which he wore for severe nearsightedness, fell off of his face. Defendant bent down, holding a box cutter with a reddish handle "below [Schweizer's] neck, sort of, at [his] breast bone," and told Schweizer not to get up. Defendant then retrieved Schweizer's wallet from his pocket; took out the 10 one-dollar bills Schweizer had; and threw Schweizer's wallet on the floor.

¶ 5 Approximately 30 to 45 minutes after the incident, defendant was brought back to the Road Ranger. Schweizer identified defendant as the man who had robbed him.

¶ 6 Toni Lenon testified that she was the general manager at the Road Ranger. When asked how the surveillance camera operated, Lenon, who had worked with the security system for 11 years, responded:

> "Um, we just go back on our back computer, my office computer. We pull up an icon that says Rapid Eye. It brings up 14 to 15 different cameras throughout the entire store. And I'm able to view one at a time or all of them at one time."

¶ 7 Lenon "believe[d]" that the surveillance footage is saved for 30 days. She also "believe[d]" that the Road Ranger's home office can download or burn recordings onto a DVD. Lennon assumed that, when recordings are burned onto a DVD, the recordings are taken from all of the cameras in the store.

¶ 8 Lenon testified that she was working at the Road Ranger when Schweizer was robbed in the men's bathroom. After the incident, the South Beloit police, who responded to a 911 call, asked Lenon if they could view the security footage. When Lenon viewed the video with the police, she believed that the video accurately depicted what had happened in the store. Lenon was shown People's exhibit 1, which is a recording of the surveillance video taken when Schweizer was robbed, and she testified that that was the same recording she viewed the morning of trial. The recording was admitted, without limitation.

¶ 9 The recording shows various images throughout the Road Ranger. They purport to show defendant and Schweizer, who identified himself and defendant when he testified and was shown the video. Defendant is wearing a white or very light-colored tank top, and it appears that he is wearing a black skull cap or possibly a "doo-rag" on his head. At some point, defendant, with a container in his hands, exits the game room; walks down the hall past the men's bathroom; and encounters Schweizer as he is walking down that hallway. Schweizer enters the bathroom and then defendant returns with the container in his hands, enters the bathroom, and leaves a short time later. After that, defendant returns to the bathroom without the container, enters the bathroom, remains there for several minutes, and runs out the bathroom door and down the

hallway. Schweizer exits, and defendant is seen leaving the store's rear exit. The recording is not completely in focus and, given that the cameras are mounted on the ceilings or high up on the walls of the Road Ranger, the images depicted are a distance away. Nevertheless, the recording does show defendant's face right before he leaves the store.

¶ 10 William Curry, a maintenance man at the Road Ranger, testified that he was at work at 12:40 p.m., throwing some garbage in the dumpster, when he saw defendant running quickly out the back door. Defendant, whom Curry described as weighing 170 pounds, being in his mid-twenties to mid-thirties, and standing approximately six feet tall, ran to the warehouse for Axium Foods, across the street, about 70 to 75 yards away, where defendant worked. Curry recognized defendant, because he and defendant had smoked cigarettes before work four or five times. When Curry saw defendant, Curry did not know that Schweizer had been robbed in the Road Ranger. Curry indicated that, when he saw defendant running from the Road Ranger, defendant was wearing baggy pants and a light-gray tank top. Curry also testified that defendant was not limping.

¶ 11 Approximately 15 to 20 minutes after defendant ran out of the Road Ranger, he was brought back to the store. At that time, Curry noticed that defendant was wearing a hoodie.

¶ 12 Terry Doyle worked with defendant and five or six other people on the docks at the Axium Foods warehouse on September 30, 2013. Doyle and defendant were the only black employees there that day. Although defendant was a temporary employee at Axium, Doyle was not. Thus, Doyle had a locker at the warehouse where he kept his things, including a box cutter. He did not remember defendant using a box cutter that day.

¶ 13 On the day Schweizer was robbed, which Doyle believed was a Monday, defendant was wearing a black sweater or pullover. Doyle indicated that, when it got warm that day, defendant

took the pullover off and wore just the light-colored tank top he had on underneath. After the 30-minute lunch break ended at about 12:35 or 12:40 p.m., defendant, who was sweating a bit and wearing the pullover again, came to Doyle and told him that the police were outside. Defendant left, the police spoke to Doyle, and after Doyle told them that defendant was the only other black man at Axium that day, Doyle escorted the police to the back of the warehouse, where defendant was loading a truck. At the request of the police, defendant lifted up his pullover, revealing that he was not wearing a tank top.

¶ 14 Arnulfo Alarcon was also working with defendant at Axium on September 30, 2013. At lunchtime that day, about noon, Alarcon went to a McDonald's about five minutes away. As he was driving there, he saw defendant walking to the Road Ranger. When Alarcon returned to Axium, about 12:20 p.m., defendant was there, and defendant asked Alarcon if he had a $10 bill that defendant could exchange for 10 $1 bills that defendant had. Alarcon agreed to the exchange, explaining that he knew that defendant would use the money to buy lottery tickets.

¶ 15 Alarcon was shown the recording taken at the Road Ranger. On a frozen frame of that recording, Alarcon identified defendant as the man seen leaving the rear exit of the Road Ranger. This still shot revealed that defendant left at 12:44:23 p.m.

¶ 16 Officer Waylon Weber responded to a 911 call at the Road Ranger in South Beloit at about 12:45 or 12:47 p.m. Weber spoke to Schweizer and Doyle before confronting defendant within seven minutes after he received the dispatch. Defendant, who was working farther back in the dock area, was wearing jeans and a black shirt. Although, in Weber's opinion, it was not particularly hot that day, Weber noticed that defendant was sweating a lot. When defendant lifted his shirt, he was not wearing anything underneath.

¶ 17 Weber asked defendant where he had gone to lunch that day, and defendant told him that he had smoked a cigarette in his car. Although defendant indicated that he did not go to the Road Ranger at lunchtime, he told police that he had gone there that morning.

¶ 18 Officer Daniel Roggenbuck also responded to the 911 call. Roggenbuck eventually went to the Axium warehouse, where he spoke to defendant. Defendant, who was sweating heavily, was taken into custody, and when he was, Roggenbuck told defendant that he had been identified as someone who was involved in a robbery in the men's bathroom at the Road Ranger. Defendant told Roggenbuck that he had been in the game room, not the bathroom, but he did not tell Roggenbuck when that was. Roggenbuck also discovered that defendant had a $10 bill in his wallet. The next day, the manager of Axium showed Roggenbuck a box cutter, gray tank top, and black doo-rag that the second-shift workers had found.

¶ 19 Brad Miller, the first-shift assistant manager at Axium, testified that he was working on September 30, 2013, when a tank top, box cutter, and doo-rag were found in the warehouse area. Miller testified that box cutters are not common in the warehouse, as most workers use pocket knives. Miller also stated that, although there is no set time for the half-hour lunch break, workers usually break for lunch anytime between 12 and 12:30 p.m. Temporary employees like defendant must report to the first-shift supervisor, Bruce Nordlof, when they leave for lunch. Miller was shown a still shot from the surveillance video recording, and he identified defendant as the man seen in the still shot.

¶ 20 Nordlof testified that he was familiar with defendant and knew where he worked in the warehouse. Although that area was air-conditioned, Nordlof stated that it did get a little warm, and he indicated that box cutters are not allowed in that area. Nordlof also stated that, although lunchtimes varied by as much as 15 minutes, lunch generally was from 12 to 12:30 p.m. Nordlof

explained that the lunch break could be from 12:15 to 12:45 p.m. Nordlof could not remember the exact time employees had lunch on September 30, 2013, but he thought that it was later than noon. When employees return to work after lunch, they are supposed to check in with Nordlof. Defendant did not check in with Nordlof that day. Nordlof was shown the surveillance recording, and he identified defendant as being on that recording. Nordlof stated that he remembered defendant wearing a tank top and doo-rag the morning of September 30, 2013.

¶ 21 The State rested, and defendant and his wife, Amy Miller, testified for the defense. Amy testified that she had four jobs. Additionally, she and defendant operated a lawn care business over the weekends. Amy stated that, because of these jobs, she and defendant were not hurting for money. Amy also testified that defendant got paid every Friday. Although Amy was not with defendant at lunchtime on September 30, 2013, she stated that she and defendant generally went to the Road Ranger for lunch, where they would play video gambling games.

¶ 22 Defendant testified that he was 38 years old on September 30, 2013, weighed 235 pounds, and is six feet four inches tall. When Schweizer was robbed, defendant was not at the Road Ranger, as he had had lunch at 11:30 a.m. that day. Defendant stated that he went to lunch at the Road Ranger, where he played slots. Defendant left the Road Ranger at around 12:10 p.m. When the lunch break ended, defendant did not tell Nordlof that he was back from break, as none of the temporary employees did that. Defendant denied wearing a doo-rag or white tank top that day, being at the Road Ranger at 12:45 p.m., carrying a box cutter, robbing Schweizer, or running out of the Road Ranger. Defendant explained that, due to an injury, he cannot run.

¶ 23 When defendant returned to Axium at around 12:13 p.m., which defendant admitted was a little late, he used the bathroom. He also exchanged a $5 bill and five $1 bills for a $10 bill that Alarcon had. Defendant stated that he did so because he wanted to buy lottery tickets that he

would scratch off throughout the day when there were no trucks to load. He then returned to work at about 12:23 p.m. Defendant and a man named "Dan Danger" were loading a truck for about 20 minutes before the police arrived.

¶ 24 In rebuttal, the State recalled Weber. The State asked Weber about Dan Danger and a man named John Skinner. Weber indicated that he talked to Skinner that day. Skinner also worked at Axium. Weber was asked, "Did [Skinner] indicate to you that the defendant went to lunch at 11:30?" Weber replied, "That the defendant went to the—no, nope." Defendant never objected to this statement.

¶ 25 Later, the court commented on Weber's rebuttal testimony. Specifically, the court noted:

> "And there was [sic] questions brought out on rebuttal on what this individual[, Skinner,] said. I really can't consider that. That was hearsay, it should have been objected to. Even though it wasn't, I can't consider that as evidence that this person, this Skinner person was asked specifically what time did [defendant] go to lunch[.]"

¶ 26 Defendant rested, and the parties proceeded with closing arguments. The State commented that four individuals identified defendant from the surveillance video. Defendant attempted to discredit the video, arguing that the video was "ambiguous" and "not clear at all." Defendant also claimed that the perpetrator seen on the video did not match the description Schweizer had given, as defendant was bigger, older, slower, and heavier. The jury found defendant guilty of armed robbery. Defendant filed a posttrial motion, taking issue with, among other things, the poor quality of the video. The trial court denied the motion, finding that the quality of the video was a "pretty subjective-type of finding." Defendant was sentenced, and this appeal followed.

¶ 27 II. ANALYSIS

¶ 28 A. Forfeiture

¶ 29 On appeal, defendant argues that his counsel was ineffective. Before addressing that issue, we consider the State's claim that defendant forfeited review of these issues, as he did not raise them in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). Ordinarily, in order to preserve an issue for our consideration, the appealing party must both object to the claimed errors at trial and raise them in a posttrial motion. *People v. Naylor*, 229 Ill. 2d 584, 592 (2008). However, this procedure does not apply to a contention that counsel was ineffective. See *People v. Wood*, 2014 IL App (1st) 121408, ¶¶ 53-56. Accordingly, because defendant raises claims related only to his counsel's ineffectiveness, we deem the State's forfeiture argument unavailing.

¶ 30 B. Ineffective Assistance of Counsel

¶ 31 Turning to the issues defendant raises on appeal, we note that claims of ineffective assistance of counsel are assessed under a two-part test. *People v. Rogers*, 2015 IL App (2d) 130412, ¶ 67 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish that counsel was ineffective, a defendant must prove that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, absent that error, the trial's outcome would have been different. *Id.* As to the first prong, a strong presumption exists that an attorney's performance fell within the wide range of reasonable professional assistance. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 24. However, this presumption may be overcome where no reasonably effective defense attorney, when confronted with the circumstances of the defendant's trial, would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002). As to the second prong, a reasonable probability exists if counsel's deficient performance rendered the result of the trial unreliable or the

proceeding fundamentally unfair. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Because a defendant must prove both prongs to prevail, we may resolve an ineffective-assistance claim under either prong. *Rogers*, 2015 IL App (2d) 130412, ¶ 67.

¶ 32 Whether counsel provided ineffective assistance presents a mixed question of law and fact. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). Thus, we defer to the findings of fact the trial court made, but we review *de novo* whether counsel's omission supports an ineffective-assistance claim. *Id.* Here, because the trial court never addressed the ineffective-assistance claims raised, we review *de novo* whether counsel was ineffective. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 33 Defendant advances two ways in which his counsel was ineffective. Specifically, he claims that his counsel provided ineffective assistance when she failed to object to (1) the substantive admission of the surveillance video, based on a lack of foundation and (2) the alleged hearsay testimony Weber provided in rebuttal when he was asked whether Skinner told him that defendant went to lunch at 11:30 a.m. We consider each contention in turn.

¶ 34 1. Surveillance Video

¶ 35 The first issue we address is whether counsel was ineffective for failing to object to the substantive admission of the surveillance video, based on a lack of foundation. A video recording is not self-authenticating. See Ill. Rs. Evid. 901, 902 (eff. Jan. 1, 2011). Thus, it is admissible only if the party seeking its admission lays a foundation that ensures its accuracy and reliability. *People v. Taylor*, 2011 IL 110067, ¶ 35.

¶ 36 Video evidence may be admitted for two purposes. *Id.* ¶ 32. First, a recording may be admitted for demonstrative purposes if a witness can testify that it constitutes a fair and accurate representation of some object or event. *Id.* When a recording is admitted for demonstrative

purposes, it serves as merely a visual aid and cannot be used as substantive evidence to establish a defendant's guilt. *People v. Flores*, 406 Ill. App. 3d 566, 573 (2010). Second, under the "silent-witness" theory, a video may be admitted as substantive evidence. *Taylor*, 2011 IL 110067, ¶ 35. Under this theory, the party introducing it must establish that the process that produced the video was reliable. *Id.*

¶ 37 Here, defendant does not challenge the use of the video as demonstrative evidence with regard to Schweizer's testimony. Rather, defendant argues that, because a proper foundation was not laid, the video should not have been admitted as substantive evidence.

¶ 38 We hold that counsel was not ineffective, as there is no reasonable probability that, even had counsel secured the substantive exclusion of the video, the jury would have acquitted defendant.

¶ 39 Even without the video, the State built a powerful case against defendant. We begin with Schweizer's identification. Generally, the strength of an identification is measured by (1) the victim's opportunity to view the offender at the time of the offense; (2) the victim's degree of attention; (3) the accuracy of the victim's prior description; (4) the victim's level of certainty at the identification confrontation; and (5) the length of time between the offense and the confrontation. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). By these measures, Schweizer's identification was strong. He initially saw defendant as he was making his way to the bathroom, focusing on defendant for a few seconds and offering a pleasantry. He thus was well prepared to recognize defendant when defendant met him in the bathroom only moments later and kicked him to the floor. Although Schweizer then lost his glasses, without which he was "pretty much blind," the obvious inference was that it was defendant who, having kicked him to the floor, went on to rob him. Additionally, Schweizer identified defendant at a confrontation that took

place within an hour. Both then and at trial, he was "100 percent" sure that defendant was the offender. Although Schweizer's description of the offender to the police does appear to have understated defendant's height and weight to some degree, his identification, on the whole, was strong. And as has often been noted, "a single witness'[s] identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Id.*

¶ 40 Defendant's attacks on Schweizer's identification are largely based on generalities: that identifications have been increasingly recognized as fallible, that they are particularly so when the victim and the offender were not previously acquainted and were of different races, that show-up confrontations are suggestive, and that a victim's certainty does not necessarily guarantee accuracy. Given these propositions, were Schweizer's identification uncorroborated by other evidence, we might be inclined to call the case close. But the State presented much more than that.

¶ 41 Indeed, perhaps most compelling is that defendant was identified not only by Schweizer but also by Curry, who saw him running from the Road Ranger at about the time of the offense. To the extent that Schweizer's previous unfamiliarity with defendant might have cast doubt on his identification, there was no such issue with Curry's. Thus, together, Schweizer and Curry all but destroyed defendant's theory of the case, which was that he had left the Road Ranger about a half-hour earlier.

¶ 42 Further, Alarcon testified that defendant gave him 10 one-dollar bills in exchange for a $10 bill. Although he testified that this exchange occurred at around 12:20 p.m., he admitted that he was merely guessing about the time. The fact that defendant relieved himself of 10 singles, which Schweizer also had been carrying at the time of the robbery, was additional circumstantial

evidence against the defendant. Defendant attempted to evade it by testifying that he gave Alarcon a five-dollar bill and only five singles; however, his explanation for why he did so—that he purchases 10 dollars' worth of "Bingo scratch tickets"—made very little sense. Indeed, there appears to be no logical reason why he needed a $10 bill to do so. (Of course, he also testified that, around the time of the offense, he was unloading a truck with a man named "Dan Danger," who could not be located later.) See *People v. Berry*, 198 Ill. App. 3d 24, 30 (1990) ("When a defendant elects to testify in his own behalf, it is incumbent upon him to tell a reasonable story or be judged by its improbabilities."). Finally, although, as defendant points out, the clothes and box cutter found at Axium were not specifically tied to defendant, their presence there was another unfortunate coincidence for defendant.

¶ 43 As noted, Schweizer's identification alone was sufficient to sustain defendant's conviction. When that identification was corroborated by the evidence noted above, the totality of the evidence established the guilt of the defendant well beyond a reasonable doubt. Although the video of course was powerful evidence, we find there was no reasonable probability the jury would have acquitted defendant had the video not been admitted. Thus, defendant's claim of ineffective assistance fails for lack of prejudice.

¶ 44 However, with respect to the admission of the video, we find counsel's performance here somewhat troublesome. The record does not reflect any apparent reason why counsel would not have objected to the admission of the video, and we make no determination as to whether the video was properly admitted here. Still, because there was no prejudice, counsel was not ineffective for failing to challenge the video's substantive admission.

¶ 45 2. Hearsay Statement

¶ 46 Defendant next contends that counsel was ineffective for failing to object to Weber's statement concerning what Skinner told him about when defendant went to lunch on the day of the robbery. As noted, Weber's statement, "[t]hat the defendant went to the—no, nope," was made in response to the question, "[d]id [Skinner] indicate to you that the defendant went to lunch at 11:30." Defendant claims that Weber's statement was hearsay in that it was offered to prove the truth of the matter asserted, *i.e.*, "that [defendant] did not go to lunch at 11:30."

¶ 47 Testimony is considered hearsay if it is comprised of out-of-court statements "offered to prove the truth of the matter asserted." *People v. Olinger*, 176 Ill. 2d 326, 357 (1997); see also Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). Because of their lack of reliability, hearsay statements generally are inadmissible. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001); see also Ill. R. Evid. 802 (eff. Jan. 1, 2011). Statements that may be interpreted as meaning a number of different things are not considered hearsay if construing them as out-of-court statements offered to prove the truth of the matter asserted amounts to pure conjecture. See *People v. Harris*, 70 Ill. App. 3d 363, 367 (1979). The rule against admitting hearsay requires more than a possibility that the out-of-court statements *could* be offered to prove the truth of the matter asserted. See *id.*

¶ 48 Here, Weber's statement could mean many different things. For example, as defendant notes, the statement could mean "(1) Skinner was not asked what time [defendant] went to lunch, (2) Skinner was asked this question but did not respond, or (3) Skinner was asked this question and stated that [defendant] went to lunch at a different time." Given the fact that Weber's statement could mean a number of different things, some of which have nothing to do with whether defendant went to lunch at 11:30 a.m., we cannot conclude that Weber's statement was hearsay. Thus, we cannot hold that counsel was ineffective for failing to challenge it as such.

¶ 49 III. CONCLUSION

¶ 50 For the above-stated reasons, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. See 55 ILCS 5/4-2002(a) (West 2014); *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 51 Affirmed.