2016 IL App (1st) 131759-U
No. 1-13-1759

THIRD DIVISION
January 20, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 7091
	)	
RAYSHON JAMES,	)	The Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* defendant's armed robbery with a firearm conviction affirmed where the State's evidence was sufficient to prove his guilt beyond a reasonable doubt; the circuit court properly admitted other crimes evidence to establish defendant's *modus operandi* and identity; and where defendant received effective assistance of counsel and a fair trial.

¶ 2 Following a bench trial, defendant Rayshon James was convicted of armed robbery with a firearm and was sentenced to 21 years' imprisonment. On appeal, defendant challenges his conviction arguing: (1) the State's identification testimony was insufficient to prove him guilty of the offense beyond a reasonable doubt; (2) the circuit court erred in admitting other crimes

evidence because the other crime was too dissimilar to the crime with which he was charged and was therefore inadmissible to prove his *modus operandi* and identity; (3) defense counsel was ineffective for failing to challenge a State witness's identification of defendant from a prejudicial photo array; and (4) he was denied his right to a fair trial where the trial court, prior to imposing a judgment of guilty, failed to accurately recall the evidence presented against him. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Pre-Trial Proceedings

¶ 5 On November 24, 2009, three armed men robbed Paisano's Muffler Shop (Paisano's), located at 2634 West 58th Street in Chicago. The suspects in the robbery were not immediately identified or apprehended and the Chicago Police Department commenced an investigation into the robbery. About two weeks later, on December 9, 2009, while the police investigation into the Paisano's robbery was ongoing, two armed men robbed Fast Way Tire Shop (Fast Way), located at 2553 West 59th Street. The suspects in the Fast Way robbery were similarly not immediately identified or apprehended and another police investigation ensued. Ultimately, during the course of these investigations, defendant and co-defendant Devin Grigler were arrested in connection with the Paisano's robbery and were charged with multiple counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)).[1] Defendant elected to proceed by way of a joint, but severed, bench trial.

¶ 6 Prior to trial, the State filed a motion seeking to admit evidence pertaining to the armed robbery of Fast Way that occurred on December 9, 2009, in order "to prove *modus operandi*, identity, and common scheme or design." Specifically, the State argued:

[1] Defendant also faced charges in connection with the Fast Way robbery. This bench trial, however, solely concerned the Paisano's robbery.

"Here the two robberies are substantially similar and have common features: both crimes occurred within two weeks of one another a block away from each other; both crimes occurred at car repair shops in the early evening; prior to both robberies, offenders feigned that they were looking for some sort of repair to their vehicles, both of which were early 1990s Ford Escorts; there was more than one offender who ordered the victims onto the ground at gunpoint demanding money; and personal property was taken from the victims as well as items from the businesses. While the crimes are not completely identical, a degree of similarity exists between the evidence of the offenses and tends to prove the Defendant guilty of the November 24, 2009, [robbery of Paisano's Muffler Shop]. ***

The probative value of this evidence outweighs its prejudicial effect. The evidence from the December 9, 2009, incident is highly probative to the identity of the Defendant as the perpetrator here and the trier of fact must be given the opportunity to weigh this evidence especially since the defendant was not arrested on scene, did not give a statement, and was not charged until months after the crime occurred putting his identity as a perpetrator at issue."

¶ 7 Defendant, in turn, objected to the State's motion seeking to introduce evidence pertaining to the Fast Way robbery. In his written response, defendant argued:

"While these cases share some facts generally common to most armed robberies of this nature, (arrival at the crime scene, use of a weapon, threats to victims, taking of valuables from victims, and flight from [the] scene) these two cases do not share 'substantially similar' and common features as to justify admission in this case.

In the [instant] case three offenders are alleged to have entered Paisano's Muffler Brake on November 24, 2009. According to witnesses two of the offenders were male blacks approximately 20 years of age, both six feet tall and 180 lbs., and dark complexion. Witnesses to this offense also state that all three offenders were armed with handguns. These offenders are reported to have arrived at this location approximately one hour earlier and inquired about muffler repair to their car, left the scene, and returned later to commit the offense.

Three of the witnesses in this case reported that they were hit and kicked by one or more of the offenders during this incident.

In the [Fast Way Tire Shop robbery], by contrast, none of the witnesses are reported to have been hit, kicked or struck in any manner. Witnesses to this offense mention only two offenders. (not three). One of the witnesses describes one of the offenders as being 5 foot 6 inches, 140 lbs and light complexion. There are no reports that these offenders had arrived at the scene earlier in the day, left and then returned to commit the crime.

Significant facts such as the number of offenders, common descriptions of the offenders, numbers of guns displayed, and physical abuse of the victims at the scene are not present in both of these cases.

Given the population of Chicago and the unfortunate high occurrence of crime in the city, it is not particularly unusual for two car shops (muffler/brake repair shop and a tire repair shop) to be robbed, even on the same day. Additionally, Ford Escorts are a very common make and model of auto, and absent any particular identifying characteristics of

the vehicle, cannot be considered a 'substantially similar' fact justifying admission in the case.

Other factors that the [S]tate mentions are factors that are common to the nature of the crime of armed robbery. Ordering victims to the ground (to prevent their ability to identify or resist) and demanding (and taking) personal property and money (the ultimate objective of the robbery) are not such unusually distinct facts that would make these two cases so similar as to allow the introduction of other crimes evidence."

¶ 8 The circuit court subsequently presided over a hearing on the State's motion, and after hearing the arguments of the parties, granted the State's request to admit evidence pertaining to the robbery of Fast Way. The court explained its ruling as follows:

"One of the concerns of this Court or any court concerning whether or not to introduce their proof of other crimes or to allow proof of other crimes to be introduced in another case is that the prejudice of allowing that other crimes evidence is not outweighed—is more probative than prejudicial, I should say. And on that point I want to identify some of the factors which this Court views as significant.

First, in these two cases it is asserted, at least by way of proffer, that the victims were both auto repair shops, tire shops. Second, these were both—within both of these cases there was an initial visit and then a return later by the same alleged offenders—actually, at that time, that is, that the armed robbery is executed. I want to indicate that [defense counsel] correctly points out that the descriptions that go out when these two events occur are different. That's indisputable.

But in both cases now, because of the investigation, the police have evidence that an identification has been made, a specific identification has been made of the defendant, at least by way of recovery of a fingerprint as part of this proof.[2]

I do believe that these two incidents are sufficiently unique, and the evidence, a degree of identity within the manner in which they were conducted which would allow a reviewing jury to consider them as evidence of *modus operandi*, and for that reason the defendant's—or excuse me. The State's motion to allow proof of other crimes will be allowed. ***[T]oday's evidence, the evidence of the other crimes in this case is more probative than prejudic[ial]. That's after having conducted an extensive weighing of the evidence that's been proffered."

¶ 9 Trial

¶ 10 At trial, in accordance with the circuit court's ruling, witnesses Karen Johnson and Gonzalo Mejia were permitted to testify about the Fast Way robbery. Johnson testified that on December 9, 2009, at approximately 6:30 p.m., she arrived at Fast Way to get one of her tires fixed. When she pulled up to the front of the shop, defendant was leaving the premises in a Ford Escort. She explained that defendant's vehicle was facing hers as he was leaving the tire shop and that she was able to observe him sitting in the driver's seat of the vehicle. After the Ford Escort left, Johnson spoke to an employee of the shop about her slow leaking tire, and was instructed to drive her vehicle inside of the garage to be repaired. She testified that she remained in her vehicle inside of the garage for approximately 15 to 20 minutes as she waited for her tire to be fixed. At that time, "when [she] looked through [her] rear view mirror, [she] saw where the overhead door was open, and [she] saw a young man with a TV in his hands and what looked

[2] Defendant's fingerprints were not recovered from either crime scene. A fingerprint from co-defendant Grigler, however, was recovered from Paisano's.

like a gun in his hand." Johnson recognized the young man as the driver of the Ford Escort she had seen earlier and identified him as defendant. She testified that defendant was approximately one car length behind her when she first observed him enter the garage with the TV and gun. She then "slouched down" in her seat and continued to watch defendant in her rearview mirror. As she looked in her rearview mirror, she noticed that the Ford Escort that she had seen defendant driving earlier was parked outside of the garage. Her attention was then diverted to "another guy [who appeared] at [her] passenger's side window." Johnson admitted that she could not provide a good description of the other armed man and testified that she only recalled that he was a "dark skinned black man." As she sat in her vehicle, she observed the man order two Fast Way Tire Shop employees and two other customers, who were the remaining occupants in the garage, to the ground. Once they complied, the man "started going through the[ir] pockets" and took their wallets and cell phones.

¶ 11 Defendant then approached her vehicle and began pulling on her driver's side door, which was locked. Johnson testified that she refused to open her car door, but that she agreed to roll down her window. When she did so, defendant asked her if she had money, and Johnson replied that she did not have money because she had just paid for new tires. She nonetheless handed defendant her purse, which he "went through." He did not find anything that he wanted so he handed her back her purse, informing her "I don't want your shit." Johnson testified that defendant was "right next" to her as he looked through her purse and that she was able to see that he had a gun "tucked on the inside of his coat." The butt of the gun was black and was peeking through a pocket in defendant's coat. After defendant returned her purse, he walked away from her vehicle, opened the shop's garage door, and exited the garage with the other man. Johnson, in turn, remained seated in her vehicle until police arrived on scene shortly thereafter.

¶ 12 Approximately one month later, on January 11, 2010, she met with Detective Dowling who showed her a photo array. She identified defendant as one of the Fast Way robbers from that array. Thereafter, on April 2, 2010, she went to Area 1 to view a physical lineup. She identified defendant from the physical lineup.

¶ 13 On cross-examination, Johnson was shown the photo array from which she identified defendant. She denied that defendant's picture in the upper-right hand corner was more well-lit or "highlighted" than the other five pictures contained in the array. Johnson also testified that when she was interviewed by police, she described the man who tried to open her car door as being approximately 5'6" tall and weighing approximately 140 pounds. She admitted that the man never pointed a gun at her and that she only saw the butt of the gun peeking out of the man's coat pocket. Johnson also admitted that she was unable to give police a good description of the other man who had been with defendant. She explained that she "didn't see him that well, because he was on [her] passenger's side" and because she was scared to look at him too closely. She further acknowledged that she described the Ford Escort she had seen when she arrived at the tire shop as being "gray" in color.

¶ 14 Gonzalo Mejia, a Fast Way employee, testified that on December 9, 2009, at approximately 6:30 p.m., "[a] person came inside asking for rims." He could not recall much about the man other than that he was "black." In response to the man's inquiry, Mejia indicated that he would check to see if he had some rims available. The man then left the shop, but returned sometime thereafter and informed Mejia that he also needed "service [on] one tire." The man then pulled out a gun and pointed at Mejia's head, ordered Mejia to "give him the money," and threatened to kill him if he did not comply. Mejia testified that he knelt on the floor and that the man removed his wallet from his pocket. Shortly thereafter, a second man armed

with a gun entered the shop and approached the occupants of the two cars that were being serviced. Mejia testified that he did not know whether the second man took any property from the customers because he "put [his] head down" when the first man put the gun against his head.

¶ 15 After calling Johnson and Mejia to provide other crimes evidence, the State presented testimony from eyewitnesses to, and victims of, the Paisano's robbery. Eric Ortega testified that on November 24, 2009, at approximately 5 p.m., he was in the back office of Paisano's with his co-worker David Huicochea and his sister Delia, who was in town visiting him from Mexico. At that time, two men "came in with guns" which they "pointed" at their heads. A third man then entered the office and approached Huicochea. Ortega testified that all three of the robbers were of "a black race." He identified defendant and co-defendant Grigler as the two individuals who approached him and his sister and pointed guns at their heads. When asked about their weapons, Ortega testified that one of the guns was "black in color" and the other was "silver in color." Defendant and co-defendant Grigler "told [them] to drop to the ground" and then began "asking for the combination of the safe." Ortega responded that there was no safe and that he was not the owner of the establishment, and in response, they began "kicking [him] in [his] ribs and [his] head" as he lay on the ground. One of the men then "cocked the gun," put it against Ortega's head, and threatened to "kill [him] if [he] did not provide the combination." Ortega recalled seeing the assailants kick Huicochea as well.

¶ 16 When he could not provide defendant and his cohorts with the information that they requested, Ortega testified that they took his watch, cell phone, wallet, computer, jacket and glasses. He estimated that he had "about $150" in his wallet at the time. He testified that they also took his sister's purse and her cell phone. She had $3,000 in cash and about $5,000 worth of gold in her purse, which she had brought for her "vacation." After the three men took their

belongings, they ordered them to stay quiet and left the office. Ortega testified that they all remained on the floor "until the moment that [he] saw that they got inside a car." He then got up and checked on his sister and Huicochea. Ortega testified that he did not call the police to report the crime because defendant and co-defendant Grigler had stolen his cell phone, and explained that one of the mechanics in the shop was able to call for help. Once police officers arrived at the scene, Ortega spoke to them and relayed what had occurred. Thereafter, he was shown photo arrays and viewed a physical lineup. Although defendant's picture was included in one of the photo arrays that he was shown, he did not identify him from his photograph. He did, however, identify defendant in court as one of the three men who struck and robbed him. Ortega confirmed that he was told that he had no obligation to identify anyone from either the photo array or physical lineup. He further confirmed that police officers never told him to identify a particular individual.

¶ 17 On cross-examination, Ortega testified that he described all of the assailants as men with dark skin. He further described one of the men as having black braids and missing two teeth. Another was described as having shoulder-length hair with braids with beads. Ortega described the third man as being 6'0'' to 6'2'' tall, weighed 160 to 170 pounds, and approximately 20 to 23 years old.

¶ 18 David Huicochea confirmed that he was in the office of Paisano's Muffler Shop with Ortega and Ortega's sister, Delia, on November 24, 2009, at approximately 5 p.m. that evening. At that time "[t]hree black people entered with guns and they kept asking about the combination of the safe in the shop." Because there was no safe in the shop, neither he nor Ortega could provide them with the information they were requesting. The men then "took [his] belongings, [his] cell phone, wallet, money and they hit [him], [and] they kicked [him]." Huicochea recalled

being kicked in the head about three times and testified that he started bleeding. He also saw the men kicking Ortega in his ribs as well. Huicochea estimated that he had approximately $500 in his wallet at the time it was stolen. He testified that they took his laptop as well. He confirmed that police arrived on scene shortly after the three men left the premises. He was then asked to view a physical lineup on January 5, 2010, where he made a "tentative" identification of co-defendant Grigler. The detectives did not tell him who to identify; rather they specified that he was not required to identify anybody. At trial, Huicochea was unable to identify either defendant or Grigler as the perpetrators of the Paisano's robbery, explaining that it had "been a long time" since the crime had occurred.

¶ 19 Pedro Gonzalez, one of the mechanics working at Paisano's on November 24, 2009, confirmed that at approximately 5 p.m. that evening, three men entered the premises to rob them. Gonzalez testified that the men had been in the shop earlier that day in a green Ford Escort and had asked him to "check their car because there was something wrong with the muffler." Gonzalez responded that he would not be able to do it right away because he was busy and instructed them to "come back later." The men then left the shop, and when they returned later that day, they had guns. He identified defendant and co-defendant Grigler as two of the three occupants of the Ford Escort. Gonzalez recalled that co-defendant Grigler hit him in his mouth with his gun and then ordered him to the back of the garage. When Gonzalez moved to the back room and kneeled on the floor, co-defendant Grigler kicked him in the ribs twice, "cocked the gun" and then ordered Gonzalez to turn over "all the money that [he] had." In response, Gonzalez handed over his wallet, which contained approximately $50.

¶ 20 Gonzalez testified that his co-worker Sergio Melgar was also taken into the back room with him and physically attacked. Specifically, he observed defendant kick and hit Melgar. He

also observed defendant strike Melgar in the mouth with his gun. After he and Melgar were beaten and robbed, defendant and co-defendant Grigler ordered them to stay put. Co-defendant Grigler then warned, "If you leave the room, we're going to shoot you." They remained in the room until they observed the men leave in their vehicle. Once the men left, police arrived on the scene and Gonzalez was interviewed. Thereafter, on January 5, 2010, he was asked to view a physical lineup. After signing a lineup advisory form, he was able to identify Grigler as one of the robbers. Gonzalez denied that any of the officers present at the time of the lineup instructed him to make a particular identification.

¶ 21 On cross-examination, Gonzalez confirmed that he was also shown a photo array on January 5, 2010. He did not identify defendant as one of the perpetrators of the crime from that array. He further confirmed that he spoke to the detectives immediately after the robbery, but admitted that he was unable to recall the precise descriptions of the offenders that he provided to investigators at that time. Specifically, Gonzalez was unable to recall if he provided the detectives with height, weight and age estimates. He explained: "At that moment that you were robbed, you're nervous, you're scared, you're not clear what you're thinking. At this moment, I'm getting nervous thinking about the time that he put the gun to my head. I will never forget the face of the person who put the gun on my head, and I will never forget the face of the person that hit my friend in the mouth with the gun." He did not recall if he ever described one of the offenders as being "light-skinned."

¶ 22 Sergio Melgar, another mechanic at Paisano's, confirmed that three men entered the shop sometime around 5 p.m. and robbed everyone who was inside. He identified defendant and co-defendant Grigler as two of the three robbers. Melgar specifically identified defendant as the one physically attacked him. He testified that defendant struck him in the mouth with his gun, which

resulted in a cut that required 18 stitches to close. Co-defendant Grigler, in turn, struck his co-worker Gonzalez. After they were attacked, Melgar testified that he and Gonzalez remained in one of the shop's offices until he observed the men leave the shop in "[a] green Ford escort." Following the robbery, on January 5, 2010, Melgar was shown a photo array. Defendant's picture was contained in that array and Melgar identified him as the individual who physically attacked and robbed him. He also viewed a physical lineup at the police station on the same date where he identified co-defendant Grigler as one of the robbers. Thereafter, on April 2, 2010, Melgar was asked to view another physical lineup, during which he made another identification.[3]

¶ 23 On cross-examination, Melgar acknowledged that he spoke to detectives shortly after the robbery and admitted that he told them that he saw two offenders, not three offenders. Melgar clarified that "[t]here were three, but I only saw two. *** I saw three people inside the car when they first came to the shop [about 30 to 60 minutes earlier]. There were three people in the car, but there was only two that I recognized." He described the two men that entered the shop the second time as "male blacks in their 20s." He was unable to specifically recall the height and weight estimates that he provided to the detectives on that date. He did recall mentioning that one of the offenders "had braids" while "the other one had short hair."

¶ 24 After the State called the aforementioned witnesses, the cause was continued for several months before the parties reassembled and delivered closing arguments. After hearing from the parties, the court found defendant guilty of armed robbery with a firearm. In doing so, the court acknowledged that the "descriptive abilities" of the State's witnesses "weren't the best;" however, the court remarked that it had paid close attention to the "manner and behavior" that the witnesses exhibited while testifying and found their identifications to be credible.

[3] It is not clear from the record whether Melgar's identification was of defendant.

¶ 25 Defendant's post-trial motion was denied and the cause proceeded to sentencing. After hearing the arguments advanced in aggravation and mitigation, the court sentenced defendant to 21 years' imprisonment.[4] This appeal followed.

¶ 26 ANALYSIS

¶ 27 Sufficiency of the Evidence

¶ 28 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the "deeply flawed witness identifications" provided by the State's witnesses "fell far short of proof of his guilt beyond a reasonable doubt." Although several of the witnesses identified defendant in court, he emphasizes that none of the descriptions that the witnesses initially provided to the police matched him. Moreover, only one of the State's witnesses—Sergio Melgar—was able to positively identify him in a photo array prior to trial.

¶ 29 The State, in turn, responds that defendant's challenge to the sufficiency of the evidence is without merit. Specifically, the State argues that the circuit "court found the victims in this case credible, and correctly determined that the evidence presented by the People proved defendant guilty beyond a reasonable doubt."

¶ 30 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122

[4] Following his conviction, defendant pled guilty to the Fast Way armed robbery and received another 21-year sentence. In exchange for defendant's guilty plea, the circuit court ordered that defendant's sentences be served concurrently.

(2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 31 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed a crime. 720 ILCS 5/3-1 (West 2008); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d 332, 341 (2010). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing a witness's identification testimony, courts employ the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and adopted by our supreme court in *Slim*, which include: (1) the opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the certainty of the witness's identification; and (5) the length of time between the offense and the witness's identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08. No one single factor is dispositive; rather, the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v.*

Smith, 2012 IL App (4th) 100901, ¶ 87. Ultimately, where, as here, a defendant's guilt and identity as the offender is dependent upon eyewitness testimony, the relevant inquiry on appeal is whether the circuit court could reasonably accept the eyewitness identification testimony as true beyond a reasonable doubt. *People v. Williams*, 2015 IL App (1st) 131103, ¶ 69 .

¶ 32 In this case, four witnesses testified about the events that transpired at Paisano's around 5 p.m. on November 24, 2009: Eric Ortega, David Huicochea, Pedro Gonzalez, and Sergio Melgar. Aside from Huicochea, the witnesses each identified defendant at trial as being one of the three men who robbed them. Although defendant identifies the *Slim* factors, he does not discuss each of the factors in detail; rather, he relies primarily on the failure of Ortega and Gonzalez to identify him from a photo array before identifying him at trial and Melgar's failure to accurately describe him to police immediately after the robbery occurred. Nonetheless, we will conduct our own review of the *Slim* factors to evaluate defendant's challenge to the sufficiency of the evidence.

¶ 33 Turning to the first factor, the opportunity the witnesses had to view the perpetrators at the time of the offense, we find that the testimony of Ortega, Gonzalez and Melgar demonstrate that they had sufficient opportunity to observe defendant during the robbery. Ortega testified that he was in the rear office when defendant and co-defendant Grigler entered the office and pointed guns at him and his sister. He was then ordered to the ground, asked about the combination of a safe that the robbers assumed was on the premises and was kicked when he was unable to provide them with that information. Ortega testified that he also observed a third man enter the office who began attacking his co-worker Huicochea. The robbers then took their wallets, cell phones and other belongings before they left the premises. He watched the men leave as he continued to lie on the ground. Gonzalez, one of the two mechanics working that

day, was afforded two opportunities to view defendant on the day of the incident. Specifically, he testified that defendant and co-defendant Grigler arrived at the shop earlier that day in a Ford Escort and made inquiries about the vehicle's muffler. Gonzalez instructed them to return later that day, and when they did so they had guns. He and Melgar, the other mechanic on duty, were then ordered to another rear office where defendant and Grigler proceeded to hit them and kick them as they knelt on the ground. The two men were then instructed to hand over all of their money. Melgar confirmed that he was taken to the back room with Gonzalez and specifically testified that defendant was the individual who struck him in his mouth with his gun, which resulted in cut that required 18 stitches. None of the State's witnesses testified that their views of the offenders were impeded. Moreover, although the robbery appeared to have happened quickly, we observe that the mere brevity of a witness's ability to view an offender does not render the witness's subsequent identification so fraught with doubt as to create reasonable doubt of a defendant's guilt. See, *e.g.*, *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (finding that the witness had sufficient opportunity to view his assailant where the witness testified that he viewed the offender's face for a "few seconds" in a dimly lit store); *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998) (identification testimony sufficient even though the witnesses "did not have more than several seconds to identify their attackers").

¶ 34 With respect to the witnesses' degree of attention, there is nothing in the testimony of Ortega, Gonzalez and Melgar that suggests that their attention was unduly compromised during the robbery. Although the offenders pointed guns at the victims and physically struck them during the course of the robbery, which was understandably an anxiety-producing experience, we note that the nature of such an encounter does not necessarily decrease a witness's degree of attention or his powers of observation. See, *e.g.*, *People v. Robinson*, 206 Ill. App. 3d 1046,

1052 (1990) (“Excitement, rather than detract from an identification, could increase the powers to observe”). Moreover, although Ortega was ordered to the ground, he testified that he was still able to view the offenders as they took belongings from his sister and Huicochea and as they left the room. There is thus nothing in the record to suggest that the degree of attention that Ortega, Gonzalez and Melgar paid to the offenders during the course of the robbery was insufficient to enable them to positively identify defendant as one of the perpetrators.

¶ 35 Turning to the third factor, the accuracy of the witnesses' prior descriptions of the offenders, there is no dispute that none of the witnesses were able to provide completely accurate descriptions of defendant. Based on the record, defendant is a light-skinned African American male who is 5'8" tall and who weighs 155 pounds. He was 28 years old at the time of the offense and wore braids in his hair. Although Ortega, Gonzalez and Melgar described the three offenders as black, he correctly observes that none of the witnesses specified that one of them was a light-skinned black man. Moreover, none of the witnesses provided accurate height and weight descriptions. Ortega and Melgar, however, did mention that one of the offenders wore braids in his hair.[5] Although we acknowledge the lack of detail and accuracy in the witnesses descriptions of the offenders, we disagree that the flaws in their descriptions are necessarily fatal to their identification testimony. See *People v. Williams*, 221 Ill. App. 3d 1061 (1991) ("Where the witness makes a positive identification, precise accuracy in the preliminary description is not necessary. [Citations]. This is true even where there are discrepancies or inaccuracies as to height and weight"). We note that courts have consistently recognized that vague or discrepant descriptions do not necessarily render identifications unreliable because very few witnesses are trained to be keen observers. See, *e.g.*, *People v. Williams*, 118 Ill. 2d 407, 413-14 (1987)

[5] Defendant's hair is braided when he appears in the physical lineups after the Paisano's robbery. The pictures of him used in the photo arrays that police officers showed to witnesses depict him with short, unbraided hair.

(witness' failure to mention the defendant's mustache and facial hair did not render her identification unreliable); *People v. Nims*, 156 Ill. App. 3d 115, 121 (1986) (victim's failure to mention the defendant's facial scars did not render her identification unreliable); see also *People v. Bias*, 131 Ill. App. 3d 98, 104-05 (1985) (recognizing that inaccuracies pertaining to the "presence or absence of a beard, mustache, or tattoo, whether the assailant had missing teeth, and the assailant's height, weight and complexion do not render an identification utterly inadmissible"). In doing so, courts have emphasized that " '[t]he credibility of an identification does not rest upon the type of facial description or other physical features which the complaining witness is able to relate. *** It depends rather upon whether the witness had a full and adequate opportunity to observe the defendant.' " *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1991), quoting *People v. Witherspoon*, 33 Ill. App. 3d 12, 19-20 (1975). Here, we are unable to conclude that the descriptions offered by the State's witnesses automatically invalidated their subsequent positive identifications of defendant.

¶ 36 The fourth factor pertains to the degree of certainty the witnesses displayed in identifying defendant. At trial, Ortega, Gonzalez and Melgar each displayed remarkable certainty when they identified defendant at trial. Although neither Ortega nor Gonzalez identified defendant from a photo array prior to trial, Ortega testified that he would "never forget the face of the person who put the gun on my head, and [that he would] never forget the face of the person that hit my friend in the mouth with the gun." Melgar, however, did identify defendant prior to trial after viewing a photo array.[6] It is apparent from the record that the circuit court found the certainty with which the State's witnesses identified defendant to be compelling evidence. In finding defendant guilty, the court specifically acknowledged that although the State's witnesses did not have the best

[6] As set forth above, Melgar also made an identification after viewing a physical lineup; however, it is unclear from the record whether this identification was of defendant.

descriptive abilities, the court was nonetheless persuaded by "their manner and behavior while testifying."

¶ 37 Turning to the fifth and final factor, the length of time between the crime and the identification, we note that the crime occurred on November 24, 2009, and that Melgar first identified defendant more than 1 month after the robbery on January 5, 2010, when he was shown a photo array. Although Ortega and Gonzalez also viewed photo arrays, neither witness identified defendant until they testified at trial on May 31, 2012. We acknowledge that a substantial period of time passed between the date of the crime and Ortega's and Gonzalez's identifications; however, we observe that courts have upheld identifications made after a considerable amount of time passed after the crime. See *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (identification made two years after the crime); *People v. Dean*, 156 Ill. App. 3d 344, 352 (1987) (identification made 2 ½ years after the crime). The mere passage of time, alone, thus does not render their identifications suspect and unreliable.

¶ 38 Ultimately, we reiterate that the reliability of a witness's identification of a defendant is a matter for the trier of fact (*In re Keith C.*, 378 Ill. App. 3d at 258) and that the testimony of a single credible witness who makes a positive identification is sufficient to sustain a criminal conviction (*People v. Barnes*, 364 Ill. App. 3d 888, 895 (2006)). After reviewing the relevant factors, we cannot conclude that the identification testimony was insufficient to prove defendant's guilt beyond a reasonable doubt; rather, we conclude that a reasonable trier of fact could have found that the testimony of the State's witnesses was sufficient to establish defendant's identity as one of the offenders.

¶ 39 Other Crimes Evidence

¶ 40 Defendant next challenges the circuit court's decision to allow the State to present evidence pertaining to the Fast Way robbery. He argues that he is entitled to a new trial because the admission of other crimes evidence was "highly prejudicial" given that the Fast Way robbery was "too dissimilar to demonstrate his *modus operandi* and too doubtful to prove his identity."

¶ 41 The State responds that the circuit court "did not abuse its discretion when it weighed the evidence and properly allowed the evidence of the armed robbery of the Fast Way Tire Shop to show defendant's *modus operandi* and identity." The State emphasizes that the details pertaining to the robberies at both establishments shared sufficiently similar earmarks to warrant admission of other crimes evidence in this case.

¶ 42 As a general rule, evidence of other crimes or prior bad acts, that is, evidence of crimes or acts for which a defendant is not on trial, is inadmissible if its purpose is merely to show the defendant's propensity to commit criminal acts. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Heard*, 187 Ill. 2d 36, 58 (1999). Other crimes evidence, however, may be admitted if it is relevant for a purpose other than to establish the defendant's bad character or his propensity to commit the charged offense. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Pikes*, 2013 IL 115171, ¶ 11; *People v. Evans*, 373 Ill. App. 3d 948, 958 (2007). Accordingly, other crimes evidence may be admitted to show *modus operandi*, intent, motive, identity, or the absence of mistake. *Pikes*, 2013 IL 115171, ¶ 11; *People v. Hensely*, 2014 IL App (1st) 120802, ¶ 50. *Modus operandi* "refers to a pattern of criminal behavior which is so distinct that separate crimes or wrongful conduct are recognized as being the work of the same person." *People v. Tipton*, 207 Ill. App. 3d 688, 694 (1990). " 'This inference arises when both crimes share peculiar and distinctive features not shared by most offenses of the same type and which, therefore, earmark the offenses as one person's handiwork.' " *People v. Jackson*, 331 Ill. App. 3d 279, 286 (2002),

quoting *People v. Berry*, 244 Ill. App. 3d 14, 21 (1991). Ultimately, "[*m*]*odus operandi* acts as circumstantial evidence of identity on the theory that crimes committed in a similar manner indicate that they were committed by the same offender." *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 44. The use of *modus operandi* evidence is therefore "especially proper when the defendant's identity is a central issue in the case." *People v. Howard*, 303 Ill. App. 3d 726, 730 (1999). Although the degree of similarity required to introduce other crimes evidence under the *modus operandi* exception is higher than for other exceptions, some dissimilarities between offenses will always exist. *People v. Clark*, 2015 IL App (1st) 131678, ¶ 53. On review, the circuit court's ruling concerning the admissibility of other crimes evidence will not be disturbed absent an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003); *People v. Moss*, 205 Ill. 2d 139, 156 (2001). An abuse of discretion pertaining to an evidentiary ruling " ' will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 101, quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 43 Here, defendant's identity as one of the Paisano's robbers was the material issue during his trial, and in an effort to sustain its burden of proving his identity as one of the offenders, the State sought to introduce evidence pertaining to the Fast Way robbery, which the circuit court allowed. After reviewing the record, we are unable to conclude that the circuit court abused its discretion in doing so. As the circuit court correctly observed, the Fast Way and Paisano's robberies shared a number of similarities. The targets of both robberies were automotive repair shops that were located in close geographic proximity to each other. Moreover, the robberies occurred within a two-week period in the early evening hours. Specifically, the robbery at Paisano's occurred on November 24, 2009, shortly after 5 p.m. while the Fast Way robbery

occurred on December 9, 2009, shortly after 6:30 p.m. These similarities support the admission of other crimes evidence in this case. See, *e.g., Littleton*, 2014 IL App (1st) 121950, ¶ 39 (finding that the circuit court did not abuse its discretion in admitting other crimes evidence to establish the defendant's *modus operandi* where the offender targeted the same type of victims who lived in a fairly narrow geographical area and robbed them during late morning and early afternoon hours)*; People v. Shief*, 312 Ill. App. 3d 673, 682 (2000) (upholding the admission of other crimes evidence to prove the defendant's *modus operandi* and identity where the crimes happened in close temporal and geographic proximity and involved the same general type of victim). In addition to the geographic and temporal similarities between both crimes, the manner in which the crimes occurred also shared distinctive similarities. In both instances, more than one man arrived at the auto repair shops in a Ford Escort and made inquiries about obtaining car service repairs, before returning shortly thereafter brandishing weapons and robbing those present on the premises. Moreover, victims from both shops subsequently identified defendant as being one of the offenders prior to trial.

¶ 44 Defendant correctly observes the Paisano's and Fast Way robberies were not in all respects identical. Notably, three offenders were involved in the Paisano's robbery, whereas two were involved in the Fast Way robbery. Moreover, Johnson, a victim of the Fast Way robbery, described the Ford Escort in which the offenders arrived as "grey," whereas Gonzalez and Melgar, victims of the Paisano's robbery, described the color of the Escort as "green." We acknowledge that differences between the Paisano's and Fast Way robberies certainly exist; however, we find that the similarities of these crimes, when viewed together, are sufficiently distinctive to raise the inference that defendant was involved in both offenses. See *People v. Wilson*, 214 Ill. 2d 127, 140 (2005) (recognizing that "even where evidence of other crimes is

offered to prove *modus operandi*, some dissimilarity between the crimes will always be apparent"); *Littleton*, 2014 IL App (1st) 121950, ¶ 36 (same).

¶ 45 Defendant, however, suggests that even if details pertaining to the Fast Way robbery were admissible to pursuant to the *modus operandi* exception, the circuit court erred in admitting that evidence because it was more prejudicial than probative. Defendant is correct that even where the other crimes evidence is relevant for purposes other than to prove the defendant's criminal propensity, such as establishing the defendant's *modus operandi* and identity, the evidence should not be admitted if its probative value is outweighed by its prejudicial effect. *Pikes*, 2013 IL 115171, ¶ 11. Given that defendant's identity was at issue during trial, however, we agree with the circuit court's conclusion that the admission of Johnson and Mejia's testimony about the Fast Way robbery was more probative than prejudicial. See *Howard*, 303 Ill. App. 3d at 730 (recognizing that *modus operandi* evidence is "especially proper when the defendant's identity is a central issue in the case"). We are also unpersuaded by defendant's argument that the circuit court abused its discretion in admitting the other crimes evidence because it allowed the State to present far more detail than necessary about the Fast Way robbery, which essentially "created a mini-trial that plainly confused the trier of fact." Although defendant is correct that when other crimes evidence is admitted, "the court should carefully limit the details to what is necessary to illuminate the issue for which the other crime was introduced" (*People v. Nunley*, 271 Ill. App. 3d 427, 432 (1995)), we find that the court properly limited the scope of the other crimes evidence admitted at trial. The State only called two witnesses to testify about the events that occurred at Fast Way prior to, and during, the robbery. The details that Johnson and Mejia provided were highly relevant and probative given that those details closely mirrored the events that had occurred two weeks earlier at Paisano's. Accordingly, we find no abuse of discretion.

¶ 46 Ineffective Assistance of Counsel

¶ 47 Defendant next argues that he was denied his constitutional right to effective assistance of trial counsel. The basis for his claim is defense counsel's failure to file a motion to suppress Karen Johnson's pre-trial identification of him from a photo array. He contends that the photograph of him that the police included in the photo array was "brightened" and the five photographs of the other men included in that array were noticeably darker. Given the contrasts between the pictures, defendant argues that the photo array was impermissibly suggestive and that if counsel had filed a motion to suppress, that motion would have been granted, which in turn, would have undermined Johnson's identification testimony and would have likely altered the outcome of his trial.

¶ 48 The State responds that defendant's ineffective assistance of counsel claim is without merit because the photo array "was not suggestive in any way." Accordingly, the State asserts that counsel's failure to seek suppression of the photo array did not constitute deficient performance because a motion to suppress would not have been successful.

¶ 49 It is well-established that every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525

(1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). "In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL App. (1st) 092802, ¶ 79, quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). More specifically to satisfy the prejudice prong where the ineffective assistance of counsel claim is based on counsel's failure to file a motion to suppress, the defendant must demonstrate that there was a reasonable probability that the unargued motion would have been granted and that the outcome of the proceeding would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15; *People v. Richardson*, 2015 IL App (1st) 113075, ¶ 17. A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 50 When challenging the propriety of a pretrial identification procedure, the defendant bears the burden of proving that the procedure was unduly suggestive. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). Specifically, the defendant must prove that the identification procedure was "so unnecessarily suggestive and conducive to irreparable misidentification that the defendant was denied due process of law." *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003). Ultimately,

when reviewing a claim challenging the suggestibility of an identification procedure, the court must consider the totality of the circumstances. *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 39.

¶ 51 In this case, prior to trial, defense counsel did file a motion to suppress in which he sought to suppress Johnson's pre-trial identification of defendant from a physical lineup. In pertinent part, counsel argued that physical lineup was impermissibly suggestive because defendant was the lightest skinned individual included in the five-person lineup and because he was wearing a bright light-blue shirt during the lineup. After conducting a hearing on the motion, the circuit court denied defendant's motion to suppress.

¶ 52 Defense counsel, did not, however, seek to suppress Johnson's pre-trial identification of defendant from a photo array. After reviewing the photo array contained in the record, we must reject defendant's argument that counsel's failure to do so amounted to ineffective assistance. The photo array shown to Johnson contains six black and white images. Defendant's image appears in the upper right-hand corner.[7] The five other men are African American with various skin tones, hair styles, and facial hair. Although we agree with defendant that his image appears to be somewhat clearer with a higher contrast in comparison to the other five half-toned images, we are unable to agree that the array was so unduly suggestive and conducive to irreparable misidentification. Indeed, reviewing courts have rejected similar claims when the differences between the defendant's image and the other images contained in the array were much more pronounced than the differences apparent here. See, *e.g.*, *People v. Bryant*, 94 Ill. 2d 514, 520 (1983) (rejecting the defendant's argument that the photo array shown to an eyewitness was unduly suggestive where the witness was shown mug shots of five individuals and a Polaroid

[7] We note that the name affixed to defendant's photograph in the photo array is "Dennis August," one of defendant's known aliases.

picture of defendant, reasoning "a different format does not automatically render a photo suggestive: it may make it more or less so. Different need not be equated with suggestive."); *People v. Cavillo*, 170 Ill. App. 3d 1070, 1079-80 (1988) (concluding that a photo array was not unnecessarily suggestive where the defendant's image was twice the size of the other images contained in the array); *People v. Hudson*, 7 Ill. App. 3d 333, 335-36 (1972) (finding that photo array not unduly suggestive simply because the defendant's picture was the only one in color). Ultimately, based on our review of the photos as well as relevant case law, we necessarily reject defendant's contention that the photo array shown to Johnson was impermissibly suggestive. Accordingly, because a motion to suppress Johnson's identification of defendant from that array would not have been successful, defendant's ineffective assistance of counsel claim is without merit. See *Gabriel*, 398 Ill. App. 3d at 349.

¶ 53 Due Process

¶ 54 Defendant's final argument is that the circuit court, prior to finding him guilty of the offense of armed robbery with a firearm, inaccurately recalled the evidence against him and his co-defendant. Given the court's flawed recollection of the trial evidence, defendant contends that he was denied his constitutional right to a fair trial.

¶ 55 Initially, the State responds that defendant failed to properly preserve this claim because he made no objections to the circuit court's purported misstatements or included the issue in a post-trial motion. On the merits, the State maintains that the circuit court sufficiently recalled the evidence against defendant when it entered its verdict and ensured that he was afforded a fair trial.

¶ 56 As a threshold matter, there is no dispute that defendant neither objected to the circuit court's recollection at trial or included the error in a post-trial motion. Generally, such failures

result in forfeiture of that issue on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (recognizing that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a post-trial motion and that his failure to satisfy both requirements results in forfeiture of appellate review of his claim). Defendant, however, correctly observes that the rules of forfeiture are less rigidly applied when the purported error involves the circuit court's conduct. See *People v. Davis*, 185 Ill. 2d 317, 343 (1998); *People v. Pace*, 2015 IL App (1st) 110415, ¶ 110. We will therefore review defendant's claim.

¶ 57 It is well-established that a criminal defendant has a fundamental due process right to a fair trial that is protected by both federal and state constitutions. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. In a bench trial, the circuit court judge is the trier of fact, and as such, is required to consider all of the evidence before rendering its decision. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75; *People v. Bowen*, 241 Ill. App. 3d 608, 624 (1992). In a bench trial, the trial court is presumed to have considered only competent evidence and that presumption will only be rebutted by affirmative evidence in the record. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. Accordingly, where there is affirmative evidence in the record that the circuit court failed to correctly recall and consider evidence critical to fully understand and evaluate a criminal defendant's defense strategy at trial, the defendant is deprived of his right to a fair trial. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992); *Williams*, 2013 IL App (1st) 11116, ¶ 75. Whether a criminal defendant's due process rights have been violated presents an issue of law, and is thus subject to *de novo* review. *People v. Stapinski*, 2015 IL 118278, ¶ 35.

¶ 58 In this case, after the State concluded its case-in-chief, the cause was continued for 11 months for various reasons before the parties ultimately returned and delivered closing arguments. In pertinent part, counsel for defendant and co-defendant Grigler challenged the

identification testimony provided by the State's witnesses. After hearing the parties' respective arguments, the court explained its ruling as follows:

> "This case was heard over a protracted period of time in which we heard from several witnesses. There was the State's case in chief as well as I allowed in in this circumstances proof of other crimes. My ruling was predicated on my understanding of witnesses' testimony as well as my own observations.
>
> Let me first indicate that it is this Court's viewpoint that the testimony of Mr. Delgar (phonetic) Malone in the proof of other crimes evidence in this case would have been sufficient to impeach, especially in Mr. Grigler's case because of his fingerprints. I disagree with [counsel for co-defendant Grigler] on that. His fingerprints were recovered on the scene.
>
> But in this case we did hear from many of the people that were at the targeted business on the date and time in question. And while their descriptive abilities weren't the best, and I'm the first to admit that, and while at least two of them misidentified the individuals in the photo array, I watched their manner and behavior while testifying.
>
> *In particular, Mr. Melgar on the proof of other crimes and Mr. Mahia were very persuasive.* And what they provided was a modus operandi, issue of identity and all the other earmarks that I allowed. It was based on this collective view of all the evidence in the case that I have reached my decision. Based on my view of the credibility of the strength of the evidence and the testimony and other factors that I mentioned, *** each is guilty of the offense of armed robbery on all counts." (Emphasis added.)

¶ 59 Defendant correctly notes that Melgar was a victim of the Paisano's robbery; not the Fast Way robbery and that Johnson and Mejia were the two State witnesses who provided other

crimes testimony. We disagree, however, that the mere fact that the circuit court substituted the names of one of the State's witnesses for another constituted a due process violation. It is apparent from the record that the court recalled the substance of the testimony that the State's witnesses provided regarding the other crimes evidence. It is also apparent from the record that the court based its finding of guilt on its "collective view of all the evidence in the case," and not solely on the testimony of the other crimes evidence witnesses. The fact that the circuit court simply transposed the names of two State witnesses does not constitute affirmative evidence that the court completely failed to correctly recall and consider evidence critical to fully understand and evaluate the strength of the State's case or the defense's theory of misidentification. We are similarly unpersuaded that the circuit court's statements concerning co-defendant Grigler's fingerprints were improperly used to implicate defendant. Based on the record, it appears that one of Grigler's fingerprints was found at the scene of the Paisano's robbery. Neither defendant's nor Grigler's fingerprints were recovered from the scene of the Fast Way robbery. The court did not attribute the fingerprint evidence recovered in the case to defendant and the record fails to support defendant's claim that the court "muddled the evidence against the co-defendants." Indeed, although the circuit court presided over a joint, but severed, bench trial, the record contains no affirmative evidence that the circuit court failed to accurately recall the evidence against defendant when it entered its guilty verdict.

¶ 60 In so finding, we are unpersuaded by defendant's reliance on *People v. Williams*, 2013 IL App (1st) 111116 and *People v. Bowie*, 36 Ill. App. 3d 177 (1976). In *Williams*, this court reversed the defendant's conviction where it was apparent that the trial court, prior to entering a judgment of guilty, "recalled the opposite of what [the defense expert] stated." *Williams*, 2013 IL App (1st) 111116, ¶ 85. Specifically, in that case the defendant was charged with multiple

crimes in connection with a home invasion in which the victim was stabbed to death. The only issue at trial was the identity of the perpetrator. During that trial, the State introduced a glove that was found at the scene that contained a mixture of DNA material from which at least three different individuals were contributors. The State's DNA expert testified that defendant was definitely one of the contributors. Defendant's expert, however, testified that the mixture of DNA made it impossible to make a positive identification and that the evidence merely showed that the defendant could not be excluded as a contributor. At the close of the bench trial, the circuit court relied primarily on the DNA evidence to find the defendant guilty. In doing so, the circuit court misstated the testimony that had been provided by defendant's DNA expert. Specifically, the court stated that defendant's expert had testified that defendant was "certainly" a contributor when in fact, his expert had "emphasized repeatedly and throughout his testimony that certainty was not possible." *Id.* ¶ 85. On review, this court found that the circuit court's misstatement constituted a due process violation, reasoning: "[F]irst, the mistakenly recalled fact concerned the primary issue in this case: was it 'certainly' defendant who committed the crime? Second, the mistakenly recalled fact occurred during the trial court's ruling so we know that it was actually part of its decision-making process." *Id.* ¶ 90.

¶ 61 Similarly, in *Bowie*, this court reversed the defendant's conviction for battery and resisting a police officer, where the record contained statements from the circuit court that demonstrated that the court clearly forgot the defendant's testimony. *Bowie*, 36 Ill. App. 3d 177. During the defendant's bench trial, the court heard testimony from both the defendant and the officer involved in the altercation. In pertinent part, the defendant and the officer each testified that it was the other person who initiated the altercation. The defendant specifically testified that the officer struck his head causing him to bleed. During closing arguments, defense counsel

referenced the defendant's testimony that the officer caused him to bleed. The circuit court, however, interrupted counsel and stated, "I didn't hear that. I heard nothing about the defendant stating anything about that he was bleeding." *Id.* at 180. On review, this court found that the circuit court's statement constituted affirmative evidence "that the trial judge did not remember or consider the crux of the defense when entering judgment" and reversed the defendant's conviction and remanded for a new trial. *Id.*

¶ 62 Unlike *Williams*, the circuit court in the instant case, did not clearly misapprehend witness testimony; rather, the court simply transposed the names of two of the State's witnesses. Moreover, unlike *Bowie*, the record in this case does not contain affirmative evidence that the circuit court failed to remember or consider defendant's theory of defense at the time it entered its judgment against him. Instead, it found that the evidence the State presented was sufficient to prove defendant's identity as the perpetrator and to rebut his misidentification defense. Accordingly, defendant's due process claim has no merit.

¶ 63 CONCLUSION

¶ 64 The judgment of the circuit court is affirmed.

¶ 65 Affirmed.