2014 IL App (1st) 113107-U

No. 1-11-3107

SIXTH DIVISION
June 20, 2014

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. 10 CR 9778
	)	
PERRENCE WASHINGTON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *HELD*: (1) The State proved beyond a reasonable doubt that defendant was guilty of armed robbery; (2) the automatic transfer provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-130 (West 2010)) is not unconstitutional; (3) the trial court properly determined that the probative value outweighed the danger of unfair prejudice before allowing the alibi witness's prior juvenile adjudication for aggravated robbery into evidence to impeach his credibility; (4)

defendant received effective assistance of counsel; (5) the State's closing argument was proper; and (6) the 15-year firearm sentencing enhancement is not unconstitutional.

¶ 2 After a jury trial, defendant Perrence Washington was convicted of three counts of armed robbery with a firearm, aggravated unlawful restraint, and aggravated battery. The trial court sentenced him to three concurrent terms of 33 years in prison on the armed robbery with a firearm convictions and merged the additional convictions.

¶ 3 On appeal, defendant contends that:

(1) the State failed to prove his guilt beyond a reasonable doubt where the eyewitnesses' identification testimony was unreliable;

(2) the automatic transfer provision of The Juvenile Court Act of 1987 (705 ILCS 405/5-130 (West 2010)) violates the due process clauses of the state and federal constitutions, the eighth amendment of the federal constitution, and the proportionate penalties clause of the state constitution where it resulted in defendant's transfer to adult court without a hearing and subjected him to more severe punishment;

(3) the trial court failed to balance the danger of unfair prejudice against the probative value before admitting for impeachment purposes evidence of the alibi witness's prior juvenile adjudication for aggravated robbery;

(4) trial counsel rendered ineffective assistance by failing to challenge improper evidence and impeach the State's witnesses with damaging evidence, all while relying on an invalid theory of defense;

(5) during closing argument, the prosecution improperly suggested intimidation of an eyewitness, made improper derogatory remarks against defendant and speculated that young people work in groups to commit crimes, made improper remarks about defendant's alibi witness, and distorted the burden of proof; and

(6) the 15-year firearm sentencing enhancement to the crime of armed robbery is unconstitutional.

¶ 4 For the reasons that follow, we affirm defendant's convictions and sentences.

¶ 5 I. BACKGROUND

¶ 6 On May 8, 2010, three Hispanic men were rehabbing an apartment building at 6131 South Fairfield Avenue in Chicago. They telephoned 911 and reported that they were robbed by five black "guys" who wore blue, black and gray hooded sweatshirts (hoodies). In response to the 911 call, police officers, several minutes after the robbery, stopped defendant Washington, codefendant Kevin Henderson, and a third person outside a gas station a couple of blocks away from the robbery. The Hispanic men were taken to the gas station, where they identified defendant and codefendant as two of the offenders.

¶ 7 Defendant was charged with three counts of armed robbery with a firearm, three counts of aggravated unlawful restraint, and three counts of aggravated battery. Defendant and codefendant Henderson were both 15 years old, and, due to their age and the nature of the offense, their cases were automatically transferred to adult criminal court, pursuant to section 5-130 of the Juvenile Court Act of 1987 (705 ILCS 405/5-130 (West 2010)). Defendant joined codefendant Henderson's motion to declare the automatic transfer statute unconstitutional, but

the trial court denied the motion after a hearing. A joint jury trial was held for defendant and codefendant Henderson in June 2011.

¶ 8 Jose Velasquez, Sr., testified for the State that, at the time of the offense, he was rehabbing an apartment building with his teenage son, Jose Velasquez, Jr., and Cesar Serrano, an employee who spoke no English. Jose Sr. had about $1,800 in his back pocket because he had collected rent from tenants earlier that day. At about 6:30 p.m., near the end of the workday, Jose Jr. was working alone on the first floor while Jose Sr. and Serrano were in the basement.

¶ 9 Jose Sr. heard footsteps upstairs and then saw Jose Jr. come down the basement stairs with a male who held a gun to Jose Jr.'s head. The gunman wore a dark hoodie and tried to conceal his face by pulling the hood over his head. Three other offenders also entered the basement and they tried to conceal their faces by pulling their hoods over their faces. The basement was illuminated by four 100 watt light bulbs. At gunpoint, the offenders pushed Jose Sr., Jose Jr., and Serrano to the floor. The offenders demanded the victims' valuables, searched their pockets, and took their keys, money, cell phones and jewelry. Jose Sr. saw the face of the gunman six or seven times because he uncovered his face when he demanded the victims' money and belongings. The basement was well lit, and Jose Sr. was face to face with the gunman when he revealed his face.

¶ 10 In court, Jose Sr. identified defendant as the gunman and codefendant Henderson as the offender who searched Jose Sr.'s pockets. Jose Sr. saw codefendant Henderson's face five or six times because he let go of his hood while he used both hands to search Jose Sr. After the offenders found the $1,800 in Jose Sr.'s back pocket, somebody said, "Kill them, kill them, kill

them." So, Jose Sr. stopped cooperating and jumped on defendant, who had the gun. The other offenders kicked and punched Jose Sr., who pushed and fought them while he struggled to get out of the basement and yell for help. During the struggle, the offenders did not use their hands to pull their hoods to conceal their faces, so Jose Sr. was able to see their faces.

¶ 11 Outside, Jose Sr. yelled for help. Two offenders ran toward the alley while the other two offenders ran to the front of the property and went south on Fairfield Avenue towards 62nd Street. Jose Sr. chased the latter two offenders for half a block and told them that he saw their faces. Jose Sr. was bleeding from his mouth, his top front teeth were pushed in, and he had bruises on his legs, arm and cheek. He returned to the scene. Serrano retrieved his cell phone from the truck, and Jose Sr. used it to call the police. The police, who were driving a black SUV with tinted windows, arrived in less than five minutes. Jose Sr. gave the police a description of the offenders, and the police left. The police returned in less than two minutes and took Jose Sr. to a showup about two blocks away at a gas station on the corner of 63rd Street and California Avenue.

¶ 12 At the showup, Jose Sr. remained inside the stopped SUV while defendant Washington, codefendant Henderson and another man stood about 10 feet away. Police officers were with the suspects, whose hands were behind them and thus not visible to Jose Sr. Jose Sr. told the police that he was 100% certain that defendant Washington was the gunman and codefendant Henderson was the offender who had searched Jose Sr.'s and Serrano's pockets. Defendant Washington was wearing the same dark-colored hoodie he had worn during the offense in the basement, and codefendant Henderson was wearing the same lighter colored, patterned hoodie

that he had worn during the offense. Jose Sr. told the police that the third man was too old to be one of the offenders and Jose Sr. did not recognize his face. No more than 5 to 7 minutes had elapsed from the time of the robbery to the showup. None of the property stolen from Jose Sr. was ever returned to him.

¶ 13 On cross-examination, Jose Sr. acknowledged that immediately after the offense he initially told the police at the scene that five black males had robbed him and they wore dark hoodies. At the trial, he explained that the offenders were moving around so fast during the offense, he was "crazy," his life was on the line, and he was worried about his son. However, after the offense, he relaxed and was certain that there were four offenders.

¶ 14 Jose Jr. testified that he was 18 years old. At the time of the offense, he was installing a light fixture in a closet on the first floor. He was on a ladder and heard footsteps. He saw four "guys" enter the room, and they were covering their faces with their hoodies. One offender told Jose Jr. to get off the ladder and pointed a gun at him. The three other offenders grabbed Jose Jr., pulled the hood of his sweatshirt down over his face, searched him, and took his cell phone and wallet. In court, Jose Jr. identified codefendant Henderson as one of the offenders and defendant Washington as the gunman.

¶ 15 Jose Jr. testified that defendant Washington put the gun to Jose Jr.'s head and asked where the other workers and the money were located. While Jose Jr. walked to the basement, defendant Washington walked beside him with the gun, and codefendant and the two other offenders followed. In the basement, defendant Washington pushed Jose Jr. to the ground and pointed the gun at Jose Sr. and Serrano while the three other offenders searched the victims.

¶ 16 Jose Jr. lay face-down on the floor and was frightened. However, he "peeked" and saw defendant Washington's face while he pointed the gun at Jose Sr. and searched him. At the time, Jose Jr. was two feet away from defendant Washington and saw "the bottom part" of his face; "because [defendant Washington] had the hoodie," "the side a little bit," "almost like half" of his face was uncovered.

¶ 17 Initially, Jose Jr. testified that he never saw codefendant Henderson's face in the basement. Later, however, Jose Jr. testified that he saw the side of codefendant Henderson's face while he was kicking Jose Sr. At the time, Jose Jr. was about two feet away from codefendant, who was wearing a beige or gray hoodie with a pattern that looked something like squares or checkers. Jose Jr.'s testimony concerning his father's struggle with the offenders was consistent with his father's testimony.

¶ 18 Jose Jr. testified that when the police drove him and Serrano to the showup in the SUV, he (Jose Jr.) already knew that his father had identified some offenders. At the gas station, Jose Jr. recognized defendant and codefendant and told the police that he was sure that they were the offenders. On cross-examination, Jose Jr. agreed with defense counsel's description that the three suspects in the showup were handcuffed to one another and the handcuffs were visible.

¶ 19 Through an interpreter, Serrano testified that when Jose Jr. entered the basement, defendant Washington held the gun to Jose Jr.'s head, which was tilted all the way towards his shoulder. Three other offenders entered behind them. Serrano did not understand the offenders' orders, so defendant Washington, whose dark-colored hood covered the top of his forehead, pointed the gun at Serrano, who looked directly at Washington's face. Serrano was only three or

four feet away from Washington, who walked closer to Serrano and held the gun against his head. Washington had been holding his shirt up over his mouth and nose, but he lowered it when he yelled at Serrano, saying, "Put to the ground down, or I will kill you mother f***er."

¶ 20 Serrano testified that the offenders threw him to the ground, and someone put his knee on Serrano's head. The gun was held against Serrano's head while the offenders searched him and took his keys. Then, the offenders searched Jose Sr., and Serrano turned to look at them. Serrano saw codefendant Henderson's whole face completely three times. Codefendant Henderson wore a light-colored hoodie that had "a different design than the other ones." The design "was like lines with squares." The offenders struggled with Jose Sr. because they thought he had more money and were trying to get it from him. The offenders kept moving around, and it was chaotic. During that struggle, Serrano saw defendant Washington's face three more times; he was only three feet away from Serrano. When an offender said something like, "kill 'er," Jose Sr. started to fight with two offenders and make his way out of the basement while the other two offenders still restrained Serrano and Jose Jr. The two remaining offenders fled, and Serrano and Jose Jr. joined Jose Sr. outside.

¶ 21 Serrano testified that when Jose Sr. returned from the showup, he explained to Serrano in Spanish that the police would take him to see two or three people to see if he recognized anyone as one of the offenders. At the gas station, Serrano viewed three people and recognized defendant Washington as the gunman and codefendant Henderson as one of the offenders. They were wearing the same clothes they wore during the robbery, and Serrano was completely certain about his identification of them. At that time, Serrano did not know that Jose Sr. had already

identified defendant and codefendant in the showup. Jose Jr. was with Serrano during the showup. Serrano did not remember whether the three suspects in the showup were handcuffed because he focused on their faces.

¶ 22 Chicago police Officer James Johnson testified that the call about the robbery came over the radio at 6:39 p.m. He, his partner, and his sergeant drove in a black, unmarked SUV and arrived at the scene at 6:41 p.m. A man standing at the curb informed them that he was just robbed. Officer Johnson asked what the offenders looked like and where they went, and the man stated they were five young black males wearing blue hoodies, black hoodies, and gray hoodies and they ran south on Fairfield Avenue. Officer Johnson did not ask for further details because he wanted to get enough information as quickly as possible so the police could begin to tour the area.

¶ 23 The police drove south on Fairfield Avenue, and several people–about two adults and some children–near the corner of 62nd Street pointed in the direction of California Avenue. Officer Johnson had grown up in that neighborhood and knew that "younger guys" always hung out at the gas station at 63rd Street and California Avenue, so the officers drove there. As they approached, they saw three young black males who matched the victim's description and were standing on the curb by the gas station's mini-mart. Two suspects wore dark hoodies, and one wore a grayish hoodie. The officers detained the three suspects at 6:45 p.m., and Officer Johnson drove back to the scene to take Jose Sr. to the showup.

¶ 24 Officer Johnson testified that when Jose Sr. viewed the suspects at the gas station, he immediately identified defendant Washington in the dark hoodie and codefendant Henderson in

the gray hoodie as the offenders. The third male in the showup was 25 years old. Jose Sr. confirmed to Officer Johnson that he was 100% certain about his identification of the offenders and stated that Jose Jr. and Serrano also observed the offenders. Officer Johnson returned to the scene and then brought Jose Jr. and Serrano to the showup. Jose Sr. sat with them in the back seat of the SUV.

¶ 25 At the gas station, Officer Johnson asked Jose Jr. and Serrano if they recognized anyone. Jose Jr. identified defendant in the black hoodie and codefendant Henderson in the gray hoodie as the offenders. Then, in broken English, Serrano identified defendant and codefendant Henderson as the offenders. Officer Johnson asked Jose Sr. to ask Serrano in Spanish if he was 100% certain about his identification, and Serrano stated that he was 120% certain. Defendant and codefendant Henderson were arrested at 6:52 p.m. At 6:57 p.m., they were transported to the station in a marked blue and white police car. On cross-examination, Officer Johnson acknowledged that his report did not indicate that Jose Sr. had described the offenders as young.

¶ 26 For the defense, Shantel Williams testified that she was twelve years old and codefendant Henderson was her cousin. On the evening of the offense, she and codefendant Henderson were at her house, located at 6238 S. California Avenue, which was three houses down from the gas station and mini-mart. Her mother, grandmother, grandmother's boyfriend, brother, and cousins were also at the house. Her mother, Antria Henderson, asked her to go to the mini-mart to buy bread, milk, and snacks and to the beauty supply store to buy hair gel and a comb. The beauty supply store was across the street from the mini-mart and closed at 7 p.m. Antria gave Shantel cash and her Link card. After *The Simpsons* television program ended, Shantel and codefendant

Henderson left the house at about 6:50 p.m. As codefendant Henderson walked, he talked on his cell phone with defendant Washington and asked Washington to meet him at the gas station. Shantel proceeded to the beauty supply store alone. Afterwards, she joined defendant and codefendant Henderson at the mini-mart across the street.

¶ 27 Shantel testified that they used Antria's Link card, which required a special password, to buy wheat bread, chips, juice and other junk food. As they left the mini-mart, the police "rolled up and started messing with them." According to Shantel, codefendant Henderson turned to her to give her his juice, and the police told him, "You turn back around or I'm going to smack the s*** out of you." Shantel thought two of the officers who exited the car were Mexican. She went home and told Antria the police were bothering codefendant Henderson. Later, codefendant Henderson called Antria on the telephone. Antria did not go to the police station.

¶ 28 Shantel was interviewed by an assistant State's attorney (ASA) two days before the trial. During cross-examination, she denied telling the ASA during the interview that the police car that pulled into the gas station was white with "Chicago Police" written on the side. She said that she bought the items at the mini-mart after 7 p.m. and the police arrived after 7 p.m.

¶ 29 Antria Henderson was Shantel's mother and codefendant Henderson's aunt. She testified that codefendant Henderson was at her house at 6:15 p.m., along with at least six other people. She wanted Shantel to buy the gel and comb at the beauty supply store before it closed, and gave her some cash. Antria also gave her Link card to Shantel to buy bread, a two liter bottle of soda, and "some junk." Antria saw Shantel and codefendant Henderson leave the house at 6:48 p.m. About five minutes later, Shantel returned home with the gel and comb from the beauty supply

store, the bread from the mini-mart, and the Link card. Shantel never mentioned anything that happened at the gas station. Antria ordered a detailed summary of her Link card charges, and her Link card was used at 7:04 p.m. at the mini-mart on the date of the offense. Initially, Antria testified that she did not remember getting a telephone call from codefendant Henderson; however, on redirect examination, she testified that she remembered getting a telephone call at 7:05 p.m. from codefendant Henderson, who was calling from the police car. Antria acknowledged that she never ordered a detailed summary of her phone records.

¶ 30 Gladys Henderson was codefendant Henderson's grandmother. Gladys testified that, on the evening of the offense, she and her boyfriend were visiting Antria. Gladys was in the bedroom watching television and did not see anyone leave the house, but she was told that codefendant Henderson and Shantel went to the store. Gladys saw codefendant Henderson at about 6:30 p.m., before he went to the store. He came up from the basement, spoke to Gladys, and asked her for money. Shantel came back from the store at about 6:50 p.m. and told Gladys that the police "had" codefendant Henderson. Gladys thought Antria ran to the gas station, but Gladys was not sure.

¶ 31 Leon Collins testified that he was 17 years old and friends with both defendant Washington and codefendant Henderson. At the time of the offense on May 8, 2010, he lived at 6412 South Richmond Avenue with his mother. Defendant Washington was at Collins' house May 7, 2010, and stayed overnight. They watched television and woke up the next day around noon. They stayed indoors all day watching television, playing video games and talking to girls on the telephone. Defendant answered a call on Collins' cell phone from codefendant

Henderson, and that conversation ended about 6:40 p.m. Defendant then said he was going to meet Henderson at the gas station. Collins testified that his home was one block south and three blocks west of the gas station. Defendant left and did not return to Collins' house that evening.

¶ 32 Collins testified he was adjudicated guilty of aggravated robbery as a juvenile in June 2010. Although he pled guilty to that offense, he asserted he falsely told the judge he was guilty so he could go home. He testified that after being arrested on that charge, he was in custody at the Audy Home for three days before agreeing to the guilty plea and being released to his mother.

¶ 33 Codefendant Henderson and the State entered into a stipulation that, if called to testify, Susan Stuki, a program director at the Illinois Department of Human Services, would testify that Antria's Link card was used at 2810 West 63rd Street on May 8, 2010, at 7:04 p.m. for a $3.88 purchase.

¶ 34 In the State's rebuttal case, Chicago police detective Eric Chopp testified that he was present when ASA Leanna Rajk interviewed Shantel two days before the trial began. When ASA Rajk asked Shantel what she bought at the mini-mart, Shantel replied, "a glazed donut, a couple bags of hot chips and some ten-cent candies." Shantel said she did not buy anything for her mother. After ASA Rajk again asked Shantel if she was sure about her answer, Shantel said that she was supposed to buy bread and milk for her mother but the mini-mart was out of those items. Detective Chopp also testified that when Shantel was asked what type of police car pulled into the gas station, she said the police car was blue and white and had "Chicago Police" written on the side.

¶ 35 Detective Chopp was also present when ASA Rajk interviewed Antria two days before the trial. Antria stated that she was on the computer when Shantel came home from the gas station and watched television. Antria stated that nothing eventful happened after Shantel came home from the gas station that day.

¶ 36 Officer Johnson testified that when he pulled into the gas station and approached the suspects, there were no other vehicles in the gas station at that time. He was driving a black Chevy Tahoe SUV that did not have "Chicago Police" written on the side. The State published an audio tape of the police radio transmissions. On the tape, Officer Johnson said that they were driving up to the scene of robbery at 6:40 p.m. Then he said that they had stopped a "couple possibles." Then, there was a transmission that defendant and codefendant were being transported to the police station at 6:57 p.m. Officer Johnson testified that neither he, his partner, nor his sergeant ever threatened to cause physical violence to the suspects. Moreover, neither Officer Johnson, his partner, nor his sergeant were Hispanic.

¶ 37 The jury found defendant guilty of three counts of armed robbery, three counts of aggravated battery, and three counts of unlawful restraint. The jury also made a finding that, during the commission of the offense of armed robbery, defendant, or one for whose conduct he was legally responsible, was armed with a firearm. The trial court sentenced defendant to three 33-year concurrent prison terms on the three armed robbery counts and merged the other counts.

¶ 38 II. ANALYSIS

¶ 39 A. Sufficiency of the Evidence

¶ 40 Defendant contends the State failed to prove beyond a reasonable doubt that he was guilty

of armed robbery because the only evidence of his guilt came from unreliable witnesses who made their identifications at an unnecessarily suggestive showup at the gas station. At the showup, defendant and codefendant Henderson were standing next to two police officers, and defendant contends that he and codefendant Henderson were handcuffed at the time. According to defendant, the unreliable showup identifications rendered the witnesses' in-court identifications unreliable because the identifications lacked an independent basis. Defendant argues that eyewitness identifications are notoriously and inherently unreliable, and cross-racial identifications, as in this case where the victims were Hispanic and the offenders were African American, are even more likely to be unreliable. Defendant also argues that nothing about his or codefendant Henderson's appearance when they were apprehended suggested they had recently been running, and no evidence indicated that they appeared nervous or tried to flee when the police approached them. Furthermore, no weapon or proceeds from the robbery were recovered on them. Defendant adds that the alibi witnesses presented at trial provided credible testimony.

¶ 41 When the sufficiency of the evidence is challenged, a criminal conviction will not be set aside unless the evidence, when viewed in the light most favorable to the prosecution, is so improbable or unsatisfactory that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). The reviewing court may not retry the defendant. *People v. Rivera*, 166 Ill. 2d 279, 287 (1995). The trier of fact determines the credibility of the witnesses, the weight given to their testimony, and the reasonable inferences drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 42 Identification by a single witness can sustain a conviction if the witness viewed the accused under circumstances sufficient to permit a positive identification and the witness is credible. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "This is true even in the presence of contradicting alibi testimony, provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). "While the credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive." *Smith*, 185 Ill. 2d at 542. A reviewing court "will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Id*.

¶ 43 Showups have been justified where, *inter alia*, "a witness had an excellent opportunity to observe the defendant during the commission of the crime, *** or prompt identification was necessary for the police to determine whether or not to continue their search." *People v. Manion*, 67 Ill. 2d 564, 569-70 (1977). To determine the admissibility of suggestive out-of-court identification evidence, courts look at the totality of the circumstances. *Id*. at 571. "[E]vidence of an unnecessarily suggestive identification may nevertheless be admitted at trial if reliability of the identification, under the totality of circumstances, is shown." *Id*. In assessing the reliability of an identification, courts look at: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior description given; (4) the witness's level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification. *Id.*; *Slim*, 127 Ill. 2d at 307. "The presence of

discrepancies or omissions in a witness's description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *Slim*, 127 Ill. 2d at 309.

¶ 44 Defendant argues that the showup identification was unnecessarily suggestive because the showup was conducted simultaneously for Jose Jr. and Serrano while they were in the backseat of the police vehicle with Jose Sr.; Jose Jr. already knew before he viewed the showup that Jose Sr. had identified offenders in the showup; and, instead of viewing a lineup at the police station, the victims observed defendant and codefendant, whose hands may have been handcuffed at the time of the identification, being detained by two police officers at the gas station. Defendant also argues the showups likely produced misidentifications because the witnesses seemed to identify the offenders based upon the color of their hoodies rather than their facial features.

¶ 45 The same arguments defendant raises on appeal were made to the jury by trial counsel. The jury must resolve factual disputes and make credibility determinations, and the record establishes that the jury was fully aware of all of the impeachment issues in this case by defense counsel's cross-examination of the witnesses and arguments. The jury, however, necessarily rejected defendant's arguments because the jury found him guilty. Furthermore, the showup identification at the gas station was justified based on both the witnesses' opportunity to view the offenders and the facilitation of the police search. *People v. Elam*, 50 Ill. 2d 214, 218 (1972) (prompt on-the-scene identifications are common in the apprehension of criminal offenders and even necessary).

¶ 46 Concerning the reliability factors, all three victims had the opportunity to see defendant and codefendant in the basement during the commission of the robbery. Although the offenders tried to conceal their faces, they revealed their faces when they let go of their hoods to yell at the victims, search them, and fight with Jose Sr. Jose Sr. and Serrano testified that they had multiple opportunities to look at the faces of defendant and codefendant in the basement under good lighting conditions when the offenders were either standing right next to the victims or only two to four feet away from them. Although Jose Jr. lay face-down on the floor and was frightened, he peeked and saw defendant Washington's face while he pointed the gun at Jose Sr. and searched him. At that time, Jose Jr. was two feet away from defendant and the bottom part or almost about half of his face was uncovered. In addition, although Jose Jr. initially testified that he never saw codefendant Henderson's face in the basement, he later clarified that he saw the side of Henderson's face from just two feet away when Henderson was kicking Jose Sr. Moreover, each victim's identification corroborated those of the other victims.

¶ 47 The witnesses' degree of attention was more than casual or passing because defendant and codefendant were the clear focus of the witnesses' attention even if for only a short time. Jose Sr. and Serrano testified that they looked at defendant Washington's face when he pointed the gun at them and when he yelled at them. They also looked at codefendant Henderson's face when he used both hands to search their pockets. All the witnesses testified that they defied the offenders' orders not to look at their faces because the witnesses wanted to see who was robbing them and what was going on. As Jose Sr. chased two offenders from the scene, he yelled, "I see your faces."

¶ 48 Jose Sr.'s description of the offenders was accurate. Although he initially told the police right after the chaos that there were five offenders, after he calmed down, he was certain that there were four offenders. Jose Jr. and Serrano also were certain that there were four offenders. When Officer Johnson arrived at the scene, he needed a quick description of the offenders, and Jose Sr. told him the offenders were young black males who wore blue, black and gray hoodies. That description proved accurate at the showup when the three victims identified defendant Washington, who wore a black hoodie, and codefendant Henderson, who wore a lighter colored hoodie with a pattern or design. In addition, all three victims demonstrated absolute certainty at the showup concerning their identifications of defendant as the gunman and codefendant as one of the offenders who had searched their pockets. All three victims excluded the third detained male, who was 25 years old, as being too old to be one of the offenders.

¶ 49 The evidence established that the call about the robbery came over the police radio at 6:39 p.m. and defendant and codefendant were transported to the police station after their arrest at 6:57 p.m. The extremely short lapse of time between the crime and the showup supports the reliability of the victims' identifications.

¶ 50 Furthermore, defendant offers no support for his assertion that no necessity or emergency required an immediate showup. On the contrary, the record establishes that the police officers needed to conduct the showup to determine whether the detained suspects were the offenders or whether the police needed to continue searching for them. The armed robbery had just occurred, the suspects fled on foot and thus were probably still nearby, and, if the victims made either a fresh identification of the offenders in the showup or eliminated any of the showup suspects, then

the police would know whether the offenders had been apprehended or were still at large. See *People v. Hicks*, 134 Ill. App. 3d 1031, 1036 (1985) (identification in a showup justified on the basis of three witnesses' opportunity to view the defendant and the facilitation of the police search). Moreover, the use of handcuffs on the suspects and the presence of police officers alongside the suspects at the gas station during the showup were necessary to ensure that the suspects did not flee. See *People v. Howard*, 376 Ill. App. 3d 322, 331-32 (2007) (presentation of the defendant handcuffed during the showup and flanked by police officers did not weaken the credibility of the identification, which stemmed from the independent observations of the defendant); see also *People v. Ramos*, 339 Ill. App. 3d 891, 898 (2003) (a two-person rather than a one-person showup enhanced the reliability of the procedure).

¶ 51 The out-of-court identifications, even though suggestive, were reliable under the totality of the circumstances. Where the showups were necessary and proper and the identifications from those showups were reliable, the subsequent in-court identifications of defendant by Jose Sr., Jose Jr., and Serrano were similarly reliable. Accordingly, we do not find the identification evidence here so unsatisfactory as to justify a reasonable doubt as to defendant's guilt. *People v. Lewis*, 165 Ill. 2d 305, 357 (1995).

¶ 52 Finally, defendant contends that the alibi testimony created a reasonable doubt as to his guilt. We disagree. "The weight to be given alibi evidence is a question of credibility for the tier of fact [citation], and there is no obligation on the tier of fact to accept alibi testimony over positive identification of an accused [citation]." *Slim*, 127 Ill. 2d at 315. The alibi testimony did not come from independent witnesses; the witnesses were three close relatives of codefendant

Henderson and one friend of both Henderson and defendant. Furthermore, codefendant Henderson's relatives–his cousin, aunt, and grandmother–provided inconsistent testimony that undermined the alibi defense. Shantel's testimony was inaccurate as to times and the type of police car that came to the gas station. Antria's testimony was inaccurate as to times, and she contradicted Shantel's testimony about informing her of the occurrence at the gas station after Shantel returned home and about the items Shantel bought at the mini-mart. Gladys's testimony was weak where she did not see anyone leave the house. Her testimony that Antria ran out of the house after Shantel returned home contradicted Antria's testimony that Shantel came home, said nothing, and the evening was uneventful. Moreover, the credibility of Shantel and Antria was severely impeached during the State's rebuttal case, which showed that their trial testimony was inconsistent with the statements they had made to the ASA during interviews just two days before the trial. Although Collins testified that defendant was at Collins' house until about 6:40 p.m. on the date of the offense, the jury took into consideration his relationship with defendant and his prior juvenile adjudication of guilt for the offense of aggravated robbery to assess his credibility.

¶ 53 From our examination of the record, we conclude that the findings of the jury do not raise a reasonable doubt as to defendant's identification and guilt.

¶ 54 B. Constitutionality of the Automatic Transfer Provision from Juvenile Court

¶ 55 Defendant's case was automatically transferred to adult criminal court pursuant to the automatic transfer statute (705 ILCS 405/5-130 (West 2010)), which provides, in pertinent part, that 15- and 16-year-old defendants charged with armed robbery with a firearm are to be

prosecuted under the Criminal Code of 1961 (720 ILCS 5/1-1 *et seq.* (West 2010)) and not the Juvenile Court Act of 1987. Defendant argues that the automatic transfer statute violated the due process clauses of the state and federal constitutions (U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2), the eighth amendment of the federal constitution (U.S. Const. amend. VIII), and the proportionate penalties clause of the state constitution (Ill. Const. 1970., art I, § 11) because the automatic transfer statute resulted in his transfer to adult court without a hearing and subjected him to more severe punishment.

¶ 56 Statutes are presumed constitutional, and we must construe statutes so as to uphold their constitutionality if there is any reasonable way to do so. *People v. Smith*, 383 Ill. App. 3d 1078, 1094 (2008). The party challenging the validity of a statute has the burden of clearly establishing a constitutional violation. *Id*. We review the constitutionality of a statute *de novo*. *Id*.

¶ 57 Defendant acknowledges that our state supreme court has previously ruled that the automatic transfer provision was constitutional (*People v. J.S.*, 103 Ill. 2d 395, 405 (1984); *People v. M.A.*, 124 Ill. 2d 135, 147 (1988); *People v. R.L.*, 158 Ill. 2d 432 (1994)), but he argues this court should review the issue in light of three more recent Supreme Court cases concerning sentencing schemes applied to juveniles. Specifically, defendant cites *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (mandatory life imprisonment without parole for offenders under 18 years of age at the time of their crime violated the eighth amendment's prohibition against cruel and unusual punishment, and the sentencing scheme prevented the sentencing court from considering the juvenile's lessened culpability and greater capacity for change), *Graham v. Florida*, 130 S. Ct. 2011 (2010) (the Court concluded that the eighth amendment forbids, in light of the goal of

rehabilitation, the sentence of life without parole for a juvenile offender who did not commit homicide), and *Roper v. Simmons*, 543 U.S. 551 (2005) (the Court concluded that the eighth amendment forbids imposition of the death penalty on offenders who were under the age of 18 when they committed their crimes).

¶ 58 Defendant argues that his substantive and procedural due process rights were violated because automatically transferring all eligible 15- and 16-year-old defendants to adult court without a hearing to determine their potential for rehabilitation and individual level of culpability bears no rational relationship to a legitimate governmental purpose. This argument was made and rejected in *People v. Jackson*, 2012 IL App (1st) 100398, and *People v. Salas*, 2011 IL App (1st) 091880. *Jackson* noted that both *Roper* and *Graham* decided constitutional challenges made to sentencing statutes; no due process arguments were raised or addressed in either case; and the Illinois supreme court's decision in *J.S.*, which rejected a due process challenge to the automatic transfer provision, still controlled the issue at bar. *Jackson*, 2012 IL App (1st) 100398, ¶¶ 16, 17; see also *Salas*, 2011 IL App (1st) 091880, ¶¶ 76-80 (similarly rejecting due process challenges to the automatic transfer statute, finding that *Roper* and *Graham* were inapplicable and that *J.S.* remained binding). *Miller*, like *Roper* and *Graham*, was decided on a constitutional challenge made to a sentencing statute. Consequently, *Miller* does not affect the analysis in *Jackson*. We follow *Jackson* and *Salas* and reject defendant's argument that the automatic transfer provision violated his right to substantive and procedural due process.

¶ 59 Finally, defendant argues that the automatic transfer provision violates the proportionate penalties clause of the Illinois Constitution and the eighth amendment of the U.S. Constitution

because it mandates adult sentencing for juveniles, who, under the rationale in *Roper*, *Graham* and *Miller*, should not be treated the same as adults. This argument was made and rejected in *Jackson* and *Salas* on the basis that the defendant was not challenging his *sentence* but, rather, the *procedure* that exposed him to the adult sentencing scheme. *Jackson* and *Salas* determined that the proportionate penalties clause of the Illinois Constitution and the eighth amendment of the U.S. Constitution apply to penalties and punishments, not to procedure, and therefore do not apply to a defendant's challenge to the automatic transfer provision. *Jackson*, 2012 IL App (1st) 100398, ¶¶ 19, 24; *Salas*, 2011 IL App (1st) 091880, ¶¶ 68, 70. We agree with the reasoning in *Jackson* and *Salas* and similarly find that the automatic transfer provision does not violate the proportionate penalties clause of the Illinois Constitution or the eighth amendment of the U.S. Constitution.

¶ 60 C. Admissibility of Alibi Witness's Juvenile Adjudication

¶ 61 Defendant contends the trial court completely abdicated its duty to conduct a meaningful balancing test of the probative and prejudicial value of the evidence before granting the State's request to impeach Collins with his prior juvenile adjudication for aggravated robbery. According to defendant, the record fails to show that the trial court ever performed the balancing test at all. Defendant argues that the erroneous admission of Collins' juvenile adjudication calls for reversal because the evidence in this case was closely balanced where defendant was not implicated in the crime by any physical evidence, was apprehended several blocks from the crime scene, and his conviction was based on unreliable identification testimony. Defendant also complains the trial court erred when it prevented defense counsel on direct from having Collins

testify about the details of his juvenile adjudication–*i.e.*, that he falsely told the court he committed the offense and pled guilty in order to be released from custody–but then allowed the prosecution to elicit those details to paint Collins as a perjurer and improperly suggest to the jury during closing argument that the juvenile adjudication showed Collins' propensity to commit crimes.

¶ 62 Defendant forfeited review of this issue by failing to file a motion *in limine*, object to the admission of the evidence during trial, and include this matter in his posttrial motion for a new trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Such forfeiture notwithstanding, the trial court properly exercised its discretion when it allowed the 2010 juvenile adjudication of aggravated robbery to be used to impeach defense witness Collins' credibility. The prior juvenile adjudication of guilt was admissible "for purposes of impeachment and pursuant to the rules of evidence for criminal trials" under section 5-150(1)(c) of the Juvenile Court Act of 1987 (705 ILCS 405/5-150(1)(c) (West 2010)), and Illinois Rule of Evidence 609(d), which states:

> "Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." Ill. R. Evid. 609(d) (eff. Jan. 1, 2011).

¶ 63 Pursuant to *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), evidence of a witness's prior conviction is admissible to attack his credibility where: (1) the prior crime was punishable

by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years have elapsed since the date of the conviction of the proper crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. In conducting the balancing test required by the third *Montgomery* factor, "the trial court should consider, *inter alia*, the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness's criminal record, and whether the crime was similar to the one charged. *People v. Mullins*, 242 Ill. 2d 1, 14-15 (2011). The determination of whether a witness's prior conviction is admissible for purposes of impeachment is within the sound discretion of the trial court. *Id*. at 15.

¶ 64 A trial judge need not explicitly state that he is balancing the opposing interests pursuant to *Montgomery* where the record otherwise establishes that he has done so. *People v. Williams*, 173 Ill. 2d 48, 83 (1996). Absent an express indication that the trial court was unaware of its obligation to balance the *Montgomery* facts, this court will assume that the trial court gave the factors appropriate consideration. *People v. Watkins*, 206 Ill. App. 3d 228, 245 (1990); see also *People v. Jordan*, 218 Ill. 2d 255, 269 (2006) (a reviewing court presumes that a trial judge knows and follows the law unless the record demonstrates otherwise).

¶ 65 We reject defendant's assertion that the trial court did not engage in "meaningful analysis of the countervailing interests at stake" concerning the third *Montgomery* factor. The record establishes the trial court was fully aware of the *Montgomery* standard and the required balancing test. During the State's case in chief, the prosecution moved *in limine* to introduce codefendant

Henderson's prior burglary juvenile adjudication if he should testify. The court ruled that it would allow that evidence because it was admissible under the Juvenile Court Act of 1987 and, additionally, pursuant to the *Montgomery* balancing test. Thereafter, the State, prior to Collins' testimony, requested leave to impeach him with his 2010 felony adjudication for aggravated robbery. The defense did not object, and the trial court responded:

> "Based on my earlier ruling regarding the Juvenile Court Act as far as admissibility of prior adjudications, if the defense brings it out, there would be nothing to impeach him with; but, otherwise, the State may use that to impeach this witness."

Although the trial court did not expressly state in its ruling concerning Collins that it was balancing the opposing interests, there is no reason to suppose the trial court disregarded the well-established standard it had previously applied to codefendant Henderson. See *Williams*, 173 Ill. 2d at 83.

¶ 66 Defendant also complains that the trial court erred when it precluded the defense on direct from having Collins testify to the details of the adjudication but then allowed the prosecution to do so. Defendant forfeited review of this issue by failing to raise it in his posttrial motion. *Enoch*, 122 Ill. 2d at 186. Such forfeiture notwithstanding, we find no error where Collins testified on direct examination that he was arrested for aggravated robbery, spent three days in custody at the Audy Home before he was released to the custody of his mother, and was convicted of the offense as a juvenile on June 24, 2010. Although the trial court sustained the State's objections to questions concerning the details, Collins' answered the questions anyway

and thereby informed the jury that he did not know the victim, the robbery occurred on the 6300 block of Wentworth, and Collins did not personally participate in the robbery. The trial court instructed the jury to disregard those details.

¶ 67 On cross-examination, Collins admitted that he pled guilty to the offense, and the trial court stated, "Since the State is proceeding in this manner, I'll allow defense counsel on redirect to go into the details." Collins testified that his guilty plea was a lie. On redirect, Collins explained that he pled guilty because "[t]hey" told him he could go home if he pled guilty and he did not like staying at the Audy Home.

¶ 68 No error occurred where the trial court allowed the defense ample opportunity on redirect to go into the details of Collins' juvenile adjudication. Furthermore, the record does not support defendant's allegation that the State used Collins' prior adjudication as propensity evidence and not to impeach his credibility. We conclude that the trial court properly admitted Collins' prior adjudication pursuant to *Montgomery*.

¶ 69 D. Ineffective Assistance of Counsel

¶ 70 Defendant claims he was denied the right of effective assistance of counsel because counsel (1) failed to file pretrial motions challenging the legality of defendant's initial stop and detention and the suggestive identification procedure employed by the police; (2) failed to use police reports to impeach the witnesses' identifications of defendant; (3) failed to challenge the admission of the audiotape of the police radio transmission and the information on the Link card transaction statement, which were used to establish the timing of the offense and undermine defendant's alibi; and (4) focused on an invalid theory of defense, *i.e.*, attacking the sufficiency

of the evidence to prove a real gun was used in the armed robbery offense.

¶ 71 In order to obtain relief on his claims of ineffective assistance of counsel, defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, defendant must show not only that his lawyer's performance fell below an objective standard of reasonableness, but also that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89; *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). The competence of counsel is assessed in light of counsel's total performance (*People v. Ayala*, 142 Ill. App. 3d 93, 99-100 (1986)), and there is a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance (*Strickland*, 466 U.S. at 689). "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998). The prejudice prong of the *Strickland* test may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). The failure to satisfy either *Strickland* prong will preclude a finding of ineffective assistance of counsel. *People v. Johnson*, 368 Ill. App. 3d 1146, 1161 (2006).

¶ 72 First, defendant argues that his trial counsel was ineffective for failing to file a motion challenging defendant's detention and subsequent identification at the gas station. We disagree; a motion to suppress in this matter would not have enjoyed a reasonable probability of success. Trial counsel's decision to file a motion to suppress in a criminal case is a matter of trial tactics

and generally has no bearing on the issue of competency of counsel. *People v. Smith*, 265 Ill. App. 3d 981, 984 (1994). To prevail on a claim of ineffective assistance for failure to file a motion to suppress, the defendant must show that the motion would have enjoyed a reasonable probability of success and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Little*, 322 Ill. App. 3d 607, 611, 613 (2001).

¶ 73 A motion challenging defendant's detention at the gas station on the basis that it was an illegal stop would not have enjoyed reasonable probability of success. A police officer may conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity and such suspicion amounts to more than a mere hunch. *People v. McDonough*, 239 Ill. 2d 260, 268 (2010) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). To justify the stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry*, 312 U.S. at 21. In determining the reasonableness of the stop, the court may examine whether the police were aware of specific facts giving rise to a reasonable suspicion and whether the police intrusion was reasonably related to the known facts. *People v. Ross*, 317 Ill. App. 3d 26, 29 (2000). A court should objectively consider whether the information known to the officer at the time of the stop would warrant a person of reasonable caution to believe a stop was necessary to investigate the possibility of criminal activity. *People v. Shafer*, 372 Ill. App. 3d 1044, 1048-49 (2007). Moreover, the limited transportation of a defendant for a showup is reasonable under *Terry*. *People v. Lippert*, 89 Ill. 2d 171, 187 (1982).

¶ 74 The police were justified in conducting a *Terry* stop. When Officer Johnson observed defendant, he knew that a robbery had occurred nearby only minutes earlier and the offenders ran south on Fairfield Avenue. Furthermore, Jose Sr. had provided a physical description of the offenders to Officer Johnson, stating they were five young black males wearing blue, black and gray hoodies. See *Ross*, 317 Ill. App. 3d at 30 (the officer had reasonable suspicion to stop the defendant, who was walking within the vicinity of the crime scene within minutes of a burglary and matched the victim's description of the offender as "a black man wearing a blue shirt"). When Officer Johnson drove in the direction the offenders had fled, a group of pedestrians pointed and directed him to go toward California Avenue. Officer Johnson knew that younger people gathered at the gas station on California Avenue and 63rd Street, so he drove there. When Officer Johnson arrived at the gas station, he observed defendant, codefendant Henderson, and a third male, who matched the description of the suspects. Officer Johnson did not see any other young black males wearing hoodies on his way from the crime scene to the gas station. Two officers detained the suspects while Officer Johnson retrieved Jose Sr. from the crime scene and returned to the gas station for the showup. Jose Sr. identified, with 100% certainty, defendant as the gunman and codefendant Henderson as the offender who had searched Jose Sr.'s and Serrano's pockets. Jose Jr. and Serrano were then brought to the gas station, and they identified defendant and Henderson as the offenders. These facts were sufficient to support the investigatory stop. Officer Johnson had knowledge that a crime had just occurred, had a description of the offenders he was searching for, and observed the suspects nearby and within a short period of time.

¶ 75 Defendant also contends trial counsel should have filed a motion to suppress the pretrial identifications as impermissibly suggestive, arguing that the "line-up procedure was highly suggestive, and improperly constructed and conducted in violation" of section 5/107A-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/107A-5 (West 2010)). To succeed on a motion to suppress an out-of-court identification, the defendant must establish that, given the totality of the circumstances, the police procedures were "so unnecessarily suggestive as to give rise to a substantial likelihood of an irreparable misidentification." *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005). Defendant's argument lacks merit because, as discussed above, the prompt on-the-scene identification procedure was necessary to facilitate the police search for the offenders. Furthermore, the identification procedure was clearly a permissible showup, not a line-up, and therefore there was no statutory violation. The record establishes that defense counsel extensively cross-examined the witnesses regarding their pretrial identifications of defendant. Counsel exercised reasonable judgment in deciding to attack the credibility of the identification witnesses through cross-examination instead of filing a motion to suppress, which would have been futile. See *People v. Robinson*, 299 Ill. App. 3d 426, 434 (1998) (motion to quash arrest and suppress evidence would have been futile where the defendant matched the description officers had received and was in the area of the robbery a short time after it occurred). Defendant has failed to meet his burden to show that counsel's performance fell below an objective standard of reasonableness when counsel decided not to file a motion to suppress challenging the *Terry* stop and the showup identifications.

¶ 76 Next, defendant contends counsel rendered ineffective assistance when he failed to impeach the robbery victims with police reports that indicated there were five offenders rather than four and an unknown offender was the gunman. The police reports, however, are not properly part of the record in this appeal but, rather, are simply presented in the appendix of defendant's appellate brief. According to the record, defense counsel gave reports to the trial judge during the hearing on his motion for a new trial, and the trial judge stated at the conclusion of the sentencing hearing that he would "include the documents in the court file" and they could "remain a part of the record." Because the reports are not part of the record on appeal, this court cannot be certain as to what the trial court received. As the appellant, defendant has the burden of presenting a sufficiently complete record to the reviewing court, and, in the absence of an adequate record, the reviewing court must presume the trial court had a sufficient factual basis for its holding and that its order conforms with the law. *Webster v. Hartman,* 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant,* 99 Ill. 2d 389, 392 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch,* 99 Ill. 2d at 392.

¶ 77 Assuming, *arguendo*, that the police reports in the appendix were the same documents counsel tendered to the trial court, defendant's argument is without merit. Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which cannot support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Even mistakes in trial strategy or tactics will not of themselves, establish that counsel was ineffective. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). Here, Jose Sr. already

admitted, prior to cross-examination by defense counsel, that he told the officer at the scene that there were five offenders. Moreover, Officer Johnson also testified that Jose Sr. indicated to him at the scene that there were five offenders. Accordingly, further impeachment with the police reports would have been cumulative. See *People v. Kluppelberg*, 257 Ill. App. 3d 516, 533 (1993) (if the witness admits to making the statement, extrinsic proof of the statement need not be presented to perfect impeachment); *People v. Henry*, 164 Ill. 2d 236, 248 (1995) (generally, failure to present cumulative evidence does not constitute ineffective assistance of counsel).

¶ 78 Defendant's argument concerning an alleged inconsistency in the police reports about defendant's identity as the gunman is not persuasive. This court is not privy to the circumstances upon which the reports were written and is not given an explanation by the officers who authored the reports as to their content. Accordingly, the suggestion that Jose Sr. could be impeached with a prior statement to police indicating that an unknown individual was the gunman is speculative. Moreover, Jose Jr. and Serrano corroborated Jose Sr.'s testimony that defendant Washington was the gunman, and their testimony was consistent and reliable. Specifically, Serrano was able to get a very good look at defendant as the gunman because Serrano, who did not understand English very well, did not immediately comply with the command to get on the ground. Serrano's delay prompted defendant to move the gun he had pointed at Jose Jr.'s head and point it at Serrano, walk toward Serrano, and hold the gun against Serrano's head while defendant exposed his face as he swore, threatened to kill Serrano, and told him to get on the ground. Defense counsel thoroughly cross-examined all three eyewitnesses on their ability to view defendant's face during the offense. Even assuming, *arguendo*, that counsel's decision not to

impeach Jose Sr. with the police reports was unreasonable, defendant cannot show a reasonable probability that the outcome of his trial would have been different because the evidence of defendant's guilt was overwhelming. As stated in detail above, the evidence showed that the three victims testified consistently and reliably that defendant was the gunman who wore a dark-colored hoodie, and defendant's alibi evidence was very weak.

¶ 79 Defendant also contends counsel was ineffective for allowing harmful evidence to be introduced without objection. First, defendant argues trial counsel was ineffective for acquiescing to the State's introduction in its rebuttal case of the Office of Emergency Management and Communications (OEMC) audiotape, which showed the time line of defendant's detention and arrest. Defendant complains that the OEMC audiotape undermined his alibi; the State never established the requisite foundation before the tape was admitted and never showed that the times stated on the tape were accurate; and the State wished to introduce the tape for the hearsay purpose of proving that the times stated by the computer-generated voice on the tape were accurate in order to bolster the credibility of its witness, Officer Johnson, and prove that the alibi witnesses were wrong or lying.

¶ 80 Defendant mischaracterizes counsel's handling of the OEMC evidence. According to the record, counsel for defendant and codefendant Henderson informed the trial court that they had no objection to the State playing the audiotape of Jose Sr.'s 911 call during the State's rebuttal case. During the direct examination of Officer Johnson, the State sought to introduce the OEMC audiotape, which, in addition to recording communications made over the police radio, had a computerized voice that stated the time every 30 seconds, *i.e.*, a time stamp. Officer Johnson

testified that he had listened to the OEMC audiotape, it was a true and accurate depiction of the communications on his radio at the relevant time, his voice was on the OEMC audiotape, and the times on the audiotape were consistent with the times that he recalled from the date of the offense. During the sidebar to address defendant's and codefendant's objections, the State explained that it would play the portions of the tape where Officer Johnson stated that he had two possible suspects in custody and where defendant and codefendant were transported away from the gas station.

¶ 81 Codefendant Henderson's counsel argued that the time stamp was hearsay and asked why the State wanted to play the tape. ASA Rajk responded it was "to show the timing of what happened." Codefendant Henderson's counsel withdrew her objection, but defendant's counsel argued that the State was not playing the victim's "hew and cry" but, rather, something like "inter-cop conversation." The trial court reminded defense counsel that they previously had stated on the record that they would not object to the playing of the 911 audiotape. The trial court also stated that both sides had the audiotape since discovery and knew what was on the recording. The trial court concluded that, even if the defense objected, the court would admit the audiotape for the limited purpose for which it was offered, and it was "as much hearsay as the Link card, which has been stipulated to and can come in."

¶ 82 Defendant cannot meet his burden under either the performance or prejudice prong of the *Strickland* test. Defendant's counsel continued to maintain his objection to the audiotape, but the trial court informed the parties that it would overrule the objections of both counsel for defendant and codefendant. In addition, we do not assume that the State was unable to satisfy defendant's

concerns about the requisite foundation for the audiotape. Defendant's counsel reasonably could have decided to let the jury question the authenticity of the time stamps on the audiotape without giving the State the opportunity to call another witness to corroborate Officer Johnson's testimony concerning the time of defendant's detention and arrest.

¶ 83 Next, defendant contends counsel was ineffective for agreeing to the admission of the stipulation concerning the transaction on Antria Henderson's Link card on the day of the offense. Defendant complains the Link card information was harmful to the defense's theory of the case–that Shantel and codefendant Henderson used the Link card when meeting defendant at the gas station. Defendant also complains counsel stipulated to the information without establishing its accuracy. The Link card information indicated that Antria's Link card was used to make a $3.88 purchase at the gas station at 7:04 p.m., which was around 12 minutes after defendant and codefendant Henderson were arrested.

¶ 84 The Link card stipulation was made by codefendant Henderson's counsel, not by defendant's counsel. Defendant's counsel did not join in the stipulation and cannot be held accountable for a stipulation he did not make. Moreover, this court previously found that the introduction of the stipulation by codefendant Henderson's counsel did not constitute ineffective assistance of counsel. *People v. Henderson*, 2013 IL App (1st) 112824-U, ¶¶ 57-60. In addition, defense counsel introduced the testimony of Collins, defendant's own alibi witness, who alleged that defendant was at Collins' house until 6:40 p.m., which was after the time of the 6:30 p.m. robbery. Defendant cannot establish prejudice under the *Strickland* standard with regard to this evidence, which constituted a minor consideration in the context of the overwhelming evidence

introduced at defendant's trial.

¶ 85 Finally, defendant contends counsel focused his efforts on a baseless and weak theory of defense by attacking the sufficiency of the State's evidence to prove the offenders used a real gun during the robbery. Defendant complains this effort, at best, would have resulted merely in reduced charges because proof that a real gun was used is sufficient where a witness testifies the offender threatened to kill him with the gun or otherwise used the gun in such a manner that indicated the gun was real, and the witness also testifies that he saw the gun and thought it was real. See *People v. Toy*, 407 Ill. App. 3d 272, 289 (2011).

¶ 86 Decisions such as what evidence to present, whether to call a certain witness, and what theory of the defense to pursue are matters of trial strategy. *People v. Morris*, 2013 IL App (1st) 110413, ¶ 74. Trial strategies must be shown to be more than unsuccessful to overcome the presumption of soundness. *People v. Rosemond*, 339 Ill. App. 3d 51, 65 (2003). Here, defense counsel explored more than one theory of defense. Counsel presented an alibi defense through Collins' testimony, challenged the witnesses' identifications of defendant through cross-examination, and cross-examined the witnesses' on their ability to identify the weapon used in the robbery as an actual firearm. The issue of whether an actual firearm was used in the robbery is an element of the armed robbery offense (*People v. Lee*, 376 Ill. App. 3d 951, 955 (2007)), and an issue of fact to be determined by the trier of fact (*People v. Brooks*, 173 Ill. App. 3d 153, 161 (1988)). Defendant cannot show that he was prejudiced where counsel, in addition to focusing on the false identification theory, also sought to raise a reasonable doubt that a firearm was used in the commission of the robbery.

¶ 87 E. Closing Arguments

¶ 88 Defendant contends he was denied his right to a fair trial based on the prosecutor's erroneous and prejudicial comments during closing argument. Specifically, defendant alleges that the prosecutor (1) suggested that Jose Jr. was intimidated by defendant, codefendant Henderson, and their families and attorneys; (2) made derogatory remarks against defendant and speculated that young people work in groups to commit crimes; (3) made improper remarks against Collins, defendant's alibi witness; and (4) distorted the burden of proof.

¶ 89 A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990). The character and scope of closing arguments are left largely to the discretion of the trial court, and we will not disturb its decision absent an abuse of discretion. *People v. Aleman*, 313 Ill. App. 3d 51, 66-67 (2000). We will reverse a conviction on the ground of improper argument only if the challenged comments constituted a material factor in the conviction, without which the jury might have reached a different verdict. *Id.* at 67. However, where a defendant has forfeited review of many of the prosecutor's statements made during closing argument, the court reviews *de novo* the legal issue of whether the prosecutor's improper statements were so egregious that they warrant a new trial.

People v. Wheeler, 226 Ill. 2d 92, 121 (2007).

¶ 90 First, defendant argues that there was no evidence to justify the prosecutor's argument that Jose Jr. testified differently from his father and Serrano because Jose Jr. was scared or intimidated by the defense attorneys, defendant and codefendant, and their family members who were present in court.

¶ 91 According to the record, the defense argued that Jose Jr.'s identification testimony was not credible because Jose Jr. initially testified that he did not see codefendant Henderson's face in the basement, but later testified that he saw Henderson's face when he was struggling with Jose Sr. In response, the prosecutor acknowledged the contradiction in Jose Jr.'s testimony but stated that he was a highschool student and had to come to court and testify before "all these people, not knowing if [they were] defendant's family." The trial court sustained the defense's objection and instructed the jury to disregard it. The prosecutor continued that Jose Jr. had to come into a public courtroom, "come face-to-face with the men who robbed him that day who had a gun, who threatened to kill him, and his father and [Serrano]." The prosecutor argued that Jose Jr.'s testimony meant that he did not see the offenders' faces when he was taken from the first floor into the basement until he had the slight opportunity to peek and see defendant Washington's face when he pointed the gun at Jose Sr. and searched him and Henderson's face when he was kicking Jose Sr. The prosecutor argued that, after cross-examination by two defense attorneys, Jose Jr. "had been seriously beat up" and was just responding affirmatively to whatever leading questions were asked during cross-examination. The prosecutor then stated that when Jose Jr. was at the showup, he identified the offenders' faces, was not intimidated, and

there was no pressure on him when he was behind the tinted glass of the SUV.

¶ 92 Although the prosecutor did not state that defendant, codefendant, or their family had threatened or intimidated Jose Jr., the prosecutor was close to making that insinuation when the trial court properly sustained defendant's objection. See *People v. Bartall*, 98 Ill. 2d 294, 317 (1983) (a potential error is cured when a trial court sustains an objection and instructs the jury to disregard the comments and that closing arguments are not evidence). The prosecutor then modified her argument to clarify that the contradiction in Jose Jr.'s testimony was attributable to his age and the intimidating circumstances of confronting in court the offenders who had held him at gunpoint and threatened his life and his father's life. We find no error in the State's argument after the trial court sustained defendant's objection; it was a reasonable inference from the evidence. The record establishes that Jose Jr. was a teenager and was repeatedly asked to speak more loudly during his testimony. Questions often had to be repeated or rephrased when his responses revealed that he had not understood the question. Accordingly, the record supports the State's argument that Jose Jr. was intimidated by the court proceeding.

¶ 93 Second, defendant argues the prosecutor improperly degraded defendant in front of the jury and speculated that the offenders were necessarily teenagers because they were not intelligent or competent enough to commit an armed robbery unless they worked in teams. Defendant has forfeited review of this issue because counsel did not timely object during the prosecution's closing argument and include the issue in defendant's motion for a new trial. *Enoch*, 122 Ill. 2d at 186 (in order to preserve an issue for review, the defendant must both timely object at trial and include the issue in his posttrial motion). Such forfeiture notwithstanding,

defendant's argument lacks merit.

¶ 94 According to the record, the defense had argued that defendant and codefendant would not have been hanging around, like "pieces of fruit hanging from a tree ready to be picked," a few blocks from the crime scene if they were the robbers. In response, the prosecutor remarked that the defense had argued the actual robbers would not have been hanging out at the gas station "like meat, like hanging pieces of fruit to catch." The prosecution argued that defendants were presumed innocent but not presumed intelligent, and one did not generally hear about older robbers working in groups unless a big bank or Las Vegas heist was involved. At that point, the trial court overruled defendant's objection to speculation of robberies in other locations by other age groups. The prosecutor argued that young men and teenagers "work in groups" and "form partnerships" because they do not feel competent or confident to rob someone alone at gunpoint. The prosecutor argued that defendant and codefendant "together with their other two teenage thugs, *** could go out and rob someone."

¶ 95 We conclude that the State's argument was not improper. The State's argument properly responded to arguments raised by the defense and was based on fair inferences from the evidence. Officer Johnson testified that Jose Sr. told him that the offenders were young males. Moreover, Officer Johnson went to the gas station because he was familiar with the neighborhood and knew that "younger guys" would "hang out" at the gas station. In addition, the State's reference to thugs was an accurate characterization of the offenders that held the victims at gunpoint, searched them and took their valuables, threatened to kill them, and punched and kicked Jose Sr.

¶ 96 Third, defendant complains the prosecutor implied that Collins, defendant's alibi witness, was one of the other robbers who was never caught; repeatedly directed the jury's attention to Leon's prior conviction by referring to him as a "convicted felon"; raised perjury allegations against Collins; and used his prior adjudication as propensity evidence to argue that he was involved in the armed robbery at issue in this case. Defendant forfeited review of such remarks where defendant failed to object to these remarks at trial and failed to include the last three remarks in his motion for a new trial. *Enoch*, 122, Ill. 2d at 186.

¶ 97 Such forfeiture notwithstanding, the prosecutor's remarks were proper where they were invited by defense counsel's closing argument, were based on the evidence, and were proper comments on the credibility of a defense witness. *People v. Smith*, 199 Ill. App. 3d 839, 854 (1990); *People v. Hudson*, 157 Ill. 2d 401, 441 (1993); *People v. Morrison*, 137 Ill. App. 3d 171, 184 (1985).

¶ 98 Fourth, defendant asserts that the prosecutor trivialized and distorted the burden of proof by suggesting that it was unjustly placed on the State and by emphasizing that the defense did not have to prove anything. Defendant forfeited review of this issue but asks this court to review it under the plain error doctrine.

¶ 99 A court may consider a forfeited issue as plain error. The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is closely balanced and the jury's guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson*, 228 Ill. 2d 181,

191 (2008); *People v. Herron*, 215 Ill. 2d 167, 177 (2005). "In plain error review, the burden of persuasion rests with the defendant." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step of plain error analysis is deciding whether any error has occurred. *Id.*; *People v. Durr*, 215 Ill. 2d 283, 299 (2005).

¶ 100 We conclude that no error occurred here. Our review of the record establishes that defendant's characterization of the State's argument is not accurate. The State did not trivialize or distort its burden of proof. According to the record, the prosecutor accurately described the State's burden of proof, said the State "gladly accept[ed] it," and argued that the jurors must concern themselves with the issue of reasonable doubt.

¶ 101 F. Constitutionality of the Firearm Sentencing Enhancement

¶ 102 Defendant argues that his 15-year firearm enhancement to the crime of armed robbery is void because it was found unconstitutional under the proportionate penalties clause of the Illinois Constitution by our supreme court in *People v. Hauschild*, 226 Ill. 2d 63, 87 (2007), and the Illinois legislature did not reenact it thereafter.

¶ 103 Defendant's argument lacks merit. In *People v. Blair*, 2013 IL 114122, ¶¶ 27-35, the court held that the enhancement was revived through an amendment to the armed violence statute.

¶ 104 III. CONCLUSION

¶ 105 For the foregoing reasons, we affirm defendant's convictions of armed robbery and his sentences.

¶ 106 Affirmed.