2015 IL App (1st) 133572-U

SECOND DIVISION
August 18, 2015

No. 1-13-3572

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. COLIN HOUSE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 1674 Honorable James B. Linn, Judge, Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt. The trial court properly denied defendant's motion to present expert eyewitness identification testimony. Two of defendant's three convictions are vacated pursuant to the one-act, one-crime doctrine. Defendant's sentence is not excessive.

¶ 2 Following a bench trial, defendant Colin House was convicted of three counts of home invasion (720 ILCS 5/19-6 (West 2013)) and three counts of aggravated unlawful restraint (720 ILCS 5/10-3.1(West 2010)). Defendant was sentenced to 30 years' imprisonment on each count

of home invasion, to run concurrently. The three unlawful restraint counts were merged into the home invasion counts. Defendant now appeals and argues that: (1) the State failed to prove him guilty beyond a reasonable doubt because the identification procedures were overly suggestive and the remaining physical evidence was insufficient; (2) the trial court abused its discretion by precluding defendant from presenting eyewitness memory and identification expert testimony; (3) his three convictions for home invasion based on a single entry violated the one-act, one-crime doctrine; and (4) his sentence is excessive. For the following reasons, we vacate two of defendant's three convictions and sentences for home invasion and affirm the trial court's judgment on the remaining issues.

¶ 3 BACKGROUND

¶ 4 On August 18, 2008, at approximately 11:20 a.m., defendant forced his way into Maria Sanchez's home at 2035 North Latrobe Avenue in Chicago. At the time of defendant's entry, Gabina and Irvine, Maria's children, her 14-year-old niece Brenda Gonzalez, and her 11-year-old nephew Graciano were present in the home.

¶ 5 Prior to trial, defendant filed a motion to suppress the eyewitness identification of defendant by Maria, Gabina and Brenda. Defendant argued that the lineup was unduly suggestive because defendant was the only person who appeared in both the photo array and the physical lineup and was without the benefit of counsel at the time the lineups were conducted. The trial court denied the motion. Defendant also filed a motion for a court appointed eyewitness identification expert to testify about eyewitness memory, cross-racial identification, misinformation, memory and exigent circumstances. The trial court also denied this motion.

¶ 6 Maria Sanchez testified that on August 18, 2008, she was cleaning her home when a man who she later identified as defendant knocked on the front door of her house. When Maria

opened the door, defendant said that he worked for Comcast and asked for “Antonio DeJesus.” Maria had difficulty understanding English, so she called for her daughter Gabina. Gabina told defendant that no one by that name lived in the home. Defendant then asked for a pen and Gabina went to the back of the house to get one.

¶ 7 Maria stood at the front door and waited for Gabina and turned her head a few moments later to look for Gabina. At that point, defendant put a gun to Maria's chest, dragged her, pushed her to the floor, and put his knee on her stomach. Defendant then approached Brenda who was lying on the couch, pointed a gun at her head, and pushed her on top of Maria. Maria screamed and Gabina returned to the living room where defendant was on top of Maria. Gabina then grabbed her then-three-year-old brother Irvine, and ran to the back of the house. Defendant followed her and stumbled against the wall and fell. When he did, the contents of his tool belt spilled onto the floor. Maria ran out of the house to get help and Brenda followed her. They went into a local restaurant and asked a man there to call the police. The police arrived about 10 minutes after the incident.

¶ 8 Gabina Sanchez testified that she was present in the home at 2035 North Latrobe on August 18, 2008, with her mother Maria, her little brother Irvine and her cousin Brenda. Her mother answered the door at about 11:20 a.m. and Gabina saw a man, who she would later identify as defendant, standing there. Defendant stated he worked for Comcast and asked for "Antonio DeJesus." After Maria told defendant that there was no one there by that name, defendant asked for a pen. When Gabina went to get a pen, she heard her mother scream. She ran into the living room and saw defendant on top of Maria. Maria's then-eleven-year-old nephew Graciano came down from the attic. Gabina told Graciano that there was a man in the house with a gun. Graciano then hid in the attic. Gabina picked up Irvine and ran toward the back

of the house. The man followed but slipped on the wet floor, fell into a wall, and his tool bag and its contents fell and spilled out onto the floor. As Gabina ran to the back of the house, defendant grabbed and pulled her and she fell down the stairs in the back. Defendant pointed the gun at Gabina and told her to "shut up." He first placed the gun on her head, then on Irvine. Gabina asked defendant not to hurt her brother. Defendant hit Gabina on the head with the gun several times and told her to shut up. He ordered her to stand up and do as he said. She heard him on the phone saying "I got them. Come through." He had his gun on her neck and directed her towards the living room as she carried Irvine in her arms.

¶ 9 When defendant saw that Brenda and Maria were gone, he walked out of the front door. He was talking on the phone outside. Gabina told Irvine to stay still and she locked defendant out of the house. Defendant knocked on the door, told her to open it, and when she wouldn't open the door he ran down the outside stairs.

¶ 10 Brenda Gonzalez testified that she was visiting her aunt and cousins at their home at 2035 North Latrobe on August 18, 2008. While her aunt Maria was cleaning and she was laying on the couch, someone knocked on the door. A man, who Brenda would later identify as defendant, stated that he was from Comcast and asked for "Antonio DeJesus." After Maria and Gabina told defendant that there was no one there by that name, defendant asked for a pen. When Gabina went to get a pen, defendant took out a gun and pointed it at Maria's chest. He shoved Maria into the wall and onto the floor. Defendant then approached Brenda, pointed the gun at her head and put her on top of Maria.

¶ 11 Brenda testified that Gabina ran toward the back of the house and when defendant followed her, Maria and Brenda ran outside to get help. They ran to a local restaurant to call the police. While they were waiting at the restaurant, Brenda saw defendant running down Latrobe

Avenue. She testified that he had tools on his waist and may have had a gun in his hand while running. Maria also testified that about five minutes after calling the police she saw someone running with a gun in their hand. Police arrived about 10 minutes after the incident.

¶ 12 Detective John Broderick interviewed Brenda, Gabina and Maria on the day of the incident. Gabina translated and answered Detective Broderick's questions for Maria. All three of them described defendant as a black male with a dark complexion, between 5 feet, 6 inches and 5 feet, 8 inches, and around 200 pounds. They also testified that defendant left behind a tool bag and some tools. Detective Broderick observed no injuries on Gabina's head.

¶ 13 Chicago Police Department evidence technician Sheila Caldwell responded to the 2035 North Latrobe Avenue home invasion. She observed a cloth bag and various tools strewn across the floor in the living room area near the entry way. Underneath the cloth bag, she found a piece of paper entitled "VEHICULAR PARKING AND EQUIPMENT VIOLATION FINE SCHEDULE, City of Hometown, Il." Detective Broderick requested crime lab testing on the tool bag and the paper recovered at the scene.

¶ 14 Chicago Police Officer Jorge Martinez testified that on June 2, 2009, he and other officers executed a search warrant of defendant's home at 4000 West 91st Place in Oak Lawn. Defendant was home during the search. Officer Martinez recovered a 9mm handgun with black and silver coloring from under a living room couch cushion. A magazine and 15 rounds of ammunition were also recovered with the gun. Officer Martinez also recovered defendant's birth certificate, insurance bill and a letter dated January 8, 2008, addressed to defendant at 4000 West 91st Place, Oak Lawn, as well as other proofs of residency. After receiving a *Miranda* warning, defendant admitted that all the recovered items belonged to him.

¶ 15 In April of 2010, the Illinois State Police Crime Lab contacted Detective Broderick and

gave him information that led his investigation to defendant. The parties stipulated that, if called to testify, Daniel Dennewitz, a latent fingerprint examiner with the Chicago police department would testify that defendant's fingerprints were found on the Hometown Fine Schedule. The parties further stipulated that if called to testify, Pauline Gordon, a forensic biologist and DNA analyst with the Illinois State police crime lab would testify that defendant's DNA was found on the tool bag and zipper pull.

¶ 16 On June 28, 2011, Detective Broderick and his partner, Detective Mullane, met with defendant. After defendant received a *Miranda* warning, he waived his rights, denied knowing "where Latrobe Avenue was," and said that "he had never been in the area." Detective Broderick then told defendant that his DNA was found at the home invasion site. Defendant told him that when he was a carpenter working at McCormick Place in 2008, his tool bag was stolen during a radiology convention. Defendant was uncertain of when exactly it was stolen. Defendant said that he was employed at McCormick Place until 2009. He also admitted to receiving parking tickets and tinted window tickets from Hometown, Illinois.

¶ 17 On June 30, 2011, Maria viewed a photo array of six people, which included a photo of defendant. Maria was unable to recognize anyone in the photo array and stated that she needed to see him in person. In July 2011, Gabina and Brenda viewed a photo array. Gabina identified someone other than defendant as the offender and Brenda identified defendant. In December 2011, Maria, Gabina and Brenda all separately viewed a physical lineup and identified defendant as the person who entered the home with a gun on August 18, 2008. Gabina identified defendant's tool bag and gun at trial.

¶ 18 Ada Stone, the general manager for Renaissance Management Incorporated, a trade show labor management company, testified that defendant worked for the company six times between

November 15, 2007, and January 1, 2009. Stone testified that defendant did not work for the company during the radiology convention at McCormick Place in 2008. He testified that defendant's 2008 RMI payroll record showed that defendant only worked for RMI in April of 2008.

¶ 19 After hearing all of the evidence, the trial court convicted defendant of three counts of home invasion (720 ILCS 5/19-6 (West 2013)) and three counts of unlawful restraint (720 ILCS 5/10-3.1(West 2010)), but found him not guilty of possessing a firearm. The trial court denied defendant's posttrial motion. The court then sentenced defendant to the maximum statutory sentence of 30 years' imprisonment for each of the three home invasion counts to run concurrently. The three unlawful restraint counts were merged into the home invasion counts. It is from this judgment that defendant now appeals.

¶ 20 ANALYSIS

¶ 21 We begin by addressing defendant's argument that his three convictions for home invasion violate the one-act, one-crime doctrine. Defendant argues, and the State agrees, that because there was only one entry into the home at 2035 North Latrobe, the entry of three convictions for home invasion was improper based on the one-act, one-crime doctrine. *People v. Morgan*, 385 Ill. App. 3d 771, 772 (2008) (vacating three of defendant's four home invasion convictions even though defendant pled guilty to other crimes occurring after the entry). Accordingly, we vacate two of defendant's three convictions for home invasion.

¶ 22 Defendant next argues that the State failed to prove him guilty of home invasion beyond a reasonable doubt where the out-of-court and in-court identifications were products of irreparably suggestive procedures, the prior descriptions were generic and based on a brief observance of the offender, and the remaining physical evidence was plainly insufficient to

connect him to the offense.

¶ 23 When a defendant challenges the sufficiency of the evidence the standard of review 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." *People v. Collins*, 214 Ill. 2d 206, 217 (2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)) (emphasis, citation, and internal punctuation omitted). Reviewing courts "will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." (Citations omitted.) *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Specifically, "the trier of fact must find only that the evidence taken together supports a finding of the defendant's guilt beyond a reasonable doubt." (Citations omitted.) *Id*. It is not this court's role when reviewing the evidence to "retry the defendant" or to substitute the fact finder's judgment with our own. (Citations omitted). *Id*.

¶ 24 Defendant argues that the witnesses' identifications were doubtful, unreliable and inadequate to sustain a conviction because the pretrial identification procedure was "grossly suggestive" because he was the only person who appeared in both the photo array and the lineup and the witnesses' identifications lacked an independent basis of reliability.

¶ 25 Defendant bears the burden of proving that a pretrial identification was impermissibly suggestive. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). In order to challenge an identification procedure, "the defendant must prove that the confrontation 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). Even if a defendant meets this burden, the State may show by clear and convincing evidence that the identification was based on the witness's independent recollection. *Brooks*, 187 Ill. 2d at 126.

¶ 26 Defendant's argument that the identification procedure was "grossly suggestive" because he was the only person who appeared in both the photo array and the lineup is directly refuted by *People v. Daniel*, 2014 IL App (1st) 121171. In *Daniel*, the defendant challenged his conviction and identification based on the fact that he was the only person to appear in both the photo array and lineup and argued that the chance of the witness identifying him as the offender increased and therefore rendered the identification procedure unduly suggestive. *Id*. at ¶¶ 6-10. The *Daniel* court rejected the defendant's claims noting that Illinois courts have repeatedly rejected this argument: " '[l]ineups are not rendered inadequate * * * merely because the defendant is the only individual in the lineup who was also in the photo array.' *People v. Johnson*, 149 Ill. 2d 118, 148, 171 Ill. Dec. 401, 594 N.E.2d 253 (1992); see also *People v. Curtis*, 262 Ill. App. 3d 876, 883–84, 200 Ill. Dec. 521, 635 N.E.2d 860 (1994) (same); *People v. Favors*, 254 Ill. App. 3d 876, 883, 193 Ill. Dec. 714, 626 N.E.2d 1265 (1993) (same)." *Id*. Based on *Daniel*, defendant cannot meet his burden of showing the pretrial identification was impermissibly suggestive.

¶ 27 Defendant next challenges the reliability of the eyewitness' identifications. Illinois applies the following *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) factors to assess identification testimony: (1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *People v. Slim*, 127 Ill. 2d 302, 307-308 (1989). "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.

¶ 28 With respect to the first factor, the victims' opportunity to observe the offender, defendant

argues that the victims' opportunity to view the offender was extremely limited because their observations were made during a home invasion in a chaotic and fast-paced environment. We disagree.

¶ 29 Maria saw defendant outside the window, opened the door for him, had a conversation with him, and waited at the door with him while Gabina went to get him a pen. While she was waiting for Gabina to return, defendant while facing Maria put a gun to her chest and forced her against the wall. Defendant then threw Maria to the floor and put Brenda on top of her. Maria ran out of the house to get help, got someone to call the police, and saw defendant running down the street with a gun in his hand five minutes later. Maria had ample opportunity to view defendant.

¶ 30 Gabina also had ample opportunity to observe defendant up close. She saw Maria and defendant having a conversation at the door. She heard him ask for a pen, and went to get one. While she was getting the pen, she heard Maria scream, and saw defendant on top of Maria. Gabina grabbed Irvine and ran from defendant. Defendant followed her and pointed his gun at her and she watched as defendant placed his gun on Irvine. Gabina pleaded with defendant not to hurt her little brother. Defendant grabbed and tripped Gabina. After defendant saw that Maria and Brenda left, Gabina watched him walk outside and talk on the phone.

¶ 31 Brenda likewise had ample opportunity to observe defendant. She saw defendant from the couch and heard him while he talked to Maria. After Gabina left to get a pen, Brenda saw defendant stand at the door, pull out a gun, and aim it at Maria's chest. Defendant then approached Brenda, held her at gunpoint, and put her on top of Maria. Brenda left with Maria, went to get help, and saw defendant running from the house down Latrobe Avenue.

¶ 32 We next look to the witnesses' degree of attention to the details. The witnesses here paid

a great deal of attention to details. Maria not only stood face to face with defendant, but spoke with him. She noticed defendant's pad of paper and tools. She answered his question about "Antonio DeJesus." She also saw him chase Gabina at gunpoint and noticed that he spilled his tools when he tripped. Gabina heard defendant knock at the door and heard defendant describe himself as a Comcast employee and ask for "Antonio DeJesus." She went to get defendant a pen when he asked for one. She watched her mother on the floor with defendant on top of her. She testified in detail about the conversation she had with defendant after she ran to the back of the house with her brother Irvine. She described the gun defendant was holding against her forehead. She testified to telling Irvine to stay still while she locked defendant out of the house. She overhead the details of defendant's phone conversation and described how defendant knocked on the door and yelled at her when she locked him out of the house. Brenda also heard defendant identify himself as a Comcast employee and ask for "Antonio DeJesus." She remembered hearing defendant ask for a pen. She saw defendant chase Gabina to the back of the house and she saw him run out of the house and down the street. All of this testimony shows that these witnesses paid a great deal of attention to the details of the crime and of defendant.

¶ 33 Third, we consider the accuracy of the witnesses' description of defendant. All three witnesses described defendant as a black male with a dark complexion, between 5 feet, 6 inches and 5 feet, 8 inches, approximately 200 pounds, and between 30 and 50 years old. These descriptions very accurately described defendant, who was a black male with a dark complexion, 5 feet, 7 inches, 188 pounds, and 35-years-old as of September 4, 2013.

¶ 34 Fourth, we consider the level of certainty the witnesses demonstrate in identifying defendant as the offender. Brenda was the only witness who positively identified defendant as the offender in the photo array. Maria did not identify anyone in the photo array and stated that

she needed to see the offender in person. Gabina identified someone besides defendant. However, when all three witnesses saw defendant in person at the lineup, each of them positively identified defendant as the offender. Prior to the lineup, each of them also received and signed a lineup and photo spread advisory form stating that the offender may or may not be in the lineup and that they were not required to make an identification.

¶ 35 Finally, we consider the amount of time between the commission of the crime and the identification. Brenda identified defendant as the perpetrator almost three years after the home invasion. All three witnesses identified defendant as the perpetrator approximately three years and four months after the home invasion. This time lapse does not negate the identifications' credibility, but instead only goes to the weight to be given to the identification testimony. *People v. Rogers*, 53 Ill. 2d 207, 214 (1972).

¶ 36 After considering all five *Biggers* factors, we consider the witnesses' identification testimony to be reliable.

¶ 37 Defendant next argues that State's remaining physical evidence is insufficient to prove him guilty of home invasion beyond a reasonable doubt. Specifically, defendant claims that the witnesses failed to provide reliable testimony indicating that defendant committed the offense, defendant had an innocent explanation as to why his tool belt was found at the location of the home invasion and there was no other physical evidence from the home invasion to indicate that defendant was the offender.

¶ 38 We have already determined that the witnesses' identification of defendant was reliable. All three witnesses described defendant, his conduct, and the home invasion in great detail. Each version of their testimony corroborated the others' testimony. Additionally, physical evidence corroborated the witnesses' testimony. Police recovered defendant's DNA from defendant's

allegedly stolen tool bag recovered at the crime scene. Police found defendant's DNA on the tool bag's zipper pull. Police also found defendant's fingerprints on the paper recovered at the crime scene.

¶ 39 It was the trial court's role, as the trier of fact, to weigh the evidence, assess the credibility of the witnesses, resolve any conflicts, and draw reasonable inferences therefrom. *People v. Washington*, 2012 IL 110283, ¶ 60. The trial court in this case clearly found Maria, Gabina and Brenda more credible, and rejected defendant's explanation of how his tool belt came to be found at the scene. We may not, and will not in this case, substitute our judgment for that of the trier of fact on questions involving the weight of the evidence, the credibility of the witnesses, or the resolution of conflicting testimony. *People v. Campbell*, 146 Ill.2d 363, 375 (1992). Therefore, viewing the evidence in the light most favorable to the State, we find the evidence sufficient to support defendant's conviction.

¶ 40 Defendant challenges the trial court's denial of his motion for a court-appointed expert witness to testify regarding cross-racial identification and eyewitness identification. He claims that this case hinged on the eyewitnesses' identifications where the identifications were the sole evidence against him. Defendant asserts that the trial judge abused his discretion in not providing a court-appointed expert witness because the trial court did not seriously consider the relevance or weigh the probative value of the proffered testimony. The State responds that the trial judge acted within his discretion in denying the motion after it considered defendant's motion and determined that an expert witness was not necessary.

¶ 41 After defendant argued his motion for a court-appointed expert, the trial court thoroughly explained its reason for denying the motion.

"Motion denied. I find this is, you don't need an expert on the ultimate issue. You

> can't have some paid person come in here and say that some witness can or cannot make an identification because of certain circumstances. You can pursue everything you ask the witness about stress, and how you're looking at the gun, and did you identify him this time, identify him that time. Did you make a description. Did you get the same person out of the photos you picked out of the lineup. You can talk to the witnesses about all those things yourself. This is all subject to cross-examination. You'll be given complete latitude to explore the basis of identification. You're not going to have some other person who wasn't an occurrence witness come in and talk about somebody else's stress that they haven't even met and they haven't had anything to do with. They're just making assumptions based on the fact that there was a robbery or a home invasion, and the person had to be stressed in looking at something else. We're not going to do that. I don't think it will be helpful to the jury. I think it will be wholly misleading and not probative."

¶ 42 Expert witnesses are permitted to testify if their "experience and qualifications afford [them] knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." (Citation omitted.) *People v. Enis*, 139 Ill. 2d 264, 288 (1990). Trial courts have broad discretion in deciding whether to admit expert testimony. *Id*. at 290. The standard of review here is abuse of discretion. *Id*.

¶ 43 When the court considers "the reliability of the expert testimony, the judge should balance its probative value against its prejudicial effect[and] ... carefully consider the necessity and relevance of the expert testimony ... prior to admitting it for the jury's consideration." *Id*. The court "must also determine whether the proffered testimony would confuse or mislead the jury. *People v. Tisdel*, 338 Ill. App. 3d 465, 468 (2003). These decisions "must be made on a

case-by-case basis." *Id*.

¶ 44 Defendant cites *People v. Allen*, 376 Ill. App. 3d 511 (2007), and *People v. Starks*, 2014 IL App (1st) 121169, to support his position that the trial court abused its discretion in denying his motion for an expert identification witness. In *Allen*, 376 Ill. App. 3d at 513, the defendant was convicted of attempt robbery of a dry cleaner. Two men entered the store, one man approached the counter, pulled out a gun, and demanded money. *Id*. When the victim turned around to get the money, she was shot in the back. *Id*. The victim identified the defendant in a photo array. *Id*. at 514-15. The circuit court rejected the defendant's proposed expert testimony stating "[we do not believe] experts in this particular case will assist the jury in determining the identification in this case. I believe it would probably confuse them more and I believe that the instruction that's provided by the Illinois Pattern Jury Instructions is sufficient." *Id*.

¶ 45 On appeal, this court found that there was little or no corroboration of a single eyewitness "who was not asked to identify the defendant in person until she saw him at counsel table, in jail uniform, at a hearing conducted 44 months after the attempt robbery." *Id*. at 524. There is also no indication that the defendant's proposed expert was court-appointed. *See Id*. Based on these facts, this court determined that the trial court's conclusions were baseless and that the trial court did not seriously consider the offer of proof. *Id*. at 526. It remanded the case only for the trial court to give the offer of proof serious consideration. *Id*. It refrained from stating whether the trial court should grant any part of the offer of proof. *Id*.

¶ 46 Unlike the *Allen* case, here, there were three reliable eyewitnesses who had ample time to observe defendant, there was more than one pretrial identification, not to mention corroborating physical evidence. In addition, as evidenced by the trial court's comments in denying defendant's motion, the trial court gave defendant's offer of proof serious consideration.

¶ 47 In *Starks*, the defendant was convicted of first degree murder after he shot and killed the victim in front of three witnesses who later identified the defendant in three separate lineups. *Starks*, 2014 IL App (1st) 121169, ¶1. When defense counsel requested to file a motion to allow expert eyewitness identification testimony, the trial judge adamantly refused to even hear it. *Id*. ¶[B]efore counsel said the word "identification," the trial court said: "Denied. Denied. You file whatever motion you want. We are not going to do that. That's going to be denied. I am telling you right now. Don't expect it. Go ahead and file it. *** It is not going to happen." Defense counsel then pointed out that the supreme court said the admission of expert testimony regarding eyewitness identification was discretionary and the trial court responded, "Denied. It's nonsense." *Id*.

¶ 48 On appeal, this court reversed and remanded this case on other grounds. *Id*. at ¶ 72. The *Starks* court held that the trial court on remand must give the defendant's eyewitness identification expert testimony request serious consideration. *Id*.

¶ 49 *Starks* is distinguishable from the instant case because unlike the trial judge in *Starks*, the trial court here let defendant present a written motion and argument before denying his motion. Additionally, in this case, the court carefully considered defendant's motion and thoroughly explained its reasoning for denying the motion. *Id*. at ¶ 9.

¶ 50 The State responds that *People v. Enis*, 139 Ill. 2d 264 (1990) is controlling here. We agree.

¶ 51 In *Enis*, the defendant was found guilty of murder after the female victim was found shot in the head in her apartment building's hallway. 139 Ill. 2d at 270-71. Four eyewitnesses placed the defendant around the crime scene and gave detailed descriptions of the offender and his conduct. *Id*. at 272-74. Only one eyewitness saw the offender with a gun. *Id*. at 274. The defense,

in an offer of proof, claimed the expert would testify that: the relationship between confidence and accuracy is insignificant; the higher the stress level the less accurate the memory; the identification is usually worse if a weapon is present; and jurors give too much weight to time estimates. The trial court precluded the defendant from introducing expert eyewitness identification testimony. *Id*. at 289-90.

¶ 52 Our supreme court upheld the trial court's decision and found the expert's testimony was not necessary because none of the witnesses were in a high stress situation, only one witness saw a weapon, and testimony regarding time estimates was not relevant to the case. Further, the court found that while the witnesses' confidence may have been at issue in the case, that factor alone did not warrant a new trial. Concluding the expert testimony would not have aided the jury in reaching its conclusion, the court held the trial court did not abuse its discretion in denying the testimony. *Id*. at 289.

¶ 53 Here, as in *Enis*, Brenda, Gabina, and Maria were not in a high-stress situation when they initially saw defendant. Prior to defendant's home invasion, Maria saw defendant through the window and then stood at the door and had a conversation with a man she believed to be from the cable company. When she was unable to understand what he was asking, she summoned Gabina who also casually spoke with defendant whom she believed to be a cable company employee. The initial contact that Maria and Gabina had with defendant was not high-stress. All three gave detailed descriptions and all three made independent lineup identifications. Therefore, we cannot say that the trial court abused its discretion in denying defendant's request for an eyewitness identification expert.

¶ 54 Finally, defendant argues that his 30-year sentence for home invasion is excessive. Defendant specifically requests a reduction in his sentence or in the alternative, a new sentencing

hearing. Defendant was sentenced to a term of 30 years' imprisonment for three counts of home invasion, to run concurrently.

¶ 55 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill. App. 3d 444, 455 (1998). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶ 56 At sentencing, in aggravation, the State presented Gabina and Maria's victim impact statements. The State also detailed defendant's juvenile and adult criminal background. The juvenile criminal background included probation for aggravated assault that was terminated unsatisfactorily and probation six months later for residential burglary, also terminated unsatisfactorily. Defendant's adult criminal background included a term of probation for a 1991 possession of a controlled substance that was terminated unsatisfactorily, and a 1993 conviction for an armed robbery, aggravated discharge of a firearm, and attempted murder, resulting in a

seven-year prison term. After his 1999 release, defendant was convicted of felony possession of a firearm and received a three-year prison sentence. In 2001, defendant was convicted of possession of a controlled substance and received a one-year prison sentence. In 2009, defendant was convicted of unlawful use of a weapon by a felon and delivery of cannabis and received a four-year prison sentence. In mitigation, defendant presented five letters of support written by friends and family. The first was from Elizabeth Tatum, a friend from church who spoke of defendant's good character, willingness to change, and supportive community. The second was from Jordan Beverung, a past employer and sous chef at Maggiano's who spoke of defendant's willingness to work. The third came from John and Mary Thompson, defendant's mother's neighbors. The fourth came from Jocelyn and Stanley McClelland, defendant's aunt and uncle. The fifth came from defendant's mother, Susan McClelland, who described defendant as a family-oriented man who had decided to change his ways after his 2011 release. Finally, defendant made a statement in allocution and asked for the court's mercy.

¶ 57 We find no abuse of discretion in this case. In imposing sentence, the court indicated that it had considered the evidence at trial, the presentence investigation, and the evidence offered in aggravation and mitigation. See 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2010). The court noted that defendant was a "criminal" who started out as a juvenile "pointing guns at people," then "started dealing drugs as a young adult" and was in and out of jail for guns and drugs.

¶ 58 Furthermore, defendant's 30-year sentence fell within the statutory range of imprisonment and is therefore presumptively proper. *People v. Johns*, 285 Ill. App. 3d 849, 856 (1996); 720 ILCS 5/5-5-3(c) (West 2010). Home invasion, whether committed with a dangerous weapon other than a firearm or committed with a firearm, is a Class X felony, which has a sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/12–11(c) (West 2010); 730 ILCS

5/5–4.5–25(a) (West 2010). In light of the facts of this case and in light of the mitigating and aggravating circumstances, we find that the trial court properly exercised its discretion in sentencing defendant to 30 years' imprisonment for home invasion. We note that based on our determination that his remaining two convictions for home invasion must be vacated based on the one-act, one-crime rule, defendant stands convicted of only one count of home invasion and one 30-year sentence.

¶ 59 Defendant argues that this court cannot determine with certainty whether the vacated home invasion convictions influenced his sentencing. *People v. Figures*, 216 Ill. App. 3d. 398, 399, 402, 404 (1st Dist. 1991) (remanding for sentencing because the court could not tell whether the vacated armed violence conviction influenced sentencing on the remaining convictions) and argues that *People v. Bone*, 103 Ill. App. 3d 1066 (1982) is applicable here. We disagree.

¶ 60 In *Bone*, the defendant challenged his convictions for both intentional murder and felony murder. *Id*. at 1067. These two convictions arose out of the killing of one gas station clerk during an armed robbery. *Id*. The defendant was sentenced to one 40-year term for both the intentional murder and the felony murder and a concurrent 20-year sentence for an armed robbery conviction. *Id*. On appeal, the court vacated the felony murder conviction because "a defendant cannot be convicted of more than one offense arising out of the same physical act." (Citations omitted.) *Id*. at 1068. The court remanded for a new sentencing hearing finding that because the defendant received only one 40-year sentence for both murders it could not tell whether or how much the vacated felony murder conviction influenced the sentencing decision. *Id*. at 1069.

¶ 61 *Bone* is distinguishable from the instant case based on the fact that the defendant in *Bone* received one 40-year sentence for both the felony murder and intentional murder. Defendant

here received a separate 30-year sentence for each separate count of home invasion, to be served concurrently. As it stands now, defendant is convicted of one count of home invasion and will serve one term of 30 years' imprisonment.

¶ 62 CONCLUSION

¶ 63 For the following reasons, we vacate two of defendant's three convictions for home invasion and affirm the remaining count.

¶ 64 Affirmed in part; vacated in part.