2014 IL App (1st) 121922-U

First Division
Order filed: August 11, 2014

No. 1-12-1922

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GILBERTO RIOS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 08-CR-17845 Honorable Angela M. Petrone, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court was affirmed where the evidence was sufficient to sustain the defendant's first-degree murder conviction and where the defendant's ineffective-assistance-of-counsel claims failed.

¶ 2 After a jury trial, the defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1998)) and sentenced to 40 years' imprisonment. On appeal, the defendant contends that the evidence is insufficient to sustain his conviction and that he received ineffective assistance of counsel at trial. For the reasons that follow, we affirm.

¶ 3 On October 4, 1999, an arrest warrant was issued for the defendant in connection with the October 2, 1999, shooting death of Filiberto Gamez. The defendant was not taken into custody, however, until August 14, 2008, after extradition proceedings led Mexican authorities to return him to the authorities in the United States.

¶ 4 On September 27, 2011, the defendant's trial commenced with Alejandro Montero testifying first for the State. Montero testified that, on October 1, 1999, he attended a birthday party at Café Penelope, a restaurant located on the corner of Ashland Avenue and Jackson Boulevard in Chicago. Montero stated that he knew many of the party attendees, including Gamez, Caesar Moreno, Jose Malacara, David Caballero, and Daniel Ibanez. He estimated that the party, which started around 9 p.m., was attended by perhaps "60 to 70 people."

¶ 5 Montero testified that, shortly after midnight, a fight erupted inside Café Penelope between a large group and a second, smaller group, both comprised of people he did not know. He saw "bottles *** flying" and people punching each other; he estimated that 30 or 35 people were involved in the fight. Eventually, restaurant management asked the people in the smaller group to leave. Approximately 10 to 15 minutes later, Montero saw that four or five of his friends left the party and were walking toward their car on Ashland Avenue. While his friends were walking, Montero saw the people from the smaller group sideswipe a four-door, dark-colored vehicle parked in front of the restaurant. After that, about 20 to 30 people from the larger group ran outside, and Montero followed. Fighting between the two groups again erupted; this time on Ashland in front of the restaurant. Most people, including Montero, ran south on Ashland toward west Jackson, where he saw a group of about eight people fighting near the entrance of an alley. He recognized three of the people as his friends, "Manny, Antonio, and Caesar."

¶ 6 As he was running toward the fight, Montero noticed an individual running to his left, and then he heard a friend scream out, "Alex, he has a gun." Montero continued running and looked over to the man running beside him, but he did not see a gun. In court, Montero identified the man running beside him as the defendant. Montero then stopped running when he heard two to three gunshots. The gunshots were coming southwest of where he was standing, and the sound caused him to turn around, toward Ashland. Montero then ran east on Jackson to return to Café Penelope. As he approached the corner of Ashland and Jackson, he heard another three to four gunshots and a friend scream out "[t]hey shot" Gamez. Montero stopped, turned around, and saw Gamez on the ground. He then witnessed some members of the large group run toward and enter a minivan on Jackson. Montero and some of his friends chased after the minivan, but the car drove off. He described one of the men that entered the minivan as a taller, thin, man wearing a vest, and another man who was about Montero's height and build. He did not see the driver of the van, and he heard the voices of others screaming in the van, but he did not see those individuals.

¶ 7 Montero and his friends immediately drove Gamez to Rush University Medical Center. While waiting in the emergency room at Rush, Montero first spoke to police and, later that morning, he spoke to detectives at the police station. Montero then returned to Rush, but learned that Gamez had been transferred to Cook County Hospital. He went to Cook County Hospital, and he was told that Gamez died at 4:39 a.m. that morning, October 2, 1999. Shortly thereafter, Montero returned to the police station, where he was shown a lineup from which he identified the defendant as the man who was running next to him. He recalled that the defendant wore a light-colored, "either white or beige sweater or top" that night. Montero estimated that he saw the defendant from a distance of only 10 to 15 feet. On cross-examination, Montero admitted

that the police showed him a lineup at the hospital from which he identified another man, Carlos Centeno, as one of the people he saw in the restaurant. However, the defendant's photo was not included in that initial lineup. Montero explained that he saw the defendant and Centeno sitting together in Café Penelope.

¶ 8 Jose Gutierrez testified that he arrived at Café Penelope around 9 p.m. and estimated that about 50 people were at the party. Shortly after midnight, Gutierrez saw about 10 to 12 people arguing and the argument escalated to include chairs and bottles being thrown. Like Montero, Gutierrez testified that there were two distinct groups fighting. He stated that the first group left the bar after restaurant management asked them to leave, but about 10 to 15 minutes later, the second group left the restaurant and another fight erupted outside on Ashland. Gutierrez went outside with some of his friends and also saw people fighting south of the restaurant, at the corner of Ashland and Jackson. Gutierrez testified that he remained outside, just in front of the restaurant's entrance, and heard someone yell that someone was running with a gun. He turned and walked toward the corner and saw a man run past him with a silver gun; the man was running south on Ashland and turned west on Jackson. In court, Gutierrez identified the man with the gun as the defendant.

¶ 9 Gutierrez next saw the defendant fire three to four shots at the crowd near the alley before the gun jammed. Another Latino man assisted the defendant with the gun, and the defendant took the gun back and fired more shots. Gutierrez testified that the defendant fired two shots at a man, who he later learned was Gamez, lying on the ground. He stated that the defendant then turned toward him, which allowed him to see the defendant's face. He could not recall whether he saw the defendant inside the restaurant before the shooting.

¶ 10 On October 2, 1999, around 6:30 p.m. or 7 p.m., Gutierrez identified the defendant as the shooter from a photo lineup at the police station. He also identified Carlos Centeno as the person who helped the defendant unjam the gun. Gutierrez testified that, on May 2, 2007, he identified the defendant from the same photo lineup before the grand jury. He further testified that, on August 16, 2008, police detectives asked him to view a different photo lineup from which he again identified the defendant. On cross-examination, Gutierrez denied telling police on October 2 that Centeno was the man with the gun.

¶ 11 David Caballero testified that there were about 50 people inside the restaurant attending the party, when just after midnight, a fight, with flying chairs and bottles, erupted among 10 to 15 people. Like Montero and Gutierrez, Caballero did not recognize the people who were fighting. Some of the people left immediately after restaurant management intervened, and another group left approximately 20 to 30 minutes. He noticed that the fight resumed outside on Ashland and that some people were running south on Ashland toward Jackson. As he was standing in front of the restaurant, Caballero saw a man retrieve a gun from the backseat of a dark, four-door car parked directly in front of the restaurant, and the man ran with the gun toward Jackson. Caballero identified the defendant as the man he saw run past him with the gun.

¶ 12 Caballero ran after the defendant toward the corner of Ashland and Jackson, yelling to his friends that "he has a gun, he has a gun." He saw the defendant fire the gun "a couple times" into the crowd near the alley off of Jackson. When the defendant fired the first shots, Caballero was standing "[b]ehind him about 15 feet." The gun then jammed and a man approached the defendant and helped him fix the gun. The defendant then turned around, facing east on Jackson and fired "a couple more times" at the crowd and at Gamez who was lying on the ground, before

running east toward Ashland. He specifically testified that the defendant "[r]an about five feet towards" him after shooting Gamez and then ran to a light-colored minivan.

¶ 13 Caballero testified that the police arrived at the scene and took him to the station to interview him. At that time, he could not identify anyone from the photos he was shown which included the defendant. However, he stated that, on April 21, 2007, Chicago Police Detective John Pellegrini asked him to view another photo lineup from which he identified the defendant as the shooter. He denied that the police told him who to identify or that they informed him of the suspect's identity in any way. Also on April 21, 2007, Caballero signed a statement for Assistant State's Attorney Michael O'Malley in which he stated that he identified the defendant from a photo lineup on the night of the incident. Caballero admitted signing the statement, which contradicted his present testimony that he was unable to identify the defendant the night of the murder. He subsequently identified the defendant from a physical lineup on August 16, 2008, and from a photo lineup before the grand jury on August 26, 2008. Caballero denied that the police or anyone else suggested or directed him to identify the defendant during any of these proceedings.

¶ 14 On cross-examination, Caballero stated that the defendant was 5'5" or 5'6", but he did not recall describing the shooter to police on the night of the murder as being about 5'3". When asked about his testimony that he failed to identify the defendant on the night of the murder conflicting with his statement to ASA O'Malley, Caballero stated that he could not recall which was accurate and stated, "I don't recall. It's 12 years ago."

¶ 15 Ruben Arroyo testified that, since 2006, he has been incarcerated in a Terre Haute federal prison after he was sentenced to 35 years' imprisonment for several drug offenses to which he pled guilty. On the night of Gamez's murder, Arroyo attended the birthday party at Café

Penelope, although he estimated that there were only about 25 to 30 attendees. Consistent with the other witnesses, Arroyo described a fight erupting around midnight which included flying bottles leading to some people being asked to leave the restaurant. Contrary to other witness estimates, Arroyo stated that there were only three or four men involved in this fight. Shortly thereafter, Arroyo saw some friends, including Gamez, Caesar and "Manny," outside fighting with another man in the street.

¶ 16 Arroyo went outside, and Montero followed him with a few other friends. Outside, he also saw an unidentified female and a man later identified as the defendant. According to Arroyo, the defendant had a rushed conversation with the female by a dark-colored, four-door car parked in front of the restaurant. From the rear, driver's side seat, the defendant retrieved a very large, "grayish" or chrome gun with a black handle. Arroyo testified that he and the defendant made direct eye contact before the defendant headed toward the fight near the alley off of Jackson. He followed the defendant and yelled ahead to his friends, warning them that the defendant was armed. Arroyo heard another person also yell a warning out.

¶ 17 Arroyo testified that he saw the defendant shoot Gamez, who fell to the ground, and then the defendant stood over Gamez and shot him about four more times. The defendant then fired more shots toward the crowd. Arroyo testified that he heard about 13 gunshots before the gun jammed and another man approached the defendant to help him unjam the gun. Unable to unjam the gun, the two then jumped into an Astro minivan, which was heading eastbound on Jackson before turning south on Ashland after the defendant jumped inside. Arroyo testified that he was approximately six or seven yards from the defendant when he witnessed him shoot Gamez. He described the corner as well-lit, with streetlights at the corner and lights from area businesses illuminating the scene.

¶ 18 On April 5, 2007, two Chicago police detectives, who stated they were in the "Cold Case Unit," visited Arroyo in Terre Haute and showed him a lineup from which he identified the defendant as the shooter. On February 19, 2008, Detective Pellegrini and an assistant state's attorney visited Arroyo in Terre Haute and showed him another photo lineup from which he again identified the defendant. Arroyo denied having any prior notice of these visits. He admitted that he spoke to his attorneys in 2010 about his cooperation in this case, but he testified that he was not promised anything from federal authorities in exchange for his cooperation. He denied even "hoping for some consideration," and stated that he was not there "because somebody cut a deal," but "because [the defendant] killed my best friend."

¶ 19 On cross-examination, Arroyo denied giving officers at the scene a description of the two men involved in the shooting which included a 6'1", 300-lb Hispanic male and a 5'8", 170-lb Hispanic male. Arroyo further denied failing to identify the defendant in a photo lineup on October 2, 1999. He also denied telling officers that the man who shot Gamez was the man who came over to help the defendant with the jammed gun. Arroyo stated "No. You have the story twisted." Later, Arroyo was recalled to clarify that, on October 2, 1999, he was shown a photo lineup which did not include the defendant's photograph. However, the next day, October 3, 1999, he returned to the police station and was shown another photo lineup from which he identified the defendant as the shooter. This fact was confirmed by the testimony of Chicago Police Detective Allen Jaglowski.

¶ 20 Chicago Police Officer Joseph Serio testified that, on October 2, 1999, he was one of the patrol officers responding to the scene, and he spoke to several witnesses at the scene who provided him with the license plate number of the black, four-door vehicle parked in front of Café Penelope. Officer Serio identified his written report from that night, which documented

that he spoke to Arroyo, Caballero, and Victor Guerrero. According to the report, Arroyo stated that two men fired shots, and he described both as Hispanic and about 20 to 25 years old. He described one as being 6'1" and about 300 pounds and the other being 5'8" and about 170 pounds. Arroyo told Officer Serio that the shorter man retrieved the gun from the black car and fired once before the gun jammed. After the jam, the larger man took the gun and then fired five or six times. Officer Serio explained that his two-page report was a summary of his conversations with multiple witnesses and multiple detectives on the scene. He admitted that he was not the primary detective on the case, and he knew that the detectives handling the case would later interview the witnesses in much further detail.

¶ 21 Detective Jaglowski testified that, on October 2, 1999, he spoke to several witnesses, police officers, and forensic investigators at the scene, at the police station, and at Rush Hospital. He traced the license plate number of the black, four-door vehicle to Rosa Becerra. Working with information provided by Ms. Becerra, Detective Jaglowski located Centeno on October 3, 1999, and searched his bedroom, finding a .40 caliber gun, which forensic investigators connected to the murder. After speaking with Centeno, Detective Jaglowski wanted to interview the defendant and acquired his photograph to include in lineups. After witnesses identified the defendant as the shooter from the photo lineups, he obtained a warrant for the defendant's arrest.

¶ 22 On cross-examination, Detective Jaglowski admitted that he signed, although he did not author, a report from the night of the murder in which it was documented that Gutierrez, his brother Ricardo Gutierrez, and Arnulfo Zamora told the police that they remained inside the restaurant after the first fight ended and that they did not see anyone pull a gun out of the black, four-door car. He also admitted that Gutierrez identified Centeno from a physical lineup on October 2, 1999, and said he looked like the man who ran past him with a gun in his hand.

Detective Jaglowski further confirmed that Caballero was unable to identify the shooter from a photo lineup containing the defendant's photograph on October 2, 1999, and that he described the shooter that night as being about 5'3" tall.

¶ 23 Regarding Officer Serio's "general offense case report" which implicated two shooters, Detective Jaglowski explained that such reports were "very condensed" versions of the "general progress reports" prepared by detectives, who had the luxury of investigating the case for days before preparing it. He stated that a general progress report (GPR) prepared by another detective indicated that Arroyo had described a "massive" Latin King male being involved in the fight preceding the shooting and that he saw a man retrieve a large, gray gun with a black handle from the rear driver's side seat of the black, four-door car. The GPR also provided that Arroyo said he saw the man fire the gun before the gun jammed, his friend came to help him, and then the man took the gun back and fired more shots before jumping into a van. The GPR documented Arroyo's descriptions of the two men involved with the gun. One man was described as male, Hispanic, 21 to 22 years of age, 5'4", 145 pounds, short, brown-knit sweater. The other man was described as a male, Hispanic, 22 years old, thin beard, light complexion, wearing a red-plaid shirt and blue jeans, about 5'6" to 5'7", and weighing about 130 pounds. He admitted that the GPR indicated that Gutierrez identified Centeno from a photo lineup and stated that he looked like the person he saw running with the gun. Later that night, however, Gutierrez identified the defendant as the shooter from a photo lineup.

¶ 24 Chicago Police Forensic Investigator Kurt Zielinski testified that he examined the firearm evidence recovered in this case, which included: a pistol and its magazine recovered from Centeno's bedroom, 14 unfired cartridges, 9 fired cartridges cases, and 2 fired bullets. Zielinski

concluded that the magazine fit the pistol and that all 9 fired cartridge cases and the 2 bullets were fired from the pistol.

¶ 25 The parties stipulated to the following facts: a bullet fell from Gamez's clothing in the emergency room at Rush Presbyterian-St. Luke's Medical Center and was retrieved by a security guard and turned over to Officer Serio; no latent fingerprints suitable for comparison were found on the firearm evidence or the beer bottles recovered from the scene; Dr. Adrienne Segovia determined that Gamez died from multiple gunshot wounds, including wounds to his chest, right thigh, and left arm, and that she retrieved one bullet from Gamez's thigh, which was turned over to Chicago police.

¶ 26 FBI Special Agent Matthew Alcoke testified that, on August 14, 2008, he flew to Houston Intercontinental Airport, along with Chicago Police Detective Robert Rodriguez and Cook County ASA Jose Villareal, to meet Mexican authorities for the turnover of the defendant. He and Detective Rodriquez met with the defendant in a business office at the airport, he advised the defendant of his *Miranda* rights. He asked the defendant to sign a standardized *Miranda* form, but he instead asked him whether he thought he should have an attorney present. Special Agent Alcoke testified that he answered the defendant's question by re-advising him of his *Miranda* rights. The defendant then stated that he wanted to talk, despite his initial unwillingness to sign the form, and that he began to cry, stating that "[i]t was a mistake, I was drunk, it wasn't planned." The defendant admitted that, on October 2, 1999, he was at Café Penelope with friends, drinking "hard liquor" instead of his usual beer and that he was "fairly intoxicated." The defendant said an argument erupted between his group of friends and another group and that the dispute spilled into the street. Once outside, the defendant's friend, "T-Bone," retrieved a silver gun from a minivan and gave it to him. He then fired multiple shots into the

crowd, but he could not recall whether the gun jammed while he was firing. After the shooting, the defendant stated that he fled the scene, and because he was afraid that "people" would be looking for him, he eventually fled to Mexico. When asked whether he remembered Gamez falling to the ground, the defendant said that he did not.

¶ 27 Special Agent Alcoke described the defendant during the interview as "somewhat emotional," crying and tearing up at times, but "otherwise fairly calm and straightforward" in his responses to questions. The defendant also volunteered the fact that the incident "changed his life," that he regretted it, and that he did not know Gamez, which made him "feel even worse to the point where he felt very sorry both for the victim and for the victim's family." The defendant inquired about the legal proceedings he now faced, and Special Agent Alcoke explained the next steps. The defendant then signed the *Miranda* form. ASA Villareal had not been in the room during the defendant's confession, but he returned afterward and the defendant was re-*Mirandized* before he spoke to the defendant. Special Agent Alcoke admitted that no formal written or taped recording of the statement was made.

¶ 28 The defendant testified in his defense that, in 1999, he had been a Latin King member for about 10 years, and that he arrived at Café Penelope around midnight on the evening of October 1 and morning of October 2, 1999. He testified that he drank "hard liquor," while sitting with some fellow Latin King members, including a man he knew only as "T-Bone," who he described as a man in his mid-20's, about 200 pounds, and about 5'7" or 5'8." The defendant described himself at that time as about 5'6" or 5'7" and about 170 to 175 pounds with very short hair.

¶ 29 The defendant stated that a fight erupted among 15 to 20 people inside the restaurant, but that he was not involved in it. According to the defendant, he and T-Bone were part of the first group that exited the restaurant, and he admitted that he was intoxicated by that time. He said

that T-Bone retrieved a gun from a light-colored minivan and that he did not see a black four-door vehicle. The defendant admitted that there were a few cars parked in front of the restaurant, but he only recalled the minivan.

¶ 30 While outside, the defendant saw a group fighting on Ashland and another group fighting on Jackson. He observed T-Bone head toward Jackson with the gun and fire several shots at the crowd. He denied touching the gun and did not recall what the gun looked like. He also denied having any experience with guns, despite his 10 years' experience with the Latin Kings. According to the defendant, he left after the shots were fired, but he did not recall how he left; namely, he did not remember if he left in the minivan, took a bus, or got a ride in another vehicle to get his home in Cicero. The defendant denied knowledge that a person had been shot or that police responded to the scene. He stated that he "left. I don't know how I left, but I know I left."

¶ 31 The defendant testified that, a few months after the shooting, he moved to Mexico with his girlfriend and they got married and had two children. He said that he left the United States "because [he] was standing by a gun shooting at people, and I was scared." He admitted that he returned to Chicago over the years to visit family, but he testified that he was unaware that the police were looking for him in connection with this shooting incident. On cross-examination, the defendant stated that he moved to Mexico because he was afraid of the police, even though, according to his testimony, he was merely a witness and not the actual shooter. He also wanted to get out of the gang life, although he denied being fearful of any other gang members.

¶ 32 Further on cross-examination, regarding his statement to Special Agent Alcoke, the defendant denied the incriminating details, such as firing the gun into the crowd, becoming emotional or crying during the interview, or stating that the shooting was a mistake and unplanned. However, he admitted telling Special Agent Alcoke non-incriminating details, such

as that there was a fight that moved from the restaurant to the street, that T-Bone retrieved the gun from a minivan, that he did not see Gamez fall to the ground, and that he moved to Mexico because he wanted to change his life. The defendant admitted that he never filed any complaint with the FBI or the Chicago Police Department regarding his assertion that Special Agent Alcoke "made up [his] confession" in connection with this case.

¶ 33 In rebuttal, the State called Detective Rodriguez who testified consistently with Special Agent Alcoke regarding the details of the defendant's statement made in Houston. He further denied that the defendant ever said that T-Bone was the shooter.

¶ 34 On October 28, 2011, the defendant moved for a new trial, stating that the State failed to prove him guilty beyond a reasonable doubt and alleging, *inter alia*, that trial counsel was ineffective for failing to file any pretrial motions to suppress the witnesses' out-of-court identifications of him. The motion was amended on April 4, 2012, and the court eventually denied it on May 23, 2012, after conducting a hearing at which trial counsel testified in his defense of the defendant's ineffective-assistance-of-counsel allegations.

¶ 35 On May 23, 2012, the defendant was sentenced to 40 years' imprisonment. On November 20, 2012, the trial court denied the defendant's motion for a reduction in his sentence. This appeal followed.

¶ 36 A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id.* Rather, " 'the relevant question 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.' "

Id. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard of review, it is the duty of the trier of fact to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302, 307 (1989); see also *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-5 (2009). Thus, we will not substitute our judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses. *Siguenza-Brito*, 235 Ill. 2d at 224-5.

¶ 37 Further, "[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." *Slim*, 127 Ill. 2d at 307 (1989). An eyewitness' identification will not be deemed sufficient to support a conviction if it is vague or doubtful. *Id.* When assessing identification testimony, we generally consider the five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the opportunity the witness 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 witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Slim*, 127 Ill. 2d at 307-08. However, discrepancies and omissions as to facial and other physical characteristics are not fatal and "do not in and of themselves generate reasonable doubt as long as a positive identification has been made," but simply affect the weight to be given the identification testimony. *Id.* at 308-09. A witness is not expected or required to distinguish individual and separate features of a suspect in making an identification, and a positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance. *Id.* Additionally, "[v]ariances between a witness' trial testimony and pretrial

statements raise questions of credibility which the trier of fact must assess in making a determination of guilt." *Id.* at 308.

¶ 38 The defendant first argues that the evidence is insufficient to sustain his conviction, namely, because witness identifications are inherently unreliable. Much of the defendant's contention on this point is based on scientific evidence and authority and jury instructions from foreign jurisdictions. The defendant further argues that reasonable doubt exists because the witnesses' identifications were contradictory and internally inconsistent and because there was no forensic or other credible corroborative evidence proving he was the shooter. We disagree.

¶ 39 First, the defendant fails to raise any relevant legal authority suggesting that Illinois courts have deemed witness identifications inherently unreliable given recent scientific developments in the area or authority from foreign jurisdictions. Rather, while the admissibility of scientific evidence or expert testimony attacking the reliability of identifications has gone unaddressed by our supreme court, our court has noted that "the trend in Illinois is to preclude expert testimony on the reliability of eyewitness identification on the ground that it invades the province of the jury as trier of fact." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 54-5. Thus, nothing in the defendant's brief suggests that our review of the sufficiency of the evidence in this case should stray from the well-settled principles stated herein, including that it is the duty of the trier of fact to determine the credibility of the witnesses' identifications.

¶ 40 We also reject the defendant's argument that reasonable doubt exists where the witnesses' identifications in this case were internally inconsistent, contradictory, and were not corroborated by any other evidence. The defendant specifically argues that there were varying accounts of his physical characteristics, the color of his clothing ("brown, beige, or white)," the number of shots fired, the size and color of the gun ("huge, grey, silver, or chrome"), and the shooter's location

("street or sidewalk"). He also contends that Montero was adamant that he did not see him with a gun and that Montero's statement alone provides reasonable doubt, not to mention that a great deal of time had passed between the in-court identifications and the crime.

¶ 41 The minor discrepancies in the witnesses' accounts, such as the color of the gun or the defendant's shirt, the number of people inside the restaurant, the number of shots fired, the exact location of the shooter, and the defendant's physical characteristics, are not fatal to the identifications, but merely affect the weight to be given the testimony by the jury. See *Slim*, 127 Ill. 2d at 307-08. The record also demonstrates that most witnesses initially identified the defendant from a photo lineup within one day of the shooting and identified him repeatedly over the years when asked by the police thereafter. While Caballero testified that he was unable to identify the defendant from the lineup on the night of the shooting, the jury could have rejected his identification and still found him guilty based on any one of the three other identifications. See *id.* at 307 (holding that a single positive identification is sufficient to sustain conviction).

¶ 42 We also reject the defendant's contention that no other evidence corroborates the identifications. Police witnesses testified regarding their investigation, which led them to Centeno and then searching for the defendant and placing his photo in lineups for the witnesses. Firearms and toolmark evidence connected the gun found in Centeno's bedroom to the crime, and the defendant implicated himself in the statements he made to law enforcement in Texas. Additionally, the defendant's immediate flight from the scene and move to Mexico could have been considered circumstantial evidence of his guilt by the jury. For these reasons, we cannot set aside the defendant's conviction where, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found him guilty beyond a reasonable doubt.

¶ 43 Next, the defendant argues that he received ineffective assistance of trial counsel when counsel failed to (1) file a motion to suppress his unrecorded confession; (2) submit expert testimony on mistaken identifications; (3) investigate whether suggestive police procedures were used in the identifications; and (4) request jury instructions on identification testimony which reflect the most recent scientific research. We disagree.

¶ 44 Claims of ineffectiveness of counsel are judged using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, the defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 688, 694). In order to meet the first-prong, the defendant must show that his counsel's performance was so inadequate that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment. *Id.* at 326-27. "Counsel's performance is measured by an objective standard of competence under prevailing professional norms," and the defendant "must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *Id.* at 327 ("Matters of trial strategy are generally immune from claims of ineffective assistance of counsel"). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001)

¶ 45 Regarding trial counsel's alleged failure to file a motion to suppress the defendant's confession because it was not recorded as required by law, we note that the defendant fails to address that the Illinois statute requiring the recording of murder confessions explicitly states that it does not apply to out-of-state statements. Section 103-2.1(b) of the Code of Criminal

Procedure of 1963 (Code) (725 ILCS 5/103-2.1(b) (West 2008)) provides that an oral or written statement of an accused "made as a result of a custodial interrogation conducted at a police station or other place of detention shall be presumed inadmissible as evidence against the accused in" any murder proceeding unless an electronic recording is made of the interrogation and the recording is substantially accurate and not intentionally altered. However, section 103-2.1(e) of the Code (725 ILCS 5/103-2.1(e) (West 2008)) provides that "[n]othing in this Section precludes the admission *** (vii) of a statement made during a custodial interrogation that is conducted out-of-state." Here, the defendant's custodial interrogation was conducted in Texas, and therefore, section 103-2.1 did not provide trial counsel with a reasonable basis for a motion to suppress the statement. Therefore, we cannot find that trial counsel's performance was deficient on this ground.

¶ 46 We also reject the defendant's next allegation, that trial counsel was ineffective for failing to submit expert testimony on mistaken identifications. As previously stated, our court has noted that "the trend in Illinois is to preclude expert testimony on the reliability of eyewitness identification on the ground that it invades the province of the jury as trier of fact." *McGhee*, 2012 IL App (1st) 093404, ¶ 54-5. In *McGhee*, we rejected a similar ineffectiveness argument and determined that, "unless and until the supreme court decides to revisit [the issue of expert testimony on the reliability of identifications], we must conclude that it was not unreasonable for defense counsel to decline" to present such evidence. *McGhee*, 2012 IL App 093404, ¶ 55. Likewise, in this case, we cannot conclude that trial counsel's performance was deficient. Moreover, even if counsel's performance was deficient, the defendant fails to establish that he was prejudiced, especially where our review of the record demonstrates that counsel extensively cross-examined each witness on the reliability of their identifications.

¶ 47 Next, the defendant contends that trial counsel was ineffective for failing to investigate the possibility of suggestive police procedures used in the lineups. "Whether defense counsel's failure to investigate amounts to ineffective assistance is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *People v. Montgomery,* 327 Ill. App. 3d 180, 185 (2001). Here, the defendant only speculates that the police used suggestive lineup procedures which might have affected the reliability of the identifications. The record shows no actual evidence which could have been presented at trial to demonstrate the police used suggestive lineup procedures. In fact, the record reflects that trial counsel testified during the hearing on the defendant's posttrial motion that he reviewed the photo arrays used for the lineups and denied having any information or belief that suggestive procedures were used. Again, even if counsel's performance was deficient, the defendant failed to argue how he was prejudiced by such non-existent evidence, given his own inculpatory statements which were properly admitted into evidence.

¶ 48 Finally, we reject the defendant's assertion that trial counsel was ineffective for failing to request non-pattern jury instructions on identification testimony which reflect the most recent scientific research. The defendant argues that the Illinois Pattern Jury Instruction, Criminal, No. 3.15 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.15), given at trial, is "completely out of date and does not reflect the numerous scientific studies that have proven eyewitness identifications are commonly false and are responsible for the vast majority of wrongful convictions." He further points to changes made in jury instructions in New Jersey and Florida which take into "account the many serious problems with reliability and eyewitness identifications."

¶ 49 The defendant here argues that the jury should have been instructed on scientific evidence establishing the various problems of eyewitness identifications, but he fails to set forth a proposed instruction and fails to cite any relevant legal authority supporting the use of a non-pattern instruction on this matter. Accordingly, this issue is forfeited. Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Ward*, 215 Ill. 2d 317, 332 (2005).

¶ 50 Forfeiture aside, IPI Criminal 4th No. 3.15 accurately reflects the *Biggers* factors, the well-settled standard used by our courts to review identification testimony:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:
>
> The opportunity the witness had to view the offender at the time of the offense.
>
> The witness's degree of attention at the time of the offense.
>
> The witness's earlier description of the offender.
>
> The level of certainty shown by the witness when confronting the defendant.
>
> The length of time between the offense and the identification confrontation." IPI Criminal 4th No. 3.15

¶ 51 "A nonpattern jury instruction should be used if a pattern instruction does not contain an accurate instruction on the subject on which the jury should be instructed." *People v. Roberts*, 351 Ill. App. 3d 684, 688 (2004). Therefore, we see no deficiency in trial counsel's failure to submit an alternative instruction where the given instruction accurately represented Illinois law and where such a decision is generally considered a matter of trial strategy. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007) (stating that choice of jury instruction or decision not to object to an instruction are generally considered matters of trial strategy and "[m]istakes in strategy or tactics do not, alone, amount to ineffectiveness of counsel"). Moreover, the defendant fails to establish

that the outcome of his trial would have been different had the jury been instructed regarding scientific evidence in the area of eyewitness identification. *People v. Martinez*, 389 Ill. App. 3d 413, 416 (2009) (stating that, if the result at trial would not have been different had the proper instruction been given, the error is harmless).

¶ 52 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 53 Affirmed.