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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 C6 60969
	)	
JAMES HUDSON,	)	
	)	The Honorable
Defendant-Appellant.	)	Brian Flaherty,
	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Mason and Justice Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant’s armed robbery conviction affirmed over claims that the State failed to prove beyond a reasonable doubt his identification as the offender and that he was denied a fair trial. Cause remanded to the trial court to correct defendant’s mittimus to reflect 531 days of presentence custody credit.

¶ 2 Following a jury trial, defendant James Hudson was found guilty of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)) and sentenced to 25 years’ imprisonment. On appeal, Hudson contends that the State failed to prove him guilty beyond a reasonable doubt because his conviction was based “exclusively on a fleeting image of a masked figure on a

surveillance video and the unreliable identification testimony” of the victim, Latanya Holiday. Hudson also contends that he was denied a fair trial because (1) the trial court admitted the surveillance video into evidence without a sufficient foundation, and trial counsel was ineffective for failing to object; (2) the trial court permitted Lieutenant Brad Bailey to offer lay opinion identification testimony about the video without following the procedural safeguards set forth in *People v. Thompson*, 2016 IL 118667, ¶ 59; (3) the trial court allowed the State to introduce irrelevant and prejudicial testimony regarding Hudson’s nickname; (4) the State committed prosecutorial misconduct during closing and rebuttal arguments; and (5) the trial court refused his request for a jury instruction on simple robbery. Hudson finally contends that his mittimus must be corrected to reflect 531 days of presentence custody credit.

¶ 3

#### BACKGROUND

¶ 4

Before trial, Hudson filed a motion *in limine* seeking to bar the introduction of evidence about his prior criminal history, his nickname “Shorty Buck” or “Buck,” his gang membership, any prior knowledge of him based on previous arrests or investigations, and any opinions about who appears in the surveillance video. The trial court granted Hudson’s motion in part but declined to bar the introduction of evidence concerning his nickname or lay opinion identification testimony based on the surveillance video.

¶ 5

At trial, 25-year-old Chicagoan Latanya Holiday testified that in June 2012, she began a telemarketing job in Lansing, Illinois. She rode a CTA train, then a Pace bus to work. She typically worked until about 10 or 10:30 p.m. and rode the last bus home.

¶ 6

On June 27, Holiday finished work at 11 p.m. and a coworker dropped her off at the Riverdale Metra Station because she could not catch the last Pace bus home. Holiday used the vending machine to purchase a ticket and speak to customer service, who said the next train was

at 12:40 a.m., about an hour later. Holiday waited alone on the raised Metra platform, which she described as open and brightly lit. She held her purse in one hand and her cell phone in the other. At 11:50 p.m., she noticed a masked man with a gun in his right hand, running up the stairs to the platform, and she started screaming. The man approached her, placed the gun in her face, and said, “Bitch, shut up before I kill you.” Holiday knew the silver object that the man pointed at her was a gun because she had seen guns many times before. She stated that the man lifted his mask to the top of his head each time he spoke to her. Holiday identified defendant in court as the person behind the mask who demanded her purse and cell phone. She complied because he threatened to shoot her in the face. Holiday stated that the encounter lasted for what felt like an hour, during which time Hudson revealed his entire face to her “a good six, seven times.” Holiday stated that she ran downstairs screaming for help, and a woman called the police. When Metra police arrived, Holiday gave a description of Hudson to Sergeant O’Neill.

¶ 7 During school on the morning of July 31, Holiday received a call from Metra Police Investigator David Robertson asking to talk about the incident. She agreed and Robertson met her at school, accompanied by another Metra police officer. Before viewing a series of photographs, Holiday read and signed a photo spread advisory form. She viewed the photographs and “couldn’t pick anyone out \*\*\* because the pictures were totally different from what I seen in person.” Later in the evening, Holiday received a call from Robertson and went to the Riverdale Police Department to view a physical lineup. She read and signed a lineup advisory form, then viewed a five-person lineup and positively identified Hudson as the person who robbed her. She stated that she recognized Hudson based on “[h]is face and from when he lifted the mask up, I remember seeing his lips. His eyes—I remember the same exact eyes, and he had a scar on his face—under his eye actually.”

¶ 8 When asked on cross-examination whether Investigator Robertson told her “he had the offender in custody” before she viewed the physical lineup, Holiday answered, “Yes.” She nevertheless maintained that she had an adequate opportunity to observe the suspect, whom she had described as a right-handed, Black male, 5 feet 10 inches tall, with a dark brown complexion, braids, a scar, and wearing a dark shirt and a blue dust mask. Holiday added on redirect examination that she had described the suspect as weighing about 170 pounds.

¶ 9 Sergeant Michael O’Neill of the Riverdale Police Department testified that shortly after midnight on June 27, he and his partner responded to a dispatch call about a robbery at the Riverdale Metra Station. There, Holiday described what happened and gave a description of the suspect. O’Neill acknowledged on cross-examination that although Holiday told him that the suspect pointed a gun at her, Holiday never specifically said the suspect put a gun in her face. On redirect examination, O’Neill added that Holiday also described the suspect as slim and in his thirties.

¶ 10 Metra Police Investigator David Robertson testified that he circulated screenshots from the Metra surveillance video of the incident throughout Riverdale. He also made several copies of the surveillance video and asked a detective at the Riverdale Police Department to share the video with his fellow officers. On July 28, Robertson received a dispatch call that someone at the Riverdale Police Department had information about the suspect, who went by the street name “Shorty Buck.” Robertson identified People’s exhibit 11 as the DVD copy of the surveillance video that he gave Riverdale police. He stated that the video cameras at the Riverdale Metra Station ran continuously and were functioning properly on the date of the incident. He identified People’s exhibits 8, 9, and 10 as screenshots or still images captured by the video cameras. The DVD was admitted into evidence without objection and published to the jury.

¶ 11 The surveillance video is included in the record on appeal. The video is in monochrome and has no sound. The picture quality is fair and shows the masked suspect walking toward the stairs to the Metra platform while reaching into his right pants pocket. Moments later, the masked suspect runs down the stairs with a woman's purse in his left hand.

¶ 12 On July 30, Robertson met with Lieutenant Brad Bailey at the Riverdale Police Department and showed him the still images and surveillance video. After meeting with Bailey, Robertson began looking for Hudson. The next morning, Robertson met with Holiday and showed her a series of photographs that included Hudson, but she did not identify a suspect. That same day, Robertson arrested Hudson and Holiday positively identified him in a physical lineup at the Riverdale Police Department. On August 1, Robertson went to Hudson's parents' house and obtained written consent to search the house, but no weapons or proceeds from the armed robbery were found.

¶ 13 Lieutenant Brad Bailey of the Riverdale Police Department testified that during the morning roll call on July 31, he viewed still images of the incident and recognized Hudson, who was his neighbor for "a few years" about 15 years ago. Since then, he had seen Hudson at least fifty occasions and most recently three days prior. Bailey contacted Investigator Robertson, then met him at the Riverdale Police Department and viewed the surveillance video of the incident. Over Hudson's objection that it was repetitive, the surveillance video was republished to the jury and Bailey identified Hudson as the person in the surveillance video. Specifically, when asked whom he recognized in the still images, Bailey answered, "James Hudson." Bailey added that Hudson went by the nickname "Shorty Buck."

¶ 14 After Bailey's testimony, the State moved its exhibits into evidence without objection and rested. Hudson presented no witnesses and moved for a directed verdict, which the trial court

denied. Following closing arguments and jury instructions, the jury found Hudson guilty of armed robbery.

¶ 15 Hudson filed a motion for a new trial alleging, in pertinent part, that the State failed to prove him guilty beyond a reasonable doubt, and that the trial court erred in failing to give a lesser included jury instruction for robbery and in allowing “Bailey’s testimony that included his identification of the defendant in the video surveillance tape.” Hudson added that the State made prejudicial, erroneous statements during closing argument and, generally, he did not receive a fair and impartial trial. The trial court denied Hudson’s motion and sentenced him to 25 years in prison. Hudson filed this appeal after the trial court denied his motion to reconsider sentence.

¶ 16 ANALYSIS

¶ 17 Sufficiency of the Evidence

¶ 18 Hudson contends that the State failed to prove him guilty beyond a reasonable doubt because his conviction was based solely on the unreliable identification testimony of Holiday and a fleeting masked figure in a surveillance video. He argues that Holiday had less than thirty seconds to observe the suspect while her attention was focused on a gun placed inches from her face. He argues that his identification by Holiday was “marred” by a suggestive physical lineup because he was the only person who also appeared in the photographs that Holiday viewed earlier that day, and he was one of two men wearing cornrows during the lineup, “which took place only after police told Holiday that they ‘had the offender in custody.’”

¶ 19 When a defendant challenges the sufficiency of the evidence, the relevant question on review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S.

307, 319 (1979)). It is for the jury to determine the credibility of the witnesses, to weigh their testimony, to resolve evidentiary conflicts, and to draw reasonable inferences from the evidence. *People v. Green*, 2017 IL App (1st) 152513, ¶ 102. We will not substitute our judgment for that of the jury on such matters (*id.*), nor will we set aside a criminal conviction unless the evidence is so unsatisfactory as to create a reasonable doubt of defendant's guilt (*People v. Austin*, 2017 IL App (1st) 142737, ¶ 67).

¶ 20 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Identification of the accused by a single witness is sufficient to sustain a conviction, even in the presence of contradictory alibi testimony, provided that the witness had an adequate opportunity to view the accused and the in-court identification is positive and credible. *Id.* Generally, we evaluate the reliability of identification testimony using the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's 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 identification confrontation. *Slim*, 127 Ill. 2d at 307-08. Moreover, courts consider the totality of the circumstances when reviewing the reliability of an identification (*People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 24), and identification testimony is “strengthened to the extent of [the witness'] prior acquaintance with the accused.” *People v. Zarate*, 264 Ill. App. 3d 667, 674 (1994) (quoting *People v. Milam*, 80 Ill. App. 3d 245, 251 (1980)).

¶ 21 As to the first *Biggers* factor, Hudson asserts that Holiday's opportunity to view the suspect was severely limited by his dust mask and the gun he put in her face. Hudson also asserts

that the brevity of the incident, which lasted less than 25 seconds, further diminished Holiday's opportunity to observe the suspect. When evaluating whether a witness had an opportunity to view the suspect, courts consider "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), quoted in *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40.

¶ 22 Here, although the suspect wore a dust mask and placed a gun in Holiday's face, she was still able to briefly see the suspect's face, about six or seven times when he raised the mask to speak. This court has upheld identifications where the victims were only able to see part of the suspect's face. See, e.g., *People v. Hicks*, 134 Ill. App. 3d 1031, 1037 (1985) (even though defendant wore a mask, three witnesses briefly saw his face) and *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006) (defendant wore a bandana covering the lower part of his face). This court has also rejected claims that the brevity of an incident undermines an identification. See, e.g., *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 32 (despite brevity of shooting, two eyewitnesses had a clear view of the gunman under adequate conditions). Similarly here, although the armed robbery occurred quickly, Holiday had the opportunity to view the suspect under adequate conditions.

¶ 23 As to the other *Biggers* factors, Hudson cites various research studies, law review articles, and foreign jurisdictions about the unreliability of eyewitness identification. Hudson selectively quotes the statement of our supreme court in *People v. Lerma*, 2016 IL 118496, ¶ 24, that such research is "well settled, well supported," and ignores the rest of the statement that such research is "in appropriate cases a perfectly proper subject for expert testimony." See, e.g., *People v. Berrios*, 2018 IL App (2d) 150824, ¶ 27 (the defendant quotes authority from our supreme court, but does so only in part). This court has previously declined to consider such

authorities where the defendant did not offer an expert to testify about such research, and we see no reason to depart from that position here, where Hudson likewise did not present such testimony at trial. See *Tomei*, 2013 IL App (1st) 112632, ¶¶ 54-55. Put another way, we will not consider evidence that was never presented to or considered by the trial court. *People v. Morgan*, 2015 IL App (1st) 131938, ¶ 97 (and cases cited therein).

¶ 24 Hudson maintains that the physical lineup was “particularly” suggestive because Holiday was told that a suspect was in custody, he was the only person who also appeared in the photographs that Holiday viewed earlier that day, and he was one of two men wearing cornrows during the lineup. However, Hudson cites no authority for the idea that the identification is rendered unreliable simply because the witness knows that a suspect is in custody; such fact is not suggestive *per se* but merely states the obvious. *People v. Johnson*, 123 Ill. App. 3d 1008, 1013 (1984); see also *People v. Ortiz*, 2017 IL App (1st) 142559, ¶¶ 25-26 (finding pretrial identification procedures not unduly suggestive, noting the witness signed a lineup advisory form informing him that police had a suspect in custody but the suspect may or may not be in the lineup). Moreover, neither the mere fact that Hudson was the only person in both the photo arrays and the physical lineup (*People v. Ortiz*, 2017 IL App (1st) 142559, ¶ 26 (citing *People v. Johnson*, 149 Ill. 2d 118, 148 (1992))), nor the fact that he was one of two persons in the lineup with braided hair or cornrows, renders the lineup unduly suggestive (*People v. Joiner*, 2018 IL App (1st) 150343, ¶ 44). Equally unavailing is the fact that Holiday did not identify a suspect from the photo arrays because she positively identified Hudson in the physical lineup and again at trial as the person who robbed her at gunpoint. See *Ortiz*, 2017 IL App (1st) 142559, ¶ 26.

¶ 25 Admission of surveillance video and ineffective assistance of counsel

¶ 26 Hudson next contends that he was denied a fair trial because the trial court admitted the surveillance video without a sufficient foundation under the silent witness rule, and trial counsel was ineffective for failing to object on that ground. Hudson acknowledges that trial counsel employed “a strategy that attacked the reliability” of the surveillance video and hence “did not object to the court’s admission of the video.” He asks us to consider his claim under the plain error doctrine.

¶ 27 To preserve any alleged error for review, a defendant must specifically object at trial and raise the same issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The failure to satisfy either requirement constitutes waiver of the error on appeal. *Id.* at 186. “This rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant’s lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level.” *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

¶ 28 “*Waiver* is the intentional relinquishment of a known right, whereas *forfeiture* is the failure to make a timely assertion of a known right.” (Emphasis added.) *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011). “In the course of representing their clients, trial attorneys may (1) make a tactical decision not to object to otherwise objectionable matters, which thereby *waives* appeal of such matters, or (2) fail to recognize the objectionable nature of the matter at issue, which results in procedural *forfeiture*.” (Emphasis added.) *Id.* The distinction between *waiver* and *forfeiture* is important because if Hudson has waived the issue, we need not review his claim for plain error. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 21.

¶ 29 Where, as here, Hudson argues that the State failed to lay the proper technical foundation for the admission of the surveillance video under the silent witness rule, and he concedes that

trial counsel made a tactical decision not to object on that ground and attack the reliability of the surveillance video, the claim is considered waived on appeal and we need not review it for plain error. *Id.*; *Bowens*, 407 Ill. App. 3d at 1098; *People v. Fields*, 202 Ill. App. 3d 910, 915 (1990).

¶ 30 Lay opinion identification testimony and procedural safeguards

¶ 31 Hudson also contends that he was denied a fair trial because the trial court permitted Lieutenant Bailey to offer lay opinion identification testimony about the surveillance video without following the procedural safeguards set forth in *People v. Thompson*, 2016 IL 118667, ¶ 59. The State concedes that the trial court did not employ such procedural safeguards, but asserts that the error was harmless because of the overwhelming evidence of defendant's guilt.

¶ 32 In *Thompson*, 2016 IL 118667, ¶ 59, the Illinois Supreme Court held that when the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the trial court should provide the defendant an opportunity to question the officer outside the presence of the jury. The supreme court stated that to ease any concerns about invading the province of the jury, the trial court should instruct the jury "before the testimony and in the final charge to the jury," that it need not give any weight to such testimony, nor draw any adverse inference from the fact the witness is a law enforcement officer if that fact is revealed. *Id.* We review the trial court's decision to admit lay opinion identification testimony for an abuse of discretion. *Id.* ¶ 53.

¶ 33 Here, although the trial court erred in admitting Lieutenant Bailey's lay opinion identification testimony without certain procedural safeguards, the error was harmless given the overwhelming evidence of defendant's guilt, namely his positive identification by Holiday as the robber. See *id.* ¶ 67 ("any error in admitting this testimony was harmless").

¶ 34 Hudson nevertheless maintains that Lieutenant Bailey's identification testimony was inadmissible hearsay that went beyond the investigatory procedure exception to the hearsay rule.



fair trial or that the trial court abused its discretion by allowing his nickname to be admitted into evidence at trial. *Salgado*, 287 Ill. App. 3d at 446.

¶ 38                   Prosecutorial misconduct during closing and rebuttal arguments

¶ 39                   Hudson next contends that he was denied a fair trial because the State committed prosecutorial misconduct during closing and rebuttal arguments. Specifically, Hudson argues that during closing argument, the State misstated Holiday’s testimony by arguing that Holiday did not identify him from the photographs she viewed because “she wasn’t sure” and “didn’t want to rush” in making an identification. Hudson also argues that during rebuttal, the State improperly bolstered Lieutenant Bailey’s credibility by misstating that Hudson lived next door to Bailey for six years, when Bailey actually testified that Hudson was his neighbor for “a few years.”

¶ 40                   Although the State disagrees with Hudson’s assertion that he fully preserved this issue because it was not alleged with specificity in his posttrial motion, we construe waiver principles liberally in favor of the criminally accused. *Scott*, 2015 IL App (4th) 130222, ¶ 25. That said, the State concedes that Holiday “never explicitly stated that she ‘was not sure’” or that she “didn’t want to rush.” The State also admits that it “inadvertently misstated some facts” regarding how long Hudson and Lieutenant Bailey were neighbors.

¶ 41                   The State has wide latitude in closing argument, but the State must not make comments that misstate the law or facts of the case. *People v. Buckley*, 282 Ill. App. 3d 81, 89 (1996). Material misstatements can provide grounds for reversal if they substantially prejudice the defendant. *Id.* at 90. However, viewing the closing and rebuttal arguments in their entirety and in the context of the challenged remarks (*People v. Long*, 2018 IL App (4th) 150919, ¶¶ 96-100), we find the mistakes made by the State were minor and did not affect the fairness of Hudson’s trial. The mistakes were not sufficiently cumulative to constitute prejudicial error warranting



¶ 47 For the reasons stated, we affirm the judgment of the circuit court of Cook County on the jury verdict finding Hudson guilty of armed robbery. However, we remand the cause to the trial court to correct the mittimus to reflect the correct amount of presentence credit.

¶ 48 Affirmed; remanded with directions.