FIFTH DIVISION
March 14, 2014

No. 1-12-1480

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. 11 CR 18660
	)	
RIZON BROWN,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for failing to file motion to suppress eyewitness identification; $200 DNA fee and $5 Electronic Citation fee vacated; defendant entitled to credit against his fines for time spent in presentence custody; affirmed and fines, fees, and costs order corrected.

¶ 2 Following a bench trial, defendant Rizon Brown was convicted of attempted robbery and aggravated battery and sentenced to four and a half years in prison. On appeal, defendant contends his counsel was ineffective for failing to file a motion to suppress the eyewitness identification of defendant. Defendant also challenges two fees he was assessed and contends he

should have received a $5 per day credit against his fines. We affirm the judgment and correct the fines, fees, and costs order.

¶ 3 At trial, the State's case primarily relied on identification testimony from the victim, Philip Pement, while defendant asserted that he had not been at the location of the incident. Pement testified that on October 26, 2011 at 12:08 a.m., he was waiting for a northbound train at the Monroe Red Line station in Chicago. Holding his iPhone, Pement sat on a bench while he listened to music and read the news on his iPhone. Pement described the station as well-lit. As Pement heard a southbound train pull in, a hand came over his left shoulder and grabbed Pement's phone while Pement felt a blow to the back of his head. Pement recalled that his "first instinct was to look up and see who was grabbing at my cell phone." Pement looked at defendant, who he also identified in court, "in the face" and held on to his phone more tightly. Defendant was less than an arm's length away from Pement and nothing obstructed Pement's view of defendant's face. When defendant reached for the phone, he said, "Give it to me," but Pement refused and a struggle ensued. Pement was punched from behind as defendant reached in with his left hand and hit Pement with his right hand. Another person who Pement could not see was also punching Pement. Subsequently, Pement fell to the ground, where he landed on his right side and faced defendant, who again tried to reach for the phone while punching and kicking Pement. Pement testified that defendant was crouched down and "right in my face." Although someone else was punching Pement from behind, Pement's attention was directed towards defendant because he "was the one grabbing at my phone, and that is where I was facing." Pement looked at defendant the entire time. While he was on the ground, Pement also observed that defendant had a "very brightly colored jacket," which was red, blue, yellow, and a

"little tiny bit of green." Pement explained that "[i]f you see the jacket, it stands out" and he had never seen a jacket like that before.

¶ 4 Eventually, defendant stopped punching and kicking Pement and ran onto the southbound Red Line train without Pement's phone. Pement now saw defendant from the back and observed that the jacket had "a person on the back" and was "crazy colorful." In total, Pement believed that, in addition to defendant and the second assailant, two or three others were involved and had gotten on the train and held the door for defendant. However, Pement could not see their faces. Pement estimated that his encounter with defendant had lasted approximately 90 seconds.

¶ 5 Pement called the police and described his attacker as an African-American male who was about his age and height and wore a brightly colored jacket. Because Pement had been seated and on the ground, he was unable to discern the offender's exact height, but did not think he was "abnormally large or abnormally small." Pement also told the police that the offender had gotten on a southbound Red Line train. Pement did not observe any other southbound trains come through the station while he waited for the police. When the police arrived, they drove Pement to the Cermak Red Line station, which was four or five stops from Monroe. The officers told Pement they were going to walk him upstairs and "ask you if you see***[d]efendant or see who attacked you at that point."

¶ 6 Once upstairs, Pement observed a group of men standing on the platform, consisting of eight African-Americans and "a couple of Hispanic gentlemen as well." Pement walked past all of the people in the group and recognized defendant as his attacker. Defendant was wearing the same brightly colored jacket Pement had observed at the Monroe station. No one else in the group was wearing a very colorful jacket. Pement estimated that approximately 15 minutes had

passed from when he was initially attacked until he selected defendant from the group on the platform. Pement was "a hundred percent, dead certain" that defendant was his attacker.

¶ 7 In addition to asking defendant to look at the group on the platform, the police also escorted Pement through the entire train, which contained "a lot of people." Pement looked at all of the passengers' faces, "some of them multiple times to be sure," but did not recognize anyone else. Pement recalled that "[e]very single person on that platform or in that train I looked at." Pement was pretty sure the other people involved in the attack were present, but he "didn't see their faces" at the Monroe station and "did not want to identify the wrong person."

¶ 8 When it was shown in court, Pement identified a jacket as the same one defendant was wearing during the incident and when he identified defendant at the Cermak station.

¶ 9 Officer Gill testified that while on duty on October 26, he and his partner received a call stating that an attempted robbery had just occurred at Monroe and the Red Line. A flash message stated that the offender was a black man who fled on foot and got onto a southbound Red Line train. Officer Gill was also told about a multi-colored jacket. The officers went to the Cermak Red Line station, stopped and boarded the first inbound train, and proceeded from beginning to end. Officer Gill removed defendant, who was wearing a multi-colored jacket. No one else was wearing a multi-colored jacket like the one worn by defendant. After Pement identified defendant as his attacker, Officer Gill asked Pement three times how certain he was. Each time, Pement responded that he was "a hundred percent sure." Defendant was placed under arrest at 12:39 a.m. and taken to the police station, where the jacket was inventoried.

¶ 10 Defendant presented his alibi defense through his testimony and the testimony of his brother and mother. Defendant testified that earlier on the night in question, around 9 p.m., he

went to his attorney's office after defendant's boss had cashed a check for him. Next, defendant picked up his brother and they went to a McDonald's at 76th and Vincennes. Around 10:30 p.m., defendant and his brother traveled to their mother's home on the west side of the city by getting on the Red Line at 79th and State, transferring to the Green Line at Roosevelt, and getting off the Green Line at Austin. Defendant and his brother visited their mother for about half an hour. When they left, they took the Green Line from Austin and transferred to the Red Line at Roosevelt. One stop later, at Cermak, the train was stopped and defendant was removed from the train, told to wait on the platform, and subsequently arrested. Defendant admitted that on that day and when he was removed from the train, he was wearing the jacket that had been shown in court.

¶ 11 Vernal Brown, defendant's brother, testified that he had met defendant around 1 p.m. that day at California and Lake. Defendant had come from meeting his lawyer. Around 8 p.m., they went to a McDonald's and then to visit their mother. Later, they left their mother's house, whereupon they got on the Green Line and transferred to the Red Line at Roosevelt. At Cermak, their train was stopped and defendant was removed from the train and arrested.

¶ 12 Iona Brown, defendant's mother, testified that she and defendant had been together most of the day. At one point, defendant left to see his lawyer and then came back to her home.

¶ 13 In its ruling, the court stated the jacket was significant, as it was "not just a generic Bulls jacket or some sort of Chicago sports team jacket that on any L train anybody would be wearing." The court further described the jacket as "unique like no other jacket that I have seen." The court additionally found that the defense witnesses testified inconsistently with respect to where defendant had been that day and that they had an interest or bias because they were

defendant's family members. Meanwhile, the court found Pement "inherently credible." The court also stated:

> "For me, the [linchpin] in this case is the jacket. Without the jacket, I think there certainly would be room for reasonable doubt. But with that jacket having been so particularly described and the defendant found close in time on that southbound train within under 20 minutes or so, under half an hour, there is no other—there is no other verdict I could give other than a finding of guilty.
>
> The State in my view proved their case beyond a reasonable doubt. I can't get beyond the jacket."

¶ 14 Defense counsel subsequently filed a motion for a new trial, contending in part that the stop at Cermak was an overly suggestive show-up. In denying the motion, the court acknowledged that it had heavily relied on the description of the jacket, but the jacket was very unique, even one-of-a-kind. The court added that "there's no way this case could be properly reviewed" unless a reviewing court looked at the jacket. The jacket's uniqueness was "kind hard to explain***on the record fully. Really almost need to see the jacket."

¶ 15 After a sentencing hearing on March 16, 2012, defendant was sentenced to four and a half years in prison, with 70 days of presentence custody credit. The sentence was to run consecutively to the sentence imposed for a different offense to which defendant pled guilty on January 6, 2012 and received 76 days of presentence custody credit. Although there was a period when defendant was in simultaneous custody for both offenses, he could not receive double credit because his sentences were consecutive. Defendant was assessed $655 in fines, fees, and costs.

¶ 16 On appeal, defendant contends his counsel was ineffective for failing to file a motion to suppress the out-of-court and in-court identifications of defendant. Defendant argues that the show-up at the Cermak station was highly suggestive and unreliable because the police acted on a description that lacked specifics other than noting a brightly colored jacket and defendant was the only person on the platform wearing a distinctive jacket. Defendant further contends that the identification lacked an independent basis because Pement's encounter was brief and stressful, his attention was largely focused on keeping his iPhone, and he was only able to provide a generic description of the offender based on an item of clothing. Defendant additionally asserts that Pement's confidence regarding his identification and the amount of time between the attack and identification should be given little consideration. Given the origin of the identifications, defendant argues that there is a reasonable probability that a motion to suppress would have been granted and the identifications would have been suppressed, thus changing the outcome of his trial.

¶ 17 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice from a failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed. *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008). The failure to show either deficient performance or prejudice precludes a finding of ineffective assistance of counsel. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). Further, if a claim can be decided based on a

defendant's failure to show prejudice, we need not determine whether counsel's performance was deficient. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 18 When ruling on a motion to suppress a show-up under the due process clause, a trial court conducts a two-part inquiry. *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008). First, the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *Id.* If the defendant meets this burden, the State must show that under the totality of the circumstances, the identification was independently reliable. *Id.*; *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994).

¶ 19 Initially, we address defendant's reliance on various psychological studies in his briefs. Defendant maintains it is permissible and common practice for reviewing courts to rely on published materials and cites several cases that do so. Defendant additionally contends that he does not rely on the studies as primary authority or evidence, but rather they are an aid to this court to interpret evidence. The State requests that we strike all references to these studies and the arguments that rely on these studies because they were never presented below and are not part of the record on appeal.

¶ 20 We agree with the State. Defendant relies on the substantive findings of the various studies to attack the show-up and the reliability of Pement's identification. In doing so, defendant is attempting to insert expert opinion evidence into the record to undermine the identification. These studies were never considered by the trial court and were never subject to cross-examination by the State. A court will not take judicial notice of critical evidentiary material not presented in the court below, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties. *Vulcan Materials Co. v.*

Bee Construction, 96 Ill. 2d 159, 166 (1983). Accordingly, we will not consider the studies defendant cites or defendant's arguments that rely on those studies. See *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30 (2007) (where the defendant submitted articles for their substance and ultimate findings and they were not presented at trial and were not in the record on appeal, this court granted the State's motion to strike portions of defendant's brief which discussed those studies); *People v. Mehlberg*, 249 Ill. App. 3d 499, 530-532 (1993) (where by arguing and referring to articles about DNA evidence, defendant attempted to interject expert-opinion evidence into the record that was never subject to cross-examination by the State and was never considered by the trial court, those portions of defendant's brief were not considered).

¶ 21 We also note that defendant relies heavily on *State v. Henderson*, 208 N.J. 208 (2011), in which the New Jersey Supreme Court modified the framework for assessing eyewitness testimony in that state. As part of the proceedings in *Henderson*, a Special Master was appointed to evaluate scientific and other evidence about eyewitness identifications and presided over a hearing that "probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies." *Henderson*, 208 N.J. at 217-18. *Henderson* has not been followed in Illinois (*People v. McGhee*, 2012 IL App (1st) 093404, ¶ 53-54) and we will follow the law as it stands in this state. Further, defendant periodically cites *Henderson* to refer to some of the studies the *Henderson* court considered. To the extent that defendant is actually relying on the studies considered by *Henderson* rather than the holding or reasoning of *Henderson* itself, we do not consider those studies or the arguments based on them for the reasons discussed above.

¶ 22 Turning to the merits of defendant's ineffective assistance of counsel claim, we first consider whether the show-up procedure was unnecessarily suggestive. Although show-ups are not favored and are even condemned, they have been justified under certain circumstances, such as when 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). Here, the show-up could be justified based on the officers' pursuit of a potential offender who had just boarded a Red Line train, providing a time-limited opportunity to find him while he was still traveling to his destination. See *People v. Thorne*, 352 Ill. App. 3d 1062, 1077 (2004) (immediate show-up near the scene of the crime was proper where the police were in hot pursuit of the suspected offenders a short time after a robbery).

¶ 23 Further, we disagree with defendant that the show-up procedure intentionally spotlighted defendant as the attacker because he was wearing a distinctive jacket. Pement's testimony suggests that, in actuality, the police took steps to create a fair show-up by placing defendant in a group of men and escorting Pement through the entire train, where Pement looked at each passenger's face. Further, there is nothing in the record to indicate that defendant was forced to wear the jacket—rather, he simply continued to wear the jacket he had already been wearing that day. Under these circumstances, there was no conduct on the part of the police that made the show-up unnecessarily suggestive. See *People v. Johnson*, 222 Ill. App. 3d 1, 7-8 (1991) (although the defendant was the only person in a line-up wearing red pants similar to those worn by the offender, the line-up was not unduly suggestive because the defendant was either wearing red pants or chose to wear them when he was arrested); *People v. Sakalas*, 85 Ill. App. 3d 59, 70

(1980) (line-up not unnecessarily suggestive where there was nothing in the record to indicate the defendant was required to wear a blue jacket similar to the one worn by the offender).

¶ 24 Additionally, contrary to defendant's assertion, Pement's testimony illustrates that he did not identify defendant based only on the jacket. Pement looked at each person in the group on the platform, and when escorted through the train, he looked at all of the passengers' faces, "some of them multiple times to be sure." Pement testified that he did not identify his other attackers because he had not seen their faces during the incident. However, he recognized defendant. Pement's thoroughness and emphasis on looking at the face of each passenger indicates that he identified defendant not only based on his jacket, but also on other features. See *People v. Ramos*, 339 Ill. App. 3d 891, 899 (2003) (witness's identification of the defendant was not based solely on the defendant's pinkish Dodge Neon car where the witness hesitated to identify the defendant until more of the defendant's physical features were viewed).

¶ 25 Nonetheless, even if we had found the show-up unnecessarily suggestive, a motion to suppress would not succeed because the out-of-court and in-court identifications of defendant were independently reliable. Factors to be considered include the witness's opportunity to view the offender at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the offender, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Moore*, 266 Ill. App. 3d at 797 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

¶ 26 Here, Pement testified that in the well-lit Monroe station, he observed defendant's face both when Pement was still on the bench and when he was on the ground. During the 90-second long incident, defendant was at different points an arm's length away from Pement and "right in

[Pement's] face." Based on his testimony, Pement's attention was focused on defendant, as it was his "first instinct***to look up and see who was grabbing at [his] cell phone." Pement also testified that he looked at defendant the entire time and that when he was on the ground, he was facing defendant. Further, Pement was able to describe with particularity the sequence of events and defendant's actions during the encounter. Although Pement's description to the police was general, he expressed complete certainty—three times, according to Officer Gill—that defendant was his attacker. Further, only 15 minutes elapsed between when Pement was attacked and when Pement identified defendant. Under the totality of the circumstances, the out-of-court and in-court identifications were independently reliable. Because the show-up was not unnecessarily suggestive and, even if it was, the identifications were independently reliable, there is no reasonable probability that a motion to suppress the identifications would have been successful and therefore defendant was not prejudiced by his counsel's failure to file such a motion. His ineffective assistance of counsel claim fails.

¶ 27 Next, defendant contends, and the State agrees, that he was improperly assessed two fees—a $200 DNA fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) and a $5 Electronic Citation fee pursuant to section 27.3e of the Clerk of Courts Act (705 ILCS 105/27.3e (West 2012)). The DNA fee may be imposed only when a defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Because defendant was already registered in the DNA database when he was assessed this fee, we vacate it accordingly. The Electronic Citation fee is only to be paid in "any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty

or grant of supervision." 705 ILCS 105/27.3e (West 2012). Defendant's offenses do not fall into these categories, and so we vacate this fee as well.

¶ 28 Finally, defendant contends the circuit court failed to offset $50 in fines with defendant's presentence custody credit. The State agrees, but questions the logic of awarding an amount of credit that would exceed the amount of the fines. Defendant was eligible for 70 days of presentence custody credit for his offenses in this case. See *People v. Latona*, 184 Ill. 2d 260, 271 (1998) (defendants sentenced to consecutive sentences are allowed a single credit for actual days served). While a defendant is allowed a credit of $5 for each day he is incarcerated, the amount allowed or credited cannot exceed the amount of the fine. 725 ILCS 5/110-14(a) (West 2010). Defendant's 70 days in presentence custody are more than sufficient to offset the $50 in fines he was assessed. We therefore reduce his fines by $50.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court and reduce defendant's total assessment from $655 to $400.

¶ 30 Affirmed; fines, fees, and costs order corrected.