FIRST DIVISION
July 16, 2012

No. 1-11-3117

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. 08 CR 17442
	)	
EMANUEL WILEY,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

ORDER

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

¶ 1 *Held*: Defendant's convictions of attempted murder and aggravated battery with a firearm were affirmed where the State proved him guilty beyond a reasonable doubt and his trial counsel provided effective assistance.

¶ 2 A jury convicted defendant, Emanuel Wiley, of attempted murder and aggravated battery with a firearm. The trial court sentenced him to 40 years' imprisonment for the attempted murder conviction and to a concurrent 25 years' imprisonment for the aggravated battery with a firearm conviction. On appeal, defendant contends: (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) his trial counsel provided ineffective assistance. We affirm.

¶ 3 At trial, Steven Williams testified that his friend, Johnny Parker, whom he had known for 12 or 13 years, picked him up at approximately 11:00 or 11:15 p.m. on August 16, 2008, on the northwest side of Chicago. Mr. Parker was driving his girlfriend's car; Mr. Williams entered the car on the passenger side. Mr. Parker drove them to the area of Lavergne Avenue and Crystal Street, where he saw a woman named Keisha.

¶ 4 Mr. Williams testified that Mr. Parker pulled the car to the corner of Lavergne Avenue and Crystal Street, inside the crosswalk. Keisha was standing on the sidewalk on the driver side of the car, and she began talking with Mr. Parker. While they were talking, Mr. Williams was playing with his phone. Mr. Williams noticed a man walking down the sidewalk on the passenger side of the car, "and he looked kind of suspect," meaning "he was just walking with his hands down, with his hands to his side." Mr. Williams did not take his eyes off the man and did not look back at his phone. Instead, Mr. Williams continued to watch the man, as he walked steadily closer. When the man was under the streetlight, Mr. Williams saw his face, and also saw he was wearing shorts and colorful shoes, but no shirt. Mr. Williams testified he had a "low haircut," was maybe six feet tall or six feet one inches tall, and skinny. He was holding a revolver in his hands. When asked to describe his degree of attention while looking at the man with the gun, Mr. Williams stated, "I just kept my eyes on him." Nothing blocked Mr. Williams's view of the man. Mr. Williams made an in-court identification of defendant as the man he saw holding the gun and walking toward them. Mr. Williams had never seen defendant prior to that evening.

¶ 5 Mr. Williams testified that as defendant got closer to the car, within two or three feet, Keisha said to him, "Why don't you go in the house and put the gun up?" Defendant replied, "Shut up

talking to me before I *** shoot at you or shoot at the other guys in the car." Mr. Williams testified in pertinent part as follows:

"Q. And were you able to see his face at this time?

A. Yes.

Q. Full face at this time?

A. Yes.

Q. Including his ears, the shape of his head?

A. Yes.

Q. The eyes, correct?

A. Yes.

Q. And you saw how he was dressed, correct?

A. Yes.

Q. Were you looking at his torso and his legs very closely at that time?

A. No.

Q. Where were you looking specifically?

A. At his right hand.

Q. Okay. And why were you looking at his right hand?

A. Because that's the hand he had the gun in."

¶ 6 Mr. Williams testified he saw defendant shoot the gun with his right hand. Mr. Williams ducked down toward the gearshift and heard defendant fire four shots. One of the shots shattered the rear window of the car, while another shot struck Mr. Williams on the lower-right side of his

back. Mr. Parker began driving them away, and Mr. Williams told him that he had been shot. Mr. Parker drove Mr. Williams to West Suburban Hospital.

¶ 7 Mr. Williams testified that when he first arrived at West Suburban Hospital, a security guard put him in a wheelchair and took him straight to the back. He spoke with police officers and then an ambulance took him to John Stroger Hospital, where he underwent surgery. When Mr. Williams got out of surgery, it took him another two or three days before he was able to get up from the bed. He was in a lot of pain in his back and side, and his left leg was numb. Mr. Williams received physical therapy and was released from the hospital one week after he had been admitted. He walked with a walker for about one month and then switched to walking with a cane. At the time of trial, Mr. Williams continued to rely on a cane in order to walk without falling.

¶ 8 Mr. Williams testified that on August 29, 2008, he went to police headquarters, where he picked defendant out of a lineup as the person who had shot him.

¶ 9 Mr. Williams testified he has a previous conviction for driving under the influence of alcohol. He received probation, which he successfully completed.

¶ 10 On cross examination, Mr. Williams testified he spoke with a detective at West Suburban Hospital and described the man who had shot him as a black male, in his late twenties, with a "low haircut," and a skinny build. Mr. Williams did not tell the detective that the man had a tattoo on the hand holding the gun. Mr. Williams did not recall whether he told the police, either at the hospital or later at the police station when he came in to view the lineup, that the man had any tattoos.

¶ 11 Johnny Parker testified he has two prior felony convictions. He received probation on a forgery in 2001, and he received probation on a 2006 drug case. Neither of those cases were pending

as of the time of trial. He did have two pending cases in DuPage County at the time of trial. Nobody had offered him any deals on those cases in exchange for his testimony.

¶ 12 Mr. Parker testified that in the evening of August 16, 2008, he was driving his girlfriend's car, a black Nissan Sentra. He picked up Mr. Williams at about 11:15 or 11:20 p.m. Mr. Williams sat on the front passenger seat. Mr. Parker drove westbound on Crystal Street and parked on the corner of Crystal Street and Lavergne Avenue, close to the crosswalk, near a girl named Keisha. Mr. Parker had known Keisha for about six months, and they began talking. Meanwhile, Mr. Williams was "playing with his phone, or something like that."

¶ 13 Mr. Parker testified that as he was talking to Keisha, he saw a man walking on the sidewalk to Mr. Parker's right. He was wearing shorts but no shirt. Mr. Parker watched as the man walked off the sidewalk, into the middle of the street, and then stepped in front of the car. Mr. Parker saw something shiny in his hand, but he did not know what it was at that time; he thought it might be "a radio or something." Mr. Parker saw his face and noticed he had a "low haircut." Mr. Parker made an in-court identification of the man as defendant. Mr. Parker had never seen defendant prior to the evening of August 16, 2008.

¶ 14 Mr. Parker testified in pertinent part:

> "Q. Now, when you saw the individual, the defendant, coming up the sidewalk, what were you focused on when you saw him?
>
> A. The shiny object in his hand.
>
> Q. Okay. And were you focused on anything else on his person?
>
> A. Yeah, his face.

Q. And did you take note of the features of his face?

A. Yeah."

¶ 15 Mr. Parker testified he asked Keisha whether defendant was holding a gun in his hand. Keisha told defendant to "put it up." Defendant told Keisha to shut up or else he would shoot her and the occupants of the car. Defendant then raised his right hand and began shooting. He was about two feet in front of the car when he fired the gun. At that point, Mr. Parker could tell that the shiny object in defendant's hand was a revolver.

¶ 16 Mr. Parker testified that after defendant fired his first shot, Mr. Parker attempted to run over defendant with the car. Defendant jumped to the side, avoided getting hit by the car, and fired a second shot which hit Mr. Williams in the back. Mr. Parker drove down Crystal Street, and defendant fired a third shot that struck the rear window. Mr. Parker drove Mr. Williams to West Suburban Hospital. While a security guard came and took Mr. Williams inside the hospital, Mr. Parker remained outside and called Keisha. After talking with Keisha, Mr. Parker believed he knew the identity of the shooter. Mr. Parker talked with a female police officer and handed her the phone so she could talk with Keisha. Mr. Parker then talked with some detectives and told them what had happened. On August 29, 2008, Mr. Parker picked defendant out of a lineup and identified him as the shooter.

¶ 17 On cross examination, Mr. Parker testified he arrived at Crystal Street and Lavergne Avenue at approximately 11:45 or 11:50 p.m. on August 16, 2008. His meeting with Keisha was accidental. He spoke with her for about three minutes before noticing defendant coming off the sidewalk and walking underneath a streetlight. Mr. Parker watched defendant for 30 or 40 seconds. Mr. Parker

reiterated that he saw something in defendant's hand but did not immediately know what it was, so he asked Keisha whether defendant was holding a gun. When defendant approached within two feet of the car, he lifted his arm and fired. Mr. Parker tried to hit defendant with the car. Defendant fired two more shots, one of which shattered the rear window and one of which struck Mr. Williams.

¶ 18 Mr. Parker testified he drove Mr. Williams to West Suburban Hospital and spoke to police. Mr. Parker gave a description of the shooter as a black male, in his early twenties, between five feet eight inches tall and six feet tall, and skinny, wearing shorts but no shirt, and having a "low haircut." Mr. Parker never told the detectives that he noticed any tattoos on the shooter.

¶ 19 Lieutenant Mary Platt testified that shortly after midnight on August 17, 2008, she was notified of the shooting and went to West Suburban Hospital, where she saw a black vehicle outside the emergency room with the rear windshield broken. She spoke with Mr. Parker, who told her what had happened and stated that Keisha knew who the shooter was. Mr. Parker called Keisha and handed the phone to Lieutenant Platt. After speaking with Keisha, Lieutenant Platt began looking for someone named "Real" or "Neal." Lieutenant Platt asked Keisha to come to the hospital or to the police station, but she did not do so.

¶ 20 On cross examination, Lieutenant Platt testified she did not recall whether Mr. Parker told her the shooter had any tattoos.

¶ 21 Detective Arthur Young testified that at approximately 1:55 a.m. on August 17, 2008, he received an assignment to investigate a shooting. He went to West Suburban Hospital because the victim of the shooting, Mr. Williams, had been taken there. When he arrived at the hospital, Detective Young noticed a black Nissan parked in front of the emergency room entrance. The rear

window was broken out.

¶ 22 Detective Young testified he spoke with Lieutenant Platt, who told him she had spoken on the phone with a woman named Keisha. After speaking with Lieutenant Platt, Detective Young knew to begin looking for a person by the nickname "Real" or "Neal." Detective Young then went into the emergency room and spoke for about five minutes with Mr. Williams, who was coherent but was in obvious pain. Mr. Williams told him that the gun used to shoot him was a revolver and that he would be able to recognize the shooter. After speaking with Mr. Williams, Detective Young spoke with Mr. Parker outside the emergency room entrance. Mr. Parker told him about Keisha and stated that the gun used in the shooting was a revolver. After speaking with Mr. Parker, Detective Young was looking for a particular person nicknamed "Real."

¶ 23 Detective Young testified he took a closer look at the Nissan after speaking with Mr. Parker. He observed that the rear window was broken, there was glass on the rear seat, and a copper-jacketed bullet had gone through the window "and wedged along the rear post and the frame of the rear window so, basically, that it was stuck within the interior trim and the metal right at the edge of the window." Detective Young testified that as he and an evidence technician tried to retrieve the bullet, it "dropped, and you could hear it continue to fall and hit metal within the wheel well of the car between the frame and the outer metal." Detective Young tried to go through the trunk to get at the bullet from that direction, but was unable to do so.

¶ 24 Detective Young testified he went back to the police station, called Keisha, and asked her to come down for an interview. She did not do so. Detective Young also testified he never asked Mr. Williams or Mr. Parker any specific, direct questions about tattoos.

¶ 25 On cross examination, Detective Young testified Mr. Williams described the shooter as a black male, in his late twenties, with a skinny build, and "low haircut," wearing blue jean shorts and colorful gym shoes, and no shirt. He did not specifically say that the shooter had any tattoos. He described the gun used in the shooting as a revolver, and said he would recognize the shooter. Mr. Parker described the shooter as a black male, between the ages of 20 and 27, approximately five feet ten inches tall, weighing 170 pounds with a skinny build, wearing blue jean shorts, and no shirt. Mr. Parker did not make any mention of tattoos.

¶ 26 Detective Young testified that after observing the bullet fall within the wheel well of the car, he could have seized the car and taken it to the police station, but he did not do so.

¶ 27 On redirect examination, Detective Young testified he did not think there was any further evidence to be gained by keeping the car. He testified that in his opinion, "the damage that would have been caused to the car in an attempt to retrieve this bullet by either cutting through the metal outside of the car or removing the entire interior didn't seem appropriate."

¶ 28 Detective Ruben Weber testified that in August 2008, he investigated the shooting of the victim, Mr. Williams. He contacted Mr. Williams, Mr. Parker, and Keisha and spoke with them by phone. Keisha was not cooperative. Mr. Williams and Mr. Parker were cooperative, and they each came to the police station on August 29, 2008, to view a lineup. Mr. Williams and Mr. Parker separately picked defendant out of the lineup and identified him as the shooter.

¶ 29 Detective Weber identified People's exhibit number 18 as a photograph of defendant on the day of the lineup that depicts his torso with accompanying tattoos. Detective Weber identified a tattoo of the word "Real" on his left arm.

¶ 30 On cross examination, Detective Weber testified further regarding the photograph of defendant's tattoos:

"Q. And in addition to the 'Real' on his forearm, there's also a number of other tattoos; is that right, sir?

A. That's correct.

Q. Specifically a 'B' and an 'M' by the shoulders?

A. Yes.

Q. Also a–what appears to be a flying dragon; is that right, sir?

A. Or something. I don't know. From here, I can't tell what that would be."

¶ 31 After the photograph was brought closer to Detective Weber, he resumed testifying as follows:

"Q. And there appears to be a winged animal on that same arm; is that right, sir?

A. Yes.

Q. And also a 'B' and an 'M'?

A. Yes.

Q. Also another tattoo up towards the right shoulder; is that right, sir?

A. Yes.

Q. Also another tattoo on the left shoulder *** right above the elbow, it appears; is that right, sir?

A. Yes.

Q. And also a tattoo on the same hand that says 'Real'–where the forearm says 'Real';

is that right, sir?

A. Yes.

Q. Also another tattoo that says 'Cherish Life' over the left breast; is that right?

A. Yes.

Q. And these are tattoos that are pretty readily seen; is that right, sir?

* * *

A. Yeah, I could see them."

¶ 32 Detective Weber was shown defense exhibit number three, which he identified as a photograph of defendant taken after the lineup. Detective Weber stated that a neck tattoo is visible in that photograph. Detective Weber was shown defense exhibit number four, which he identified as another photograph of defendant after the lineup. Detective Weber agreed that a "couple more tattoos" were visible in that photograph, including a sickle with something written above it, another tattoo on the hand and another name on the forearm.

¶ 33 Defendant failed to include any of the photographs in the record on appeal.

¶ 34 After the State rested, defendant called Pierra Arrington to testify. Ms. Arrington testified defendant was her neighbor and she had known him for 24 years. At about 9:00 or 9:30 p.m. on August 16, 2008, she was at Lafollette Park with Keith Hodges (who was the father of her baby), defendant, and Latrice Longstreet (who was the mother of defendant's baby). Lafollette Park is located at Lavergne and Potomac Avenues. After about an hour of drinking at the park, they all went to a store at Division Street and Lavergne Avenue to buy cigarettes. The store was closed, so they went to a gas station one block over at LeClaire Avenue and Division Street. They bought the

cigarettes, saw a couple of friends, and talked with them for 30 to 45 minutes. Then they returned to Lafollette Park and began drinking again.

¶ 35 Ms. Arrington testified that about one hour later, they heard gunshots. The four of them began running away. Ms. Arrington tripped, and defendant helped her up. Ms. Arrington and Mr. Hodges ran to Ms. Arrington's house, which was a five-minute walk from the park. Defendant and Ms. Longstreet ran to Ms. Longstreet's house, which was around the corner from Ms. Arrington's house.

¶ 36 Ms. Arrington testified she did not see defendant with a gun that evening, she did not see him shooting anybody, and he did not leave her presence until after the gunshots were fired.

¶ 37 Latrice Longstreet testified that defendant is the father of her two children. On August 16, 2008, Ms. Longstreet and defendant arrived at Lafollette Park at about 9 p.m., and Ms. Arrington and Mr. Hodges met them there about five or six minutes later. Everyone was drinking except for her, because she was pregnant at that time. After about an hour, they all walked to a corner store at Lavergne Avenue and Division Street, but it was closed. Then they walked to a gas station, where they bought cigarettes and spoke with some friends. The four of them returned to the park.

¶ 38 Ms. Longstreet testified that approximately one hour later, they heard gunshots and then they all began running in the same direction. Ms. Arrington tripped, and defendant helped her up. They all ran to Ms. Longstreet's house, and she and defendant went inside. Ms. Arrington and Mr. Hodges then went to Ms. Arrington's house, although Ms. Longstreet testified she did not actually see them go in their house. Ms. Longstreet testified that at the time of trial, she was no longer in a relationship with defendant.

¶ 39 On cross examination, Ms. Longstreet testified she heard three gunshots. She further testified that defendant's nickname is "Hell Real" and he has a tattoo on his arms that says "Hell Real."

¶ 40 Both Ms. Arrington and Ms. Longstreet testified that even after becoming aware that defendant had been accused of the shooting, they never contacted the police or the State's Attorney's office to inform them that defendant was not the shooter.

¶ 41 Following all the evidence, the jury convicted defendant of attempted murder and aggravated battery with a firearm. The trial court, subsequently, sentenced him to a 40-year term of imprisonment for attempted murder and to a concurrent 25-year term of imprisonment for aggravated battery with a firearm. Defendant appeals.

¶ 42 First, defendant contends the State failed to prove him guilty of attempted murder and aggravated battery with a firearm beyond a reasonable doubt. "To prove defendant guilty of attempted murder, the prosecution must prove that defendant intended to kill and he took a substantial step toward killing his intended victim." *People v. Smith*, 402 Ill. App. 3d 538, 547 (2010). To prove defendant guilty of aggravated battery with a firearm, the prosecution must prove that in committing a battery, defendant knowingly or intentionally caused an injury to another person by means of discharging a firearm. 720 ILCS 5/12-4.2(a)(1) (West 2008).

¶ 43 It is not the function of the reviewing court to retry defendant when presented with a challenge to the sufficiency of the evidence. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Under this standard, the trier of fact remains responsible for determining the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 44 "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. [Citations.] 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). "In assessing identification testimony, our courts have generally been using steps set out by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). There the Court held that circumstances to be considered in evaluating an identification include: (1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Slim*, 127 Ill. 2d at 307-08.

¶ 45 In the present case, the testimony of Mr. Williams and Mr. Parker identifying defendant as the shooter was sufficient to sustain his convictions of attempted murder and aggravated battery with a firearm. With respect to the first *Slim/Bigger*s factor, both men had a good opportunity to view defendant at the time of the crime, as they each testified to seeing defendant approach within two or three feet of their car from off the sidewalk, step under a streetlight to reveal his face, raise his right hand that contained a revolver, and shoot at their car. Mr. Williams specifically testified that nothing blocked his view of defendant and, that it was so bright under the streetlight, he was able to see

defendant's eyes, nose, the structure of his face, his haircut, height and build, and type of clothes he was wearing. Mr. Parker testified to watching defendant for 30 or 40 seconds before he began firing and he also claimed a good opportunity to see the shooter. Mr. Parker saw the shiny object in defendant's hand, he saw his face, he observed the length of his hair, he identified the type of weapon defendant was holding, he saw that defendant had shorts but no shirt, and he described defendant's height, build, age, and type of haircut.

¶ 46 With respect to the second factor, both men testified to their high degree of attention. Specifically, Mr. Williams testified he did not take his eyes off defendant because defendant "looked kind of suspect" while walking with his hands to his side. As defendant stepped under the streetlight, Mr. Williams saw he was carrying a revolver. When asked to describe his degree of attention, Mr. Williams stated, "I just kept my eyes on him." Mr. Williams testified to seeing defendant shoot the gun. Mr. Parker testified that when he saw defendant coming up the sidewalk, he focused on defendant's face and the shiny object in defendant's hand, while asking Keisha whether defendant was holding a gun. Mr. Parker testified to seeing defendant shoot the gun.

¶ 47 With respect to the third factor, both men gave prior accurate descriptions of defendant. Specifically, they each described defendant as a black male in his twenties, with a skinny build and "low haircut," wearing shorts and no shirt. Defendant does not dispute the accuracy of these descriptions of him.

¶ 48 With respect to the fourth factor, the level of certainty in their identification, both men described defendant to police and, subsequently, picked defendant out of a lineup and identified him as the shooter. There was no testimony as to any uncertainty regarding their descriptions or

identifications of defendant.

¶ 49 With respect to the fifth factor, the length of time between the crime and the identification was less than two weeks. The shooting occurred on August 17, 2008, and both men identified defendant in a lineup on August 29, 2008. Such a relatively brief lapse in time between the crime and the identifications lends to the reliability of the identifications. See *Slim*, 127 Ill. 2d at 313 (holding that "the interval of 11 days [between the date of the crime and the date of the identification] was not significant" and noting the courts had upheld identifications made two years after the crime); *People v. Cox*, 377 Ill. App. 3d 690, 699 (2007) ("the passage of two months between the date of the crime and the date of the lineup does not adversely affect the identification.")

¶ 50 In sum, weighing all of the *Slim/Biggers* factors, and viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Mr. Williams and Mr. Parker viewed defendant under circumstances permitting a positive identification. As such, their identifications of defendant as the person who intentionally shot at them and struck Mr. Williams in the back were sufficient to support his convictions of attempted murder and aggravated battery with a firearm beyond a reasonable doubt.

¶ 51 Defendant argues, though, that Mr. Williams's and Mr. Parker's identifications of him as the shooter are suspect because even though his torso and arms are covered with various tattoos, neither man mentioned seeing any tattoos on the shooter when they were questioned by the police. Our supreme court has held, "[a]s a general proposition, it can be said that discrepancies and omissions as to facial and other physical characteristics are not fatal, but simply affect the weight to be given the identification testimony." *Slim*, 127 Ill. 2d at 308. We have held, "[w]hile it is true that failure

of a witness to include a certain distinctive physical characteristic in an original description of the offender may affect the credibility of the description [citation], the important factor is the ability of the witness to make a positive identification after having had an adequate opportunity to view the offender at the time of the crime." *People v. Mays*, 38 Ill. App. 3d 182, 184 (1976). In *Mays*, we held that the two witnesses' failures to tell police that defendant had a number of missing teeth and a two and a half inch tattoo on his forearm were factors to be evaluated by the jury. However, they were not so important as to raise a reasonable doubt of defendant's guilt, where each witness made a separate and positive identification based on an adequate opportunity to observe the offender at the time of the crime. *Id*. at 184-85. Similarly, in the present case, Mr. Williams's and Mr. Parker's failures to mention the presence of defendant's tattoos merely affected the weight of their testimony and were factors to be evaluated by the jury, but they were not so important as to raise a reasonable doubt of defendant's guilt, where Mr. Williams and Mr. Parker each made a separate and positive identification of defendant based on an adequate opportunity to observe him at the time of the crime. (See our discussion above.)

¶ 52 In so holding, we note Mr. Williams and Mr. Parker each provided testimony explaining why he failed to mention the presence of defendant's tattoos. Specifically, Mr. Williams testified that as he watched defendant move toward their car and speak with Keisha, he was *not* looking very closely at defendant's torso but, instead, was looking at defendant's face and at his right hand because "that's the hand he had the gun in." Mr. Parker testified that when he saw defendant coming up the sidewalk, he focused his attention on defendant's face and on the "shiny object in his hand." Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found

from Mr. Williams's and Mr. Parker's testimony, that they did not mention the tattoos on defendant's torso and arms because their concentration, instead, was focused on defendant's face and hand. When asked to provide a description to police, they naturally provided a description of those features of defendant upon which they had focused their attention. A rational trier of fact also could have found that Mr. Williams's and Mr. Parker's failure to mention defendant's tattoos was explainable because Detective Young, who questioned Mr. Williams and Mr. Parker at West Suburban Hospital, failed to ask either of them any specific, direct questions about tattoos.

¶ 53 We also note defendant failed to include, in the record on appeal, any of the photographs of him with his tattoos and, therefore, we are unable to see for ourselves exactly how prominent those tattoos are. Defendant is the appellant and, therefore, bears "the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error. " *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Any doubt arising from the incompleteness of the record is resolved against defendant. *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985).

¶ 54 Defendant argues *People v. Ash*, 102 Ill. 2d 485 (1984), *People v. Byas*, 117 Ill. App. 3d 979 (1983), and *People v. King*, 10 Ill. App. 3d 652 (1973), compel a different result, and require us to hold that Mr. Williams's and Mr. Parker's failures to mention his tattoos to the police raise a reasonable doubt of his guilt. In *Ash*, the supreme court reversed defendant's conviction, holding that his identification by the witness was vague and doubtful where: the witness described him as being six feet three inches tall, but the police photo showed he was only five feet nine inches tall–a discrepancy of six inches; the day after the crime, the witness viewed several mug shots, one of

which was defendant, but failed to pick out defendant; and, at a hearing approximately four months after the crime, the witness misidentified two attorneys seated in the spectator section as defendant. *Id.* at 494. *Ash* is inapposite, as Mr. Williams and Mr. Parker here did not exhibit any difficulties in identifying defendant and did not misidentify him as someone else.

¶ 55 In *Byas*, we reversed defendant's conviction, holding that his identification by the witness was vague and doubtful where: after initially describing her assailant as being six feet tall and weighing 170 pounds, the witness described him the next day as being five feet eleven inches tall, weighing about 175 pounds and having a hairy chest, but defendant was five feet seven inches tall, weighed 147 pounds, and had no hair on his chest or stomach; she testified she picked defendant's photograph only after the officer told her to select the man most resembling her assailant; her identification of defendant in a lineup and during a preliminary hearing was hesitating and equivocal; and there was no meaningful corroboration of her identification of defendant. *Id*. at 985-86. *Byas* is inapposite, as Mr. Williams and Mr. Parker each gave consistent descriptions of defendant and picked him out of a lineup and there was no evidence that their descriptions and identifications of defendant were in any way uncertain, hesitant, or equivocal.

¶ 56 In *King*, we reversed defendant's conviction of rape, holding that his identification by the victim was vague and uncertain where: she failed to tell the detective that her offender wore a heavy mustache; she failed to inform the detective that the offender was someone she had seen at her place of work; and she subsequently saw the offender three times at her place of work but did not tell anyone there that he had raped her nor did she have him arrested. *Id*. at 655. Unlike the witness in *King*, Mr. Williams and Mr. Parker showed no hesitation in identifying defendant, where they each

described him on the day of the shooting and then picked him out of a lineup 12 days later.

¶ 57 Neither *Ash*, *Byas*, nor *King* compel the conclusion that Mr. Williams's and Mr. Parker's failures to tell the police about defendant's tattoos, raise a reasonable doubt of his guilt. Rather, as discussed above, their failures to mention defendant's tattoos were factors for the jury to consider in assessing the weight of their identification testimony. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Mr. Williams and Mr. Parker had a plausible reason for why they did not notice and/or mention defendant's tattoos. Any rational trier of fact also could have found Mr. Williams and Mr. Parker had an adequate opportunity to view defendant under circumstances permitting a positive identification of him and, that their identifications of him were positive and credible and supported his convictions for attempted murder and aggravated battery with a firearm.

¶ 58 Defendant argues a reasonable doubt of his guilt was raised by the State's failure to call Keisha as a witness against him. Defendant cites in support *People v. Doll*, 371 Ill. App. 3d 1131 (2007), in which we held:

> "As a general rule, if a potential witness is available and appears to have special information relevant to the case, so that his testimony would not merely be cumulative, and the witness's relationship with the State is such that he would ordinarily be expected to favor it, the State's failure to call the witness may give rise to a permissible inference that, if the witness were called, the witness's testimony would have been unfavorable to the State's case. [Citations.] Such a negative inference is permissible only under certain circumstances: for example, where the State fails to call a witness who possesses unique knowledge of a crucial, disputed

> issue of fact [citation], or where the government has caused the absence of a material witness [citation]." *Id*. at 1137.

¶ 59 Defendant argues Keisha had unique knowledge, not only of the crucial fact of the identity of the shooter but, also, that defendant's nickname was "Real" or "Neal," the name tattooed on his arm. Defendant contends "[t]he prosecution's failure to call Keisha to testify to these critical facts gives rise to the permissible inference that her testimony would have been adverse to the prosecution."

¶ 60 Defendant's argument is without merit. In *Doll*, we held "no negative inference is raised when the witness is also known and available to the defense yet is not called by it." *Id*. Here, the State argues, and defendant does not dispute, that Keisha "was just as available to defendant, and defendant could have, but did not, call her to testify." Accordingly, contrary to defendant's argument, the prosecution's failure to call Keisha to testify does not give rise to the inference that her testimony would have been adverse to the prosecution, and does not raise a reasonable doubt of his guilt.

¶ 61 Defendant points to the testimony of alibi witnesses Ms. Arrington and Ms. Longstreet in further support of his argument that he was not proved guilty beyond a reasonable doubt. The jury heard all the testimony and obviously found Mr. Williams's and Mr. Parker's testimony identifying defendant as the shooter to be more credible than Ms. Arrington's and Ms. Longstreet's alibi testimony. We will not substitute our judgment for the jury's credibility determinations. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002).

¶ 62 Defendant also points out there was no physical evidence tying him to the shooting. However, even in the absence of any physical evidence, Mr. Williams's and Mr. Parker's

identification testimony was sufficient to sustain his convictions. See *Slim*, 127 Ill. 2d at 307 (A single witness's identification of defendant is sufficient to sustain his conviction where, as here, the witness viewed defendant under circumstances permitting a positive identification.).

¶ 63 In conclusion, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found from Mr. Williams's and Mr. Parker's identification testimony that the State had proved defendant guilty of attempted murder and aggravated battery with a firearm beyond a reasonable doubt. Accordingly, we affirm defendant's convictions.

¶ 64 Next, defendant contends his trial counsel provided ineffective assistance. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show "counsel's representation fell below an objective standard of reasonableness" (*id*. at 688), and second, that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶ 65 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective-assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 66 First, defendant contends his trial counsel provided ineffective assistance by failing to object to certain of Mr. Williams's hearsay testimony offered by the prosecution which implicated defendant in the shooting and, by eliciting hearsay testimony from Mr. Williams "that virtually convicted her client." In particular, defendant points to the following colloquy at trial between the prosecutor, Mr.

Williams, and the trial court:

"MS. KANTER [Assistant State's Attorney]: Okay. And as he got closer to your car and you saw him with the gun, can you tell the ladies and gentlemen what happened then?

MR. WILLIAMS: Well, Keisha had said, 'Why don't you go in the house and put the gun up?' And he replied, 'Shut up talking to me before I shoot–shoot at you or shoot at the other guys in the car.'

THE COURT: Could you repeat that just a little bit louder?

MR. WILLIAMS: Keisha had told him why don't he go in the house and put the gun up, and he replied, 'You need to shut up talking to me before I shoot at you and shoot at the other guys in the car.'"

¶ 67 Defendant argues that his trial counsel "not only did not object to a critical out-of-court statement by a non-witness which implicated [him], she did not even object when the judge invited the witness to repeat the hearsay statement." Defendant further argues that "moments later, on cross examination, [defendant's] counsel then solicited this same damaging testimony from Mr. Williams, and then she compounded her error by failing [to take] any steps to strike the hearsay from the record." Specifically, defendant points to the following colloquy at trial between his trial counsel and Mr. Williams:

"Q. Did you ever tell the detective that you did not hear a conversation between the shooter and Keisha?

A. No.

Q. So you told him you heard something.

A. Well, it was just what I – like I said, it wasn't a conversation conversation.

Q. I'm sorry?

A. It was just like I said: She told him why don't he go in the house and put the gun up, and he said, 'You better shut the F up before I shoot at you and shoot at those guys in the car.' "

¶ 68 Defendant's trial counsel committed no ineffective assistance as defendant was not prejudiced by Mr. Williams's testimony regarding Keisha's conversation with defendant, in which she stated she saw defendant with a gun, and defendant responded by threatening to shoot the persons in the car. Even if Mr. Williams's testimony regarding Keisha's conversation with defendant had not been elicited at trial, the jury still would have heard Mr. Williams and Mr. Parker testify to personally seeing defendant walk toward their car and purposely shoot the gun at them (under circumstances permitting a positive identification). As there is no reasonable probability that the result of the trial would have been different had Mr. Williams not testified to Keisha's conversation with defendant, defendant's claim of ineffective assistance fails.

¶ 69 Next, defendant contends his trial counsel was ineffective for failing to object when the prosecutor remarked during closing arguments on Mr. Williams's hearsay testimony that Keisha told defendant to put his gun in the house. Again, any error in failing to object to this comment was not prejudicial to defendant because, given Mr. Williams's and Mr. Parker's testimony identifying defendant as the shooter, there is no reasonable probability the result of the trial would have been different even absent the prosecutor's remark. In the absence of any prejudice, defendant's claim of ineffective assistance fails.

¶ 70 Next, defendant contends his trial counsel provided ineffective assistance during closing arguments by referencing allegedly prejudicial testimony Mr. Parker gave against him:

> "We also heard testimony from Johnny Parker who said that he knew Keisha and he pulled over to talk to her on the corners of Lavergne and Crystal and that he had been talking to her for approximately three to four minutes before he noticed the shooter. He said that he didn't notice what the shooter was carrying and he had to ask Keisha what the shooter was carrying. He said that approximately 30 to 40 seconds passed between the time that he first saw the shooter stepping off the sidewalk to the time that he pulled away after the first shot. He admitted that it happened quickly and he admitted that he was scared."

¶ 71 Defense counsel's reference to Mr. Parker having to ask Keisha what the shooter was carrying was meant to cast doubt on Mr. Parker's ability to see the shooter and to cast doubt on his certainty that defendant was the shooter. Defense counsel was arguing that Mr. Parker could not be certain of the shooter's identity because everything happened so fast and he was afraid. Defense counsel's argument was objectively reasonable and did not constitute ineffective assistance.

¶ 72 Next, defendant contends his trial counsel provided ineffective assistance by failing to object to the following testimony by Detective Young offered by the prosecution:

> "Q. And what did Lieutenant Platt tell you?
>
> A. She told me that she had had a conversation with a woman on the telephone.
>
> Q. Okay. Did she provide you with any information with regard to that woman?
>
> A. Yes. She told me that she had spoke with a woman named Keisha, and she provided me with the phone number that she had called.

Q. After speaking with Lieutenant Platt, were you looking in your investigation for the shooter and for someone–you know, someone specifically?

A. Yes. We were looking for a person by the nickname of Real or Neal."

¶ 73 Defendant argues that Detective Young's testimony constituted hearsay and should have been objected to by his counsel. This case is similar to *People v. Gacho*, 122 Ill. 2d 221 (1988). In *Gacho*, the officer testified he spoke to one of the victims at the hospital, after which he and his partner began looking for "Robert Gacho," the defendant. *Id*. at 247-48. The trial court denied defendant's motion for a mistrial based on the officer's hearsay testimony identifying defendant as one of the offenders. *Id*. at 248. The Illinois Supreme Court affirmed the admission of the officer's testimony holding that although any testimony as to the substance of the officer's conversation with the victim would have been objectionable as hearsay, the officer's given testimony "was not of the conversation with [the victim], but to what [the officer] did and to investigatory procedure." *Id*.

¶ 74 Subsequent to *Gacho*, we have held:

" ' [The] explanatory exception' to the hearsay rule allows the admission of statements that explain the progress of a police investigation under the rationale that such evidence is not offered for its truth. [Citation.] Such statements can be 'offered for the limited purpose of showing the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact.' [Citation.] In such a case, '[a] police officer may not testify to information beyond what was necessary to explain the officer's actions.' [Citation.] Such testimony is not hearsay because it is within the officer's personal knowledge." *People v. Peoples*, 377 Ill. App. 3d 978, 984 (2007).

¶ 75 In the present case, as in *Gacho*, Detective Young did not testify to the substance of his conversation with Lieutenant Platt, but rather to the investigatory procedures undertaken following their conversation. Detective Young's testimony fell within the explanatory exception to the hearsay rule, and therefore defendant's trial counsel was not ineffective for failing to object to said testimony on hearsay grounds.

¶ 76 Defendant next argues his trial counsel provided ineffective assistance by eliciting hearsay testimony from Lieutenant Platt that went beyond the explanatory exception to the hearsay rule. Specifically, defendant points to the following colloquy at trial between his trial counsel and Lieutenant Platt:

> "Q. Did you ask [Keisha] how she knew the person she named as Neal or Real?
>
> A. She said she knows him from the neighborhood."

¶ 77 We agree this testimony went beyond the explanatory exception to the hearsay rule because it revealed the substance of the conversation between Lieutenant Platt and Keisha. However, we fail to see how the substance of the conversation revealed, that Keisha knew the person named "Real" or "Neal" from the neighborhood, was so prejudicial that a reasonable probability exists that the result of the trial would have been different had the testimony not been elicited. In the absence of any prejudice, defendant's claim of ineffective assistance fails.

¶ 78 For the foregoing reasons, we affirm the circuit court.

¶ 79 Affirmed.