2011 IL App (1st) 081972-U

FOURTH DIVISION
Rule 23 Filed March 31, 2011
Modified Upon Denial of Rehearing September 1, 2011

No. 1-08-1972

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. 07CR11292
	)	
JOSEPH DIXON,	)	Honorable
	)	Michael P. Toomin,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Sterba[1] and Justice Lavin concurred in the judgment.

ORDER

HELD: Defendant's conviction upheld where: the State proved defendant's guilt beyond a reasonable doubt; defendant was not prejudiced by the State's discovery violation; the trial court's failure to comply with Supreme Court Rule 431(b) did not prejudice him; and the lineup identification procedure was not impermissibly suggestive.

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[1]Pursuant to Justice Gallagher's retirement, Justice Sterba has participated in the reconsideration of this case. He has reviewed all relevant materials, including the original order filed on March 31, 2011, and defendant's petition for rehearing.

¶1 Following a jury trial, defendant Joseph Dixon was convicted of attempt armed robbery and aggravated battery and sentenced to 20 years' and 5 years' imprisonment, respectively, the sentences to be served concurrently. Defendant appeals his convictions and the sentences imposed thereon, arguing: (1) the State presented insufficient identification testimony and failed to prove him guilty of the charged offenses beyond a reasonable doubt; (2) the trial court failed to eliminate prejudice caused by the State's discovery violation; (3) the trial court deprived him of his right to a fair and impartial jury when it failed to comply with the mandates of Illinois Supreme Court Rule 431(b) as amended in 2007, and inquire whether the jury members understood and accepted each of the principles of law articulated therein; and (4) the trial court erred in denying his pretrial motion to suppress lineup identification testimony because the lineup was unduly suggestive. On March 31, 2011, this court filed an order in which we rejected the arguments defendant raised on appeal and affirmed his conviction. Defendant subsequently filed a petition for rehearing. Upon review of the arguments raises in his petition, we again affirm defendant's conviction.

¶2 On April 27, 2007, Carol Moseley Braun was struck to the ground by a knife-wielding assailant in an effort to take her purse. Defendant was subsequently charged in connection with the offense. Specifically, he was charged with one count of attempt armed robbery (720 ILCS 5/8-4, 720 ILCS 5/18-2 (West 2006)), five counts of aggravated battery (720 ILCS 5/12-4(a), 720 ILCS 5/12-4(b) (West 2006)) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)).

¶3 Prior to trial, defendant filed a written motion to suppress identification testimony. In the

motion, defendant argued suppression was warranted because he was the only individual in the lineup conducted in connection with the offense who was wearing a dark hooded sweatshirt, an item of clothing worn by Braun's attacker. The trial court conducted a hearing on the motion.

¶4 At the hearing, Detective Joaquin Mendoza testified that he, Detective Louis Otero and Detective Sandy Bryant conducted a lineup on May 20, 2007, in an effort to ascertain whether Braun could identify her attacker. Detective Mendoza spoke to Braun before she viewed the lineup but they did not discuss any prior descriptions that she had given of the offender. Namely, they did not discuss the description Braun had given on April 28, 2007, to Detective Davis and Detective Anderson, wherein she indicated that her assailant had been wearing a black hooded sweatshirt and a scarf over his face at the time of the offense. Detective Mendoza indicated that he had not reviewed any of the police reports before assembling the police lineup and was not aware that the offender that Braun had described had been wearing a black hooded sweatshirt.

¶5 Defendant was part of a lineup with three other men and he was the only individual wearing a black hooded sweatshirt. All four men were instructed to look straight ahead and show their right and left profiles. After viewing the men, Braun requested defendant and one of the other participants to follow the same series of instructions. After viewing defendant and the second lineup participant, Braun identified defendant as her attacker. Detective Mendoza testified that Braun appeared tearful and was attempting to contain her emotions before identifying defendant. After making the identification, Braun indicated she was "thankful" the police had "gotten" him. At no time during the lineup was defendant asked to speak or to place

the hood of his sweatshirt over his head.

¶6 Detective Louis Otero confirmed that he and Detective Mendoza had worked to assemble the lineup for Braun to view. They attempted to find people who appeared similar to defendant in terms of stature, age, race, and facial characteristics. He did not review the police report compiled by Detective Anderson and Detective Davis, where Braun provided her earlier description of her assailant, nor did he converse with the detectives prior to arranging the lineup. Detective Otero also indicated that he was not aware of any description that Braun had provided to Officers Holmes and Curlington who were also involved in the investigation.

¶7 Detective Sandra Bryant similarly testified that she was unaware that Detective Anderson and Detective Davis had conversed with Braun and that she did not review any reports before helping to assemble the "fillers" for the lineup. She, too, was unaware of any report assembled by Officer Holmes and Officer Curlington in connection with the offense.

¶8 Thereafter, the parties entered into two stipulations. First, the parties stipulated that if Officer Holmes were called to testify, he would indicate that he spoke to Braun on April 27, 2007. At that time, the victim described her attacker as a black male between 30 to 40 years' old who was approximately 5'10'' tall and weighed approximately 200 pounds. At the time of the offense, the offender was wearing a black hooded sweatshirt, blue jeans, dark boots, and a black mask over part of his face. Braun's attacker was armed with a knife. Next, the parties stipulated that if Officer William Davis were called to testify, he would state that he conducted an interview with Braun on April 28, 2007, while she was recovering from her injuries at Northwestern Memorial Hospital. During the interview, Braun revealed that her attacker was wearing a black

sweatshirt with the hood pulled over his head and a dark colored scarf covering the lower half of his face. When Officer Davis inquired whether Braun thought she would recognize her offender if she were to see him again, Braun was uncertain; however, she indicated that she would be willing to attempt a composite sketch. Later the same day, Officer Davis conversed with Braun via telephone and she indicated she changed her mind about attempting a composite sketch because she believed that the attempt would be futile.

¶9 After hearing the evidence, the trial court denied defendant's motion to suppress identification testimony. In doing so, the trial court found that the lineup bore no indicia of suggestiveness except for defendant's attire. The fact that the officers involved in conducting the lineup were unaware of the prior descriptions the victim had provided of her attacker, however, mitigated against any overriding suggestiveness.

¶10 Thereafter, the cause proceeded to a jury trial. During the jury selection process, the trial court made a series of introductory remarks to the entire venire. In particular, the court informed the jurors of three of the four *Zehr* (*People v. Zehr*, 103 Ill. 2d 472 (1984)) principles delineated in Supreme Court Rule 431(b) as amended in 2007 (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). Accordingly, the prospective jurors were instructed about the defendant's presumption of innocence, the prosecution's burden of proof, and the right of the defendant not to testify or present evidence. The trial court failed to inform the prospective jurors of the fourth *Zehr* principle: that a defendant's decision not to testify could not be used against him. The trial court also failed to inquire whether each of the prospective jurors understood and accepted each of the principles as required by Rule 431(b). After the *voir dire*

process was concluded and the jury impaneled, the parties delivered opening statements.

¶11 In its opening remarks, the State argued, in pertinent part, that the victim would testify that she was attacked by a man wearing a hooded sweatshirt and a scarf covering the lower half of his face. He came up behind her and was holding a knife when he attempted to take her purse. Braun would further testify that during the struggle over her purse, the offender's scarf lowered and she was able to view defendant's face. Based on these opening remarks, defense counsel moved for a mistrial, arguing in pertinent part, that the State committed a discovery violation because none of the documents and reports tendered during the discovery process contained any information about the offender's mask dropping to the ground during the assault.

¶12 In response, the State argued that it had faxed a one-page photocopy of a summary of notes taken by the Assistant State's Attorney (ASA) who conversed with the victim. In the notes, the ASA wrote that the victim "struggled with defendant, saw defendant three times when happened (within a few minutes) 2 on block right before + when it happened." The State explained that this was "not *Brady* material" but that the prosecution had nonetheless turned the summary over to defense counsel as a professional courtesy because the notes explained why the police had asked Braun to attempt a composite sketch and view a lineup. Nonetheless, in response to defense counsel's motion for mistrial, the State tendered the entire contents of the ASA's felony review folder, which contained five pages of notes and included the following statement: "knife is not recovered D was wearing a hoodie and scarf but V could see his face." Defense counsel argued that the content contained in the ASA's five-page felony review notes differed from the one-page synopsis the State had tendered earlier because the latter did "not

include the information that the victim could see [defendant's] face and mask and hood. *** It [said] nothing about the mask coming off his face."

¶13 The trial court found that the State's failure to tender the entire contents of the felony review folder constituted a discovery violation even though the entire folder contained "a good deal of duplication" of what the State had previously turned over to defense counsel; however, there was nothing in the tendered document about Braun's ability to view defendant's face. The court found these were "discoverable statements by the victim" and "obviously should have been tendered." Because of the late tender, the trial court held that defense counsel could impeach the witness with the fact that she had not informed the investigating officers that she had been able to see defendant's face and that the State would not be permitted to rehabilitate Braun with any of the statements she provided to the felony review ASA.

¶14 Officer Robert Bullington testified that he was a 19-year veteran of the Chicago Police Department and that he also worked a second security job at the University of Chicago for the past 17 years. On April 27, 2007, he was providing security services at a University of Chicago fraternity party located at 5712 South Woodlawn. At approximately 11:00 p.m., Officer Bullington saw defendant, with whom he was familiar, because defendant frequented that area. Defendant was wearing a white tee shirt, a black sweatshirt, dark colored jeans and a bandana over his head. He was conversing with students as they approached the party. Students complained that defendant was asking them for money "very aggressively," and Officer Bullington told him, "Joe, you have got to leave. You can't be around here today." Defendant cooperated and left the area, walking northbound toward 57th Street. Defendant entered a dark

colored SUV driven by a male black driver who appeared to be in his twenties and the SUV continued northbound toward 56th Street. Approximately 10 minutes later, Officer Bullington saw marked and unmarked police cars and emergency vehicles driving toward 56th Street. The next day, Officer Bullington learned that the police activity was in response to the alleged assault on Braun. Officer Bullington subsequently spoke with Officer Mendoza about the attack on Braun. On cross-examination, Officer Bullington acknowledged that he did not see defendant holding a knife when he was approaching students and asking them for money on the University of Chicago campus.

¶15 Rachel McFadden, a University of Chicago student, testified that on April 27, 2007, at approximately 11:30 p.m., she and her friend, Zachery Trayes-Gibson, were walking westbound on the 1200 block of East 56th Street. As they approached the end of the block, Rachel heard a female screaming. She and Trayes-Gibson turned around and saw a person on the ground more than half a block away being beaten by another individual. She yelled "Hey," called 911 and ran toward the struggle. The attacker looked up in her direction and then ran away. Rachel indicated that she did not get close enough to see the offender's face, but observed that he was of medium stature, medium weight, and was wearing dark colored clothing including a hood over his head. Rachel reached the victim and helped her up, while Trayes-Gibson pursued the attacker.

¶16 Zachery Trayes-Gibson confirmed McFadden's account of the attack. He described the offender as a heavy-set man wearing a black hooded sweatshirt, dark pants and work boots. When McFadden went to assist the female victim, Trayes-Gibson chased the offender. Although the offender had a good lead on him, Trayes-Gibson caught up with the man at the intersection of

East 56th Street and Kimbark. At that point, the offender pulled out a knife and Trayes-Gibson put his hands in the air and took several steps backwards. The offender then fled and Trayes-Gibson returned to assist McFadden and the victim. Thereafter, on May 20, 2007, Trayes-Gibson viewed a lineup at the police station, but was unable to make a positive identification. He told Detectives Davis and Anderson that the offender was a black male who was approximately 5'10'' to 5'11'' tall and weighed approximately 170 pounds.

¶17 Braun testified that she resided at 1229 East 56th Street. On April 27, 2007, she arrived at the 1200 block of 56th Street at approximately 11:30 p.m. She was in her car, driving east on 56th Street looking for street parking when she observed defendant standing in the alley. He was wearing dark clothing and Braun thought it was unusual for him to be standing in that location. The alley was lit and provided enough illumination to see defendant's face. As she watched him, defendant crossed the street and began to walk eastbound. Braun then parked her vehicle and began to get her belongings out of her car. At that time, she saw McFadden and Trayes-Gibson walking together down the street and noticed that defendant had disappeared. Braun finished gathering her belongings, hung her purse around her neck with the strap placed across her body, and ascended the stairs to the front porch of her residence. When she tried to unlock her door, the key became stuck in the lock. As she was struggling with the key, defendant reappeared behind her and began pulling her bag. Braun turned around to face defendant and he produced a knife with a blade two to three inches in length.

¶18 Although it was dark, she was able to view defendant because her porch light and the street lights provided illumination. Braun observed that defendant was approximately 6 feet tall,

had a medium build and was dark complected. He was wearing a dark colored sweatshirt with the hood pulled over his head as well as a dark colored scarf on the lower half of his face. The scarf did not cover defendant's eyes, eyebrows, or forehead, and Braun observed that defendant had a receding hairline. Defendant used his knife to slash at Braun's purse and she put her arms up to defend herself. Defendant kept slashing at her and cut her right thumb. She screamed loudly and tried to maneuver away from defendant. During the struggle, she tumbled down her porch stairs and fell backwards onto her arm, causing her to break her wrist and suffer back and neck injuries. Defendant continued with his attempts to take her purse, which was pinned beneath her. As defendant hovered above her, his scarf fell and Braun was able to view his face.

¶19 McFadden and Trayes-Gibson then reappeared and defendant ran off as they came closer and as Braun's neighbors began to turn on their lights and exit their residences to ascertain the cause of the disturbance. On May 10, 2007, Braun traveled to the police station to view a lineup. She was informed that defendant was not necessarily present in the lineup and that she did not have to identify anybody. After viewing the lineup, Braun did not make an identification. Defendant was not a participant in this initial lineup. Braun returned to the police station to view a second lineup on May 20, 2007. Defendant was a participant in that lineup and was the only man wearing a hooded sweatshirt. After viewing the participants, Braun identified defendant as her assailant.

¶20 On cross-examination, Braun indicated she was certain that the person in the alley was the same person who attacked her and that defendant was that individual. He was in the alley for

approximately 30 seconds. At that time, she did not focus on what defendant was wearing, she "just knew there was a man standing there who was dressed casually who shouldn't have been standing there." Braun had never seen defendant before and indicated that she did not see a scarf over his face or a knife in his hands when he was standing in the alley. When defendant reappeared, he was wearing a mask covering his lower jaw and mouth; however, she was able to see his "big" forehead and eyebrows and observed that he was losing his hair. Braun acknowledged that she spoke to several police officers after the attack and provided a description of her attacker. She "believe[d]" she included defendant's receding hairline and his full eyebrows in her description. Braun also informed at least one of the officers that she saw defendant's scarf fall during the attack. She did not recall telling any of the officers that she was unsure whether or not she could recognize the offender and she denied telling any of the officers that she believed attempting a composite sketch would be futile. Prior to viewing the lineup, Braun did not discuss the clothing her assailant was wearing at the time of the offense or any prior descriptions she had provided of the offender. Braun also acknowledged that when she viewed the second lineup, she requested defendant to put on the hood of his jacket. She indicated that she was "99.9 percent certain" that defendant was the offender before he put on the hood, and was "absolutely certain" that it was defendant who attacked her after she viewed him wearing the hood.

¶21 Buford Hart, a paramedic for the City of Chicago, testified that he was dispatched to treat Braun at approximately 11:46 p.m. on April 27, 2007. At that time, Braun appeared to have a

fractured wrist and a laceration. After conducting an initial assessment of her vital signs and putting a splint on her wrist, Hart transported Braun to Northwestern Memorial Hospital.

¶22 Thereafter, the parties stipulated to the testimony of Doctor Randall Meyers. Pursuant to the stipulation, Doctor Meyers would testify that Braun was admitted to the emergency room of Northwestern Memorial Hospital at approximately 12:47 a.m. on April 28, 2007. Braun reported that she had been mugged by a man wielding a knife. An X-ray revealed that Braun suffered a fracture to her left wrist and a laceration to her right thumb. She was treated, released, and instructed to receive additional treatment from an orthopedic doctor.

¶23 Detective Joaquin Mendoza testified that he conducted a lineup for Braun to view on May 20, 2007. Before Braun viewed the lineup, Detective Mendoza spoke to her about the procedure. In accordance with the department's witness advisory form, he informed her that the suspect would not necessarily be present in the lineup. Braun signed the form, acknowledging that she understood the procedure. After viewing the lineup, Braun identified defendant as her assailant. On cross-examination, Detective Mendoza indicated that he was not familiar with any prior reports that documented Braun's description of her assailant's clothing at the time of the offense. He acknowledged that defendant was the only lineup participant wearing a hooded sweatshirt but indicated that he did not provide defendant with clothes. Each of the lineup participants was wearing his own clothing. Thereafter, the State rested its case-in-chief and defendant again moved for a mistrial, which the trial court again denied.

¶24 The defense recalled Detective Mendoza. He testified that McFadden and Trayes-Gibson also came to the police station on May 20, 2007, to view the same lineup Braun viewed earlier

that day. Defendant was a participant in the lineups that McFadden and Trayes-Gibson observed, but neither one was able to make an identification.

¶25 Detective William Davis was also called by the defense and he indicated that he spoke to the victim at Northwestern Hospital on April 28, 2007. Although she appeared to be in pain, Braun was able to provide a physical description of her assailant, which he memorialized in his report. Braun informed him that her attacker wore a scarf covering the bottom of his face, but he did not recall her ever saying that the scarf had fallen off the assailant's face during the attack. Detective Davis would have put that information in his report if she had done so. Detective Davis also did not recall Braun describing her assailant as having a receding hairline or full eyebrows. Initially, Braun indicated that she was unsure whether she could identify her attacker, but was willing to come to the police station to attempt a composite sketch. Later that day, Braun told Detective Davis that she changed her mind about attempting a composite sketch because she believed it would be a futile exercise. On cross-examination, Detective Davis acknowledged that he did not ask Braun whether the scarf covering the lower portion of the offender's face had fallen during the attack.

¶26 Both parties rested their cases and subsequently delivered closing arguments. The defense renewed its motion for a mistrial based upon the discovery violation and as well as its motion to suppress identification testimony. The trial court denied both motions and the cause was submitted to the jury. Following deliberations, the jury returned with a verdict finding defendant guilty of attempt armed robbery and aggravated battery. Defendant was subsequently sentenced to 20 years' imprisonment for the attempt armed robbery offense and 5 years'

imprisonment for the aggravated battery conviction, the sentences to be served concurrently.

¶27 Defendant subsequently filed a posttrial motion in which he asserted various grounds of error, including the State's discovery violation, in an effort to receive a new trial. At the hearing on the motion, the State argued that there had been no discovery violation because Braun's statement regarding the scarf falling off defendant's face during the attack was never reduced to writing. The entirety of the ASA's felony review notes merely reflected that Braun "saw" defendant on three occasions: in the alley, crossing the street, and during the attack. The court reversed its prior position and agreed that there had been no discovery violation and that the State had provided the defense with that information prior to trial. The court further found that the sanction it imposed "was really not even called for given the posture of the case *** but it was done to protect [defendant] even more." The trial court thus found that the alleged discovery violation did not entitle defendant to a new trial and further found that the remaining allegations asserted in defendant's posttrial motion similarly lacked merit. Accordingly, the trial court denied defendant's posttrial motion and this appeal followed.

¶28 ANALYSIS

¶29 I. Sufficiency of the Evidence

¶30 Defendant first argues that the State failed to prove him guilty of attempt armed robbery and aggravated battery beyond a reasonable doubt. He contends that his convictions were based solely upon the identification testimony of the victim and argues that her testimony was unreliable. Specifically, defendant argues that Braun did not have an adequate opportunity to view her attacker, expressed doubt about her ability to identify her assailant and identified

defendant only after viewing a suggestive lineup. Moreover, defendant argues that the State failed to introduce any corroborating evidence connecting him to Braun's attack.

¶31 The State acknowledges that Braun was the sole witness who identified defendant, but argues that her testimony was sufficient to establish that defendant was the perpetrator of the crime. The State contends that Braun had adequate opportunity to view defendant both before and during the attack and disagrees that the lineup was overly suggestive. Moreover, the State argues that the evidence introduced at trial sufficiently corroborated Braun's identification and established defendant's guilt beyond a reasonable doubt.

¶32 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶33 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed a crime. 720 ILCS 5/3-1 (West 2006); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d 332, 341 (2010). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing a witness's identification testimony, courts employ the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), which include: (1) the opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the certainty of the witness's identification; and (5) the length of time between the offense and the witness's identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08.

¶34 Here, Braun was afforded sufficient opportunity to view the defendant at the time of the offense. Braun first observed defendant as he was standing in the alley. Her attention was drawn to him because she found it unusual that defendant would be standing in that location. She continued watching him as he crossed the street. At this time, defendant was not covering his head with the hood of his sweatshirt, nor was he covering his face with a scarf. When defendant reappeared on Braun's porch steps, defendant had covered his head and masked the lower-portion of his face. Although the attack happened at night, Braun indicated that the street lights

and her porch light were lit allowing her to view defendant. The alley in which she first observed defendant was also lit. While defendant argues that Braun had little opportunity to view her attacker because his face was covered throughout the incident, the use of a mask does not invalidate a witness' opportunity to view the offender. See, *e.g*, *People v. Bryant*, 94 Ill. 2d 514, 519, 521 (1983) (witness had sufficient opportunity to view the defendant even though the defendant had worn a mask covering his face from his jaw-line to his nose); *People v. Camel*, 59 Ill. 2d 422, 432 (1974) (witness had sufficient opportunity to view the defendant even though the defendant covered the lower-portion of his face). Here, we find that Braun had sufficient opportunity to view defendant both before and during the attack.

¶35 Turning to the second factor, Braun's degree of attention, we disagree with defendant that she was more focused on defendant's clothing rather than his person. Rather, we find that Braun's degree of attention while viewing defendant was high. Before the attack, Braun observed defendant standing in an illuminated alley and watched him as he walked away. She paid attention to defendant because she found it unusual for him to be standing in that location. During the attack, Braun struggled against defendant at close range. Although the attack was understandably an anxiety-producing experience, this does not necessarily decrease a witness' degree of attention or powers of observation. See, *e.g.*, *People v. Robinson*, 206 Ill. App. 3d 1046, 1052 (1990) ("Excitement, rather than detract from an identification, could increase the powers to observe"). Here, there is nothing to suggest that the attack itself negated the degree of attention that Braun paid to defendant.

¶36 Turning to the accuracy of Braun's description of her attacker, defendant argues

that Braun's description of defendant as a 6'0'' tall male with a medium complexion and medium build was so general that its usefulness in identifying her attacker was minimal. He contends that the only singular identifying characteristic that Braun provided was that her attacker wore a black hooded sweatshirt. Although Braun provided additional details at trial, namely, defendant's large forehead, large eyebrows and his receding hairline, these additional characteristics were not part of the initial descriptions contained in the police reports. We disagree that Braun's initial description of defendant is fatal to her identification testimony. Courts have consistently recognized that vague or discrepant descriptions do not necessarily render identifications unreliable because very few witnesses are trained to be keen observers. See, *e.g.*, *People v. Williams*, 118 Ill. 2d 407, 413-14 (1987) (witness' failure to mention the defendant's mustache and facial hair did not render her identification unreliable); *People v. Nims*, 156 Ill. App. 3d 115, 121 (1986) (victim's failure to mention the defendant's facial scars did not render her identification unreliable); see also *People v. Bias*, 131 Ill. App. 3d 98, 104-05 (1985) (recognizing that inaccuracies pertaining to the "presence or absence of a beard, mustache, or tattoo, whether the assailant had missing teeth, and the assailant's height, weight and complexion do not render an identification utterly inadmissible"). Indeed, " '[t]he credibility of an identification does not rest upon the type of facial description or other physical features which the complaining witness is able to relate. *** It depends rather upon whether the witness had a full and adequate opportunity to observe the defendant.' " *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1991), quoting *People v. Witherspoon*, 33 Ill. App. 3d 12, 19-20 (1975). Accordingly, the lack of identifying facial characteristics in Braun's initial descriptions to the

investigating officers does not automatically invalidate her subsequent positive identification.

¶37 With respect to the witness' certainty of identification, we acknowledge that Braun initially expressed doubt over her ability to identify her assailant, telling Officer Davis that any attempt at completing a composite sketch would be "futile." Braun's initial hesitancy over her ability to recognize her attacker, however, does not render her subsequent identification of defendant inherently insufficient or unreliable. See, *e.g.*, *People v. Calderon*, 369 Ill. App. 3d 221, 231-32 (2006) (even though the witness initially told police he would not be able to identify the shooter, his subsequent identification of the defendant was reliable); *People v. Maloney*, 201 Ill. App. 3d 599, 608 (1990) (identification sufficient even though witness initially told officers that she could not identify the assailant because she had only seen the back of his head). Moreover, after observing defendant in the lineup Braun indicated that she was "99.9 percent" certain that he was the offender. She became even more certain of her identification when defendant pulled up the hood of his sweatshirt. Accordingly, we find that the certainty of Braun's identification was high.

¶38 Finally, we observe that Braun identified defendant a little more than three weeks after her attack. Although defendant argues that the passage of time was too lengthy to permit a reliable positive identification, we disagree. Courts have upheld identifications made after a considerable time passed after the crime. See *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (identification made two years after the crime); *People v. Dean*, 156 Ill. App. 3d 344, 352 (1987) (identification made 2 ½ years after the crime). We do not find the passage of time in this case to be too lengthy such that Braun's identification is rendered suspect and unreliable.

¶39 Ultimately, we reiterate that the reliability of a witness's identification of a defendant is a matter for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d at 258. After reviewing the relevant factors, we cannot conclude that Braun's identification testimony was insufficient to prove defendant's guilt beyond a reasonable doubt; rather, a reasonable jury could have found her testimony sufficient to establish defendant's identity as the offender. We also reject defendant's argument that the State failed to present any evidence to corroborate Braun's identification testimony. Although defendant correctly observes that both Rachel McFadden and Zachery Trayes-Gibson, the two eyewitnesses to the attack, failed to positively identify defendant from a lineup, he ignores the testimony of Officer Bullington who observed defendant in the area shortly before Braun's attack. Notably, Officer Bullington observed defendant wearing a black sweatshirt and a bandana as he aggressively approached college students and asked for money. Moreover, although McFadden and Trayes-Gibson failed to pick defendant out of a police lineup, they both corroborated, in part, Braun's physical description of defendant, including his clothing, approximate height and race.

¶40 II. Discovery Violation

¶41 Defendant next argues that the trial court erred in refusing to declare a mistrial or excluding evidence when the State committed a discovery violation and failed to tender to defense counsel documentation of a statement Braun made indicating that she had seen defendant's face during the attack. Defendant argues that the discovery violation was prejudicial because the entirety of the State's case rested on Braun's dubious identification and there was nothing in the tendered pretrial discovery materials that suggested that Braun had been able to see

defendant's face during the attack.

¶42 The State responds that no discovery violation occurred because there is nothing in the record to show that Braun's statement about defendant's mask being displaced during the attack was ever reduced to writing and was discoverable. Moreover, the discovery it tendered made it clear that Braun had seen defendant's face. The State contends that police reports made it clear that Braun had observed defendant, who was unmasked at the time, in the alley and watched as he crossed the street. Braun further observed defendant wearing a mask during the attack and was able to view some of his facial features. Nonetheless, assuming that there was a discovery violation, the State argues that defendant suffered no prejudice and the sanction that the trial court imposed was reasonable and actually resulted in a "windfall" to defendant.

¶43 The purpose of the discovery process is to prevent surprise, promote fairness, and aid in the search for the truth. *People v. Boclair*, 119 Ill. 2d 368, 373-74; *People v. Botsis*, 388 Ill. App. 3d 422, 436 (2009). Supreme Court Rule 412 governs discovery in criminal proceedings and requires the State to produce certain information and materials that are within its control prior to trial. 188 Ill. 2d R. 412; *People v. Lowry*, 354 Ill. App. 3d 760, 769 (2004). In pertinent part, the rule provides:

> "(a) Except as otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or

> recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements." 188 Ill. 2d R. 412(a)(i).

The purpose of this rule requiring the State to disclose materials and information within its possession is to protect criminal defendants from surprise and unfairness, and allow for adequate preparation for trial. *People v. Hood*, 213 Ill. 2d 244, 258 (2004); *Lowry*, 354 Ill. App. 3d at 770. Because Rule 412, however, only applies to "memoranda containing substantially verbatim reports of their oral statements," and "memoranda reporting or summarizing their oral statements" (188 Ill. 2d R. 412(a)(I)), purely oral statements made by witnesses that are not memorialized are not subject to Rule 412's disclosure requirements, absent bad faith on the part of the State (*People v. Mahaffey*, 128 Ill. 2d 388, 418 (1989); *People v.Williams*, 262 Ill. App. 3d 808, 823-24 (1994)). The State's Rule 412 disclosure duty is a continuing one and, accordingly, the State is required to promptly notify the defendant of any material or information that is discovered up to, and during, trial. *People v. Hendricks*, 325 Ill. App. 3d 1097, 1103 (2001).

¶44 In the event of a discovery violation, Supreme Court Rule 415 permits a trial court to apply an array of sanctions. See 134 Ill. 2d R. 415(g)(i) ("If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances"). In certain circumstances, when the trial court is faced with a serious discovery violation, it may find

that the most appropriate remedy is to declare a mistrial. See, *e.g.*, *People v. Edwards*, 388 Ill. App. 3d 615, 629-33 (2009). Nonetheless, declaring a mistrial is a "drastic sanction" (*People v. Morgan*, 112 Ill. 2d 111, 135 (1986)), and a party's discovery violation warrants a new trial only if the defendant is prejudiced by the violation and the court fails to eliminate the prejudice (*People v. Stewart*, 227 Ill. App. 3d 26, 29 (1992)). To determine whether a new trial is warranted, courts may consider several factors including the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that any prior notice would assist the defense in discrediting the evidence, and any potential remedies the defendant sought to alleviate the potential prejudice, such as requesting a continuance. *People v. Lovejoy*, 235 Ill. 2d 97, 120 (2009). Ultimately, a trial court's decision whether or not to declare a mistrial will be upheld absent an abuse of discretion. *People v. Sims*, 167 Ill. 2d 483, 505 (1995). The issue of whether a discovery violation occurred, however, is subject to *de novo* review. *Hood*, 213 Ill. 2d at 256.

¶45 Here, in response to defendant's discovery request, the State identified the names of the potential witnesses it would call at trial, including Braun. It further indicated that "[w]ritten statements of witnesses, if any, have been tendered to the defense in open court" and "[a]ll memoranda reporting or summarizing oral statements made by witnesses are contained in the police reports tendered to the defense in open court." Prior to trial, the State tendered a one-page summary of the felony-review ASA's notes transcribed after the ASA spoke to Braun. In the summary, the ASA documented that Braun had seen defendant on three occasions. Specifically, the ASA observed that Braun "struggled with [defendant], saw [defendant] three times when happened (within a few minutes) 2 on block right before + when it happened." During opening

statements, the State indicated that Braun would testify that she observed the defendant's face during the attack and that the scarf covering the lower-half of his face had fallen at some point during the attack. After hearing this statement and receiving the entire contents of the felony review folder, defense counsel moved for a mistrial, citing the State's alleged discovery violation.

¶46 Included in the additional discovery was the statement: "Knife is not recovered. D was wearing a hoodie and scarf but V could see his face." Based on this statement, the trial court initially found that a discovery violation occurred. As a sanction, the court ruled that the defense would be permitted to impeach Braun with the fact that she had not informed any of the investigating officers that the scarf had fallen off defendant's face during the attack and the State would be precluded from rehabilitating her with any of the information she provided to the ASA. Later, however, in reviewing defendant's posttrial motion seeking a new trial, in part, on the basis of the purported discovery violation, the court reversed its position and found that no discovery violation had occurred and that the sanction it imposed had not been necessary, but had benefitted defendant.

¶47 Based on the record, we find that the State did commit a discovery violation by failing to turn over the entire contents of the ASA felony review notes to defense counsel prior to trial. Initially, we observe that neither the ASA's notes nor the summary that the State initially tendered contained any statement that the scarf defendant had been wearing to conceal the lower half of his face had fallen during the attack. There has been no showing that Braun's statement regarding the scarf displacement was ever memorialized in written form. Indeed, during the

hearing on defendant's posttrial motion, defense counsel conceded that this statement was not in any of the police reports or in the felony review notes. Nowhere in the record is there evidence that this statement was recorded. Although it is unclear as to when the State obtained this information, there has been no showing that the State intentionally prevented any such written recording to be made in an effort to surprise defendant at trial. The ASA's full report that the State tendered after the trial began, did however, contain a statement made by Braun indicating that she had seen defendant's face *during* the attack. Specifically, the report contained the following statement: "Knife is not recovered. D was wearing a hoodie and scarf but V could see his face." There was nothing in the discovery that the State had previously tendered that specifically indicated that Braun had been able to observe defendant's face during the attack. Accordingly, we agree with the trial court's initial ruling and find that the State committed a discovery violation.

¶48 Nonetheless, we do not find that the State's discovery violation mandates that defendant receive a new trial. Although compliance with the discovery rules is mandatory, the failure to comply does not require reversal absent a showing of surprise or undue prejudice. *People v. Robinson*, 157 Ill. 2d 68, 78 (1993); *People v. Matthews*, 299 Ill. App. 3d 914, 919 (1998). Here, the surprise to defendant was the *opening statement* that Braun would testify that the scarf fell down and she saw defendant's face during the attack. Braun had not yet testified. As a result, defendant was permitted to review the entire felony review file and move for a mistrial. Although the trial court denied defendant's motion, we find that defendant was not prejudiced by the court's ruling. We acknowledge that none of the discovery materials tendered to the defense

specifically indicated that Braun saw defendant's scarf fall during the attack. The discovery materials provided to defendant did however, indicate that Braun had seen defendant's uncovered face moments prior to the attack when she observed him in a nearby alley and watched him as he crossed the street. Similarly the felony review file also contained information that Braun had seen defendant's face, although it did not specifically state that defendant's scarf fell during the attack.

¶49 Moreover, while defendant contends that he was unfairly surprised by the violation, we note that defendant never sought a continuance. See *People v. Robinson*, 157 Ill. 2d 68 (1993) (recognizing that a "defendant cannot request only the most drastic measures, such as either an immediate mistrial or the total exclusion of testimony by a witness [as a result of a discovery violation], and then on appeal argue he is entitled to a new trial when these requests are not granted"). Although his motion for a mistrial was denied, the court permitted defense counsel to impeach Braun with the fact that she failed to inform any of the investigating officers that defendant's scarf had fallen off his face during the attack and the State was precluded from rehabilitating her with information that she provided to the ASA, and effectively cured any prejudice resulting from the State's discovery violation. Indeed, defendant was permitted to vigorously cross-examine Braun and cast doubt about her ability to view her attacker or identify the offender, and it was within the province of the jury to determine what weight to afford her testimony. Specifically, during his cross-examination of Braun, defense counsel emphasized the time of night the attack occurred and the lighting conditions in which Braun had to view the offender, the short time in which Braun had to view her attacker, and her prior statement to

Detective Mendoza that she doubted her ability to recognize the offender. Moreover, defense counsel asked Braun whether she ever provided police with the information that the scarf her assailant was wearing to cover his face fell during the attack. When she indicated that she believed she had provided "someone" with that detail, counsel was able to call Detective Davis who testified that Braun never informed him that the scarf had fallen off her assailant's face during the attack and that he would have included this detail in his report had she done so.

¶50 Ultimately, we disagree that the factors used to evaluate whether a discovery violation entitles a defendant to a new trial weighs in favor of granting defendant this relief *Lovejoy*, 235 Ill. 2d at 120. Notably, we have already found that Braun's identification testimony and the evidence corroborating her testimony was sufficient to sustain defendant's conviction and disagree that the evidence was closely balanced. Moreover, the strength of this additional evidence is not high, as defense was aware Braun saw defendant's unmasked face moments before the attack. In addition, given that defense counsel was permitted to vigorously cross-examine Braun about her prior statements and call Detective Davis to rebut her testimony about the displacement of the assailant's scarf during the attack, we do not find that any prior notice would have assisted defense counsel in discrediting the evidence. Finally, as we observed above, that defendant at no point sought a continuance as a result of the alleged prejudice he suffered as a result of the purported discovery violation in order to better investigate Braun's testimony and prepare for her cross-examination. Accordingly, we find that the State's discovery violation does not entitle defendant to a new trial.

¶51 III. Rule 431(b) Violation

¶52 Defendant next argues that the trial court failed to abide by the mandates of Illinois Supreme Court Rule 431(b), as amended in 2007, when it failed to inquire whether the jurors understood and accepted each of the four principles of law contained therein. Instead, the trial court merely provided the venire with a general admonishment about three of the four principles. Defendant maintains that the trial court's failure to conform to the requirements of Rule 431(b) constitutes *per se* reversible error. He bases his argument on the 2007 amendment to Rule 431(b), which imposed a mandatory *sua sponte* duty on trial courts to ascertain whether potential jurors understand and accept the principles contained therein. Because the amendment made the rule mandatory, defendant argues that any violation of Rule 431(b)'s requirements necessarily deprives a defendant of his fundamental constitutional right to be tried by a fair and impartial jury.

¶53 Initially, the State responds that defendant forfeited review of this issue because counsel failed to object to the trial court's methodology during the jury selection process. Moreover, the State argues that there was no Rule 431(b) violation, and even if there were, the trial court's failure to strictly comply with the rule does not constitute *per se* plain error requiring reversal of defendant's conviction.

¶54 To properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). A defendant's failure to abide by both requirements results in forfeiture of appellate review of his claim. *Enoch*, 122 Ill. 2d at 186; *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Here, it is undisputed that defendant failed to

object to the trial court's purported Rule 431(b) violations at trial or in a posttrial motion, and accordingly, we find that forfeiture applies.

¶55 The plain error doctrine, however, provides a limited exception to the forfeiture rule. 134 Ill. 2d R. 615(a); *Bannister*, 232 Ill. 2d at 65. It permits review of otherwise improperly preserved issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. 134 Ill. 2d. R. 615(a); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009). If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶56 Defendant's claim of error concerns the trial court's compliance with a supreme court rule, which is subject to *de novo* review. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007); *People v. Haynes*, 399 Ill. App. 3d 903 (2010). To determine whether an error occurred in this case, we examine amended Rule 431(b), which provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or

her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to the specific questions concerning the principles set out in this section." Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007)).

¶57 The amendment's use of the term "shall" created a mandatory question and response process to address a jury's acceptance of each of the four enumerated principles. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010); see also *Haynes*, 399 Ill. App. 3d at 912 (explaining that "[i]n enacting the amended version of Rule 431(b), our supreme court imposed a *sua sponte* duty on courts to ask potential jurors individually or in a group whether they accept the [four *Zehr*] principles").[2] A trial court's failure to inquire as to a potential juror's acceptance of all four principles constitutes error. See *Thompson*, 238 Ill. 2d at 607; *Haynes*, 399 Ill. App. 3d at 912; *People v. Magallanes*, 397 Ill. App. 3d 83, 72 (2009).

¶58 Here, the record reveals that the trial court admonished the venire in narrative form about three of the four Rule 431(b) principles before *voir dire* questioning of the prospective jurors commenced. Specifically, in its prefatory comments, the trial court advised the venire that defendant was presumed innocent of the charges brought against him, that defendant was not required to offer evidence on his behalf and that the State bore the burden of proving defendant's

[2] Prior to the amendment, Rule 431(b) required questioning only "[i]f requested by defendant." See *Thompson*, 238 Ill. 2d at 608.

guilt beyond a reasonable doubt. The trial court did advise the prospective jurors that defendant was not required to testify, but failed to mention the fourth Rule 431(b) principle that prohibits a defendant's decision not to testify from being used against him. Despite providing the general admonishments, the trial court failed to question the prospective jurors, either individually or as a group, to ascertain their acceptance and understanding of the four Rule 431(b) principles. We thus find that the trial court clearly erred by failing to strictly comply with Rule 431(b)'s requirements. We disagree with defendant, however, that this error constitutes *per se* reversible error.

¶59 In so finding, we rely on our supreme court's recent decision in *People v. Thompson*, where the court expressly rejected the argument that a trial court's failure to strictly comply with amended Rule 431(b) necessarily infringes upon a defendant's right to a fair and impartial jury, thereby affecting the integrity of the judicial process and constituting plain error under the second prong of plain-error review. *Thompson*, 238 Ill. 2d at 613-15. The court acknowledged that "[a] finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process," but explained that a reviewing court "cannot presume the jury was biased simply because the trial court erred in conducting Rule 431(b) questioning." *Id*. at 614. The court acknowledged that the 2007 amendment to the rule made it mandatory for trial courts to assess every potential juror's acceptance of the four Rule 431(b) principles but explained:

> "the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that questioning is mandatory or

> permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules." *Id*. at 614-15.

Accordingly, because a trial court's Rule 431(b) violation does not necessarily result in a biased jury and constitute plain error, the court concluded that it was the defendant's burden of persuasion to show that the trial court's violation of Rule 431(b) in his case resulted in a biased jury and affected the integrity of the judicial process. *Id*. at 614. The court observed that although the prospective jurors in the defendant's case received some, but not all, of the Rule 431(b) questions, they had been admonished and instructed on all of the principles. *Id*. at 615 Ultimately, the court concluded that the defendant failed to meet his burden of showing that the error affected the fairness of his trial and that the second prong of plain-error review did not provide a basis for excusing the defendant's forfeiture. *Id*.

¶60 Here, as in *Thompson*, the trial court failed to strictly comply with Rule 431(b). Notwithstanding the trial court's error, we find that defendant has failed to prove that the trial court's Rule 431(b) violation resulted in an unfair trial and affected the integrity of the judicial process. Notably, there is nothing in the record to indicate that the jury was biased. Moreover, the record shows that the while the trial court failed to question the prospective jurors about their

acceptance of the four Rule 431(b) principles, defense counsel did conduct individualized questioning on all four principles with all but one of the jurors. Although the final juror was not asked about her acceptance and understanding of the principles, she was present for the questioning of the other members of the venire. Accordingly, we find that the second prong of plain-error review does not provide us with a basis to excuse defendant's procedural default. See *Thompson*, 238 Ill. 2d at 615; *Haynes*, 399 Ill. App. 3d at 914; *Magallanes*, 397 Ill. App. 3d at 100. We similarly reject defendant's alternative argument that the first prong of plain-error review provides another basis for relief as we have already rejected his assertion that the evidence against him was closely balanced. Rather, we have already found that Braun's identification testimony was sufficiently reliable and sufficiently corroborated. Accordingly, we must honor defendant's procedural default.

¶61 IV. Suggestive Lineup

¶62 Lastly, defendant argues that the trial court erred in denying his motion to suppress Braun's lineup identification testimony because the lineup was unduly suggestive as he was the only individual present in the lineup wearing a dark-colored hooded sweatshirt, an item of clothing worn by the offender.

¶63 The State rejects defendant's argument that the lineup was impermissibly suggestive. The State emphasizes that the apparel defendant wore during the lineup was not the result of police influence; rather, he wore the hooded sweatshirt of his own volition. Moreover, the State argues that the mere fact that a suspect wears clothing similar to that worn by the offender is not sufficient to establish that the lineup was unduly suggestive.

¶64 In a motion to suppress identification testimony, the defendant bears the burden of proving that the pretrial identification procedure was impermissibly suggestive. *People v. Enis*, 163 Ill. 2d 367, 398 (1994); *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). " 'Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by law under the due process clause of the 14th Amendment.' " *People v. Love*, 377 Ill. App. 3d 306, 311 (2007), quoting *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994). The law does not require the participants in a lineup to be nearly identical or to exactly match the descriptions given by eyewitnesses. *Gabriel*, 398 Ill. App. 3d at 348; *Love*, 377 Ill. App. 3d at 311. Moreover, a lineup is not suggestive merely because the defendant is the only person wearing a specific item of clothing worn by the offender at the time of the offense. See, *e.g.*, *Gabriel*, 398 Ill. App. 3d at 349 (lineup not overly suggestive where the defendant was the only one wearing a white T-shirt); *People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999) (lineup not unduly suggestive when the defendant was the only one present wearing a gray sweatshirt); *People v. Robinson*, 206 Ill. App. 3d 1046, 1051-52 (1990) (lineup not overly suggestive where the defendant was the only one wearing dark pants and a gray striped shirt); *People v. Therriault*, 42 Ill. App. 3d 876, 884 (1976) (lineup not overly suggestive where the defendant was the only one wearing a cardigan sweater). The suggestibility of a lineup depends on " 'the strength of the suggestion made to the witness. [Whether] [t]hrough some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities.' " *Gabriel*, 398 Ill. App. 3d at 349, quoting *People v.*

Johnson, 149 Ill. 2d 118, 147 (1992). Courts will evaluate the totality of the circumstances to evaluate whether the defendant has met his burden of showing that the identification procedure was impermissibly suggestive. *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005). Only if the defendant satisfies his burden of proof will the burden shift to the State to show by clear and convincing evidence an independent basis of reliability. *Id.* Ultimately, a trial court's ruling on a motion to suppress will not be reversed unless a reviewing court can conclude that it was manifestly erroneous. *Id.*

¶65 Here, we conclude that defendant has not established that the lineup identification was impermissibly suggestive. The photograph of the police lineup shows that the three other men who participated in the lineup appeared to be the same approximate age as defendant and possessed a similar skin tone. Two of the men also possessed similar facial hair to defendant. All of the men were seated on a bench with their hands in their laps. The photograph reveals that defendant was the only man wearing a dark hooded sweatshirt. He was seated between a man wearing a white tee-shirt covered by a dark blue bomber jacket and one wearing a beige sweatshirt. The final line-up participant wore a gray and black track suit. Although the clothing choices of the men differed, it is important to note that defendant and the other men wore their own clothing to the lineup and were not instructed to dress in any specific manner. Indeed, Detective Mendoza indicated that he was not familiar with any prior reports documenting Braun's description of her assailant's clothing when he conducted the lineup. We find no improper influence or suggestibility here when defendant simply wore his own clothing in the lineup. See *Gabriel*, 398 Ill. App. 3d at 349; *Peterson*, 311 Ill. App. 3d at 49; *Robinson*, 206 Ill.

App. 3d at 1051-52; *Therriault*, 42 Ill. App. 3d at 884. Although defendant did manipulate his hood during the lineup, he did so at the request of Braun and not at the request of the officers conducting the lineup. Notably, there is nothing in the record to indicate that the officers suggested or persuaded Braun to make that request. Moreover, Braun indicated she was 99.9 percent sure defendant was the offender even prior to the hood manipulation. Based on a review of the totality of the circumstances, we do not find that the lineup in which Braun identified defendant was overly suggestive and a violation of defendant's due process rights and uphold the trial court's order denying defendant's motion to suppress identification.

¶66 CONCLUSION

¶67 For the reasons explained herein, we affirm the judgment of the trial court.

¶68 Affirmed.