2016 IL App (1st) 140334-U

No. 1-14-0334

Third Division
December 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN B. MYLES Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 07 CR 04091 Honorable Brian Flaherty, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Probable cause existed to search defendant's van and arrest him where an officer testified credibly that he observed a firearm and money through the vehicle's window following a report of an armed robbery. Showup identifications of defendant were not impermissibly suggestive where multiple witnesses viewed defendant simultaneously. Trial court did not abuse its discretion in refusing non-pattern jury instruction regarding missing video evidence. Two of three armed robbery counts must be vacated where they were based on a single taking of money.

¶ 2 Following a jury trial, defendant John B. Myles was convicted of three counts of armed robbery and sentenced to three concurrent terms of 40 years in prison. On appeal, defendant

contends that (1) a search of his vehicle and his subsequent arrest lacked probable cause because the arresting officer's testimony was rendered incredible by photographic evidence, (2) identifications of defendant given by the three victims were tainted by an impermissibly suggestive group showup, (3) the trial court erroneously refused his proposed non-pattern jury instruction, and (4) two of his armed robbery convictions should be vacated because they are based on a single act in violation of one-act, one-crime principles. We affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 Following the robbery of a CVS pharmacy on December 3, 2006, police officers stopped defendant's van. A subsequent search of the vehicle recovered a handgun, cash, and other items, and defendant was arrested. Police officers then brought defendant to the CVS where three witnesses identified him as the offender. He was later charged by indictment with, *inter alia*, three counts of armed robbery. The indictments each alleged that defendant "knowingly takes property, to wit: United States currency from the person or presence of another" and then named one of three individuals.

¶ 5 A. Motion to Quash Arrest and Suppress Evidence

¶ 6 Prior to trial, defendant filed a motion to quash arrest and suppress evidence, alleging that the police lacked probable cause to search his van. At a hearing on the motion, defendant testified that he was driving from his home in Indiana to a friend's home in Hazel Crest, Illinois, on the morning of December 3, 2006. As he drove through Chicago Heights, he was stopped by a police car. Officers called out to defendant through their car's speaker and told him to exit his van with his hands up. After defendant exited, two uniformed officers with weapons drawn ordered him to walk toward the police car and place his hands on its hood.

An officer then "shook [him] down." One officer asked defendant if he had anything illegal in his van. After defendant replied negatively, the second officer walked to the van, looked through the front window, and entered the driver's side door. The officer removed a handgun and a bag of money from the van and defendant was subsequently arrested.

¶ 7 Officer Warner Biedenharn testified that he was on patrol with a partner on the morning of December 3, 2016, when he received a radio dispatch regarding an armed robbery in his area. The dispatch indicated that the offender was "Male black, black coat, with a hood" and possessed "a large caliber handgun." As the officers drove towards the scene of the robbery, they witnessed a large van travelling at a high rate of speed. The van made several quick turns and failed to stop at two stop signs. The officers pulled behind the van and activated their lights. When the van stopped, the officers ordered the driver, defendant, to exit his van and approach their police car. Defendant wore a large coat with a hood. He stated that he was coming from his girlfriend's home in Hazel Crest despite the fact that he had been driving towards that city when he was stopped. Biedenharn then walked to the van to check if any other individuals were present. He looked in its rear window before walking around the van and checking in each side window. Looking through a large "sun window" behind the driver's seat, the officer observed "a large caliber handgun" on the van's floorboard. Nothing in the window obstructed his view. The firearm was on top of a white cloth bag with multiple rolls of change, loose change, and cash. Biedenharn entered the vehicle and recovered the handgun and other items.

¶ 8 Following arguments, the trial court denied defendant's motion, explicitly finding Biedenharn's testimony to be credible.

¶ 9 Several months later, defendant filed a motion to reopen the motion to quash arrest and suppress evidence, arguing that newly discovered photographs of his van required further argument. The court reopened the motion to quash and suppress for the limited purpose of introducing the photographs and examining the witnesses on the subject.

¶ 10 At the new hearing, defendant produced several photographs which showed his van from multiple angles. He testified that the pictures depicted his van as it was on the day of his arrest. He stated that blinds in the van's windows had been present since the day he bought the vehicle. Officer Biedenharn testified that he observed a handgun, coin rolls, and a CVS bag on the van's floorboard through the window behind the driver's seat. His view was not obstructed in anyway. Looking at the van photographs, Biedenharn agreed that there were blinds shown in the rear windows of the van. Regarding the window behind the driver's seat, however, he testified, "But from what I can see there are no blinds on that side window."

¶ 11 Following the witnesses' testimony, defendant argued that the officer could not have had a plain view of the recovered evidence because the entered photographs showed that the van's blinds would have obstructed his view. The trial court again denied defendant's motion to quash and suppress, stating that it found "Officer Biedenharn to be an extremely credible officer." The trial court further explained that in looking at the photographs it could see some blinds in the rear windows of the van, but "these pictures don't reflect, as far as I'm concerned, directly behind the driver's side door that there are blinds down. I just don't see it."

¶ 12 B. Motion to Suppress the Showup Identification

¶ 13 During pretrial litigation, defendant also filed a motion to suppress identifications made by three witnesses after police officers brought defendant to the CVS following his arrest, as

well as any in-court identifications. He argued that the prejudicial nature of the showup called into question the accuracy of the identifications.

¶ 14 At the hearing, two CVS employees testified. Ricci Greenwood testified that he was working in the pharmacy at around 7 a.m. on December 3, 2006. A robbery occurred and Greenwood interacted with the robber. Following the robbery, police officers responded and questioned Greenwood. They then left the CVS and returned 25 to 30 minutes later with defendant. Greenwood, two other employees, and a police officer stood in an office looking down on the pharmacy's main floor through a one-way window. A police officer stood next to the defendant twenty feet from the office, who was handcuffed and wearing a dark, hooded sweatshirt. The officer in the office asked "Is that him?" and Greenwood answered "Yes."

¶ 15 Timothy Jones testified that following the robbery, police officers brought defendant to the CVS. Jones was in the upstairs office with the other two employees and a police officer, looking down at the main floor. Defendant was brought in by two police officers. He was wearing a brown or tan hooded winter coat. The officer in the office asked "is this the person" and the employees "all agreed" at "[b]asically" the same time.

¶ 16 Detective Meder, of the Chicago Heights police department, also testified. Meder transported defendant from his arrest to the CVS for the showup. Defendant was in handcuffs and wore a dark, hooded coat. Meder remained with him at all times. He brought defendant to the front area of the store while another officer and the pharmacy's employees watched from a second floor office.

¶ 17 Following arguments, the trial court denied defendant's motion.

¶ 18 C. The Missing Video Tape

¶ 19 Immediately prior to the scheduled start of defendant's trial, the State informed the trial court that Greenwood had indicated for the first time that an officer had come to the CVS and asked for a copy of video surveillance of the robbery. Greenwood did not remember the name of the officer, but remembered giving the officer a DVD copy of the video. The State informed the court that it had spoken with the lead detectives for the case and learned that a search of the evidence locker and police inventory reports did not indicate that the police department had ever been in possession of the reported video. Defendant argued that an investigation was necessary and the court agreed. At the following status date, the State informed the court that there was no evidence that any video was logged in. Defendant subsequently filed a motion to impose sanctions after it became known that CVS no longer had a copy of the surveillance video. The trial court denied the motion, finding that there was no showing of bad faith by the State and no evidence that the police department ever possessed the video. It did state that defendant could cross-examine Greenwood regarding the video and argue any reasonable conclusions related to that testimony.

¶ 20 D. Trial

¶ 21 At trial, Greenwood testified that he was working at the CVS with Jones and Laura Hernandez just after 7 a.m. on the morning of the robbery. As Greenwood worked in the aisles, an individual walked towards him. The man wore a black jacket with a hood, was African-American, and looked between 40 and 50 years old. In court, Greenwood identified the man as defendant. Defendant pulled a large revolver out from under his jacket. He told Greenwood "Walk this way." and "Don't say a word." Defendant then led Greenwood to the front of the store, keeping the gun a few inches from Greenwood's back. He told Greenwood to call Jones and Hernandez over and Greenwood complied. Defendant then "marched" the

employees behind the counter, up the stairs, and into the office. He told Jones and Hernandez to "get on the floor face down," and then told Greenwood to open the safe. Greenwood opened the safe and handed defendant bags of cash and change from inside. Defendant told Greenwood to lie down, and Greenwood then heard defendant go through the safe and take the rolled coins. Defendant then asked for the employees phones. Greenwood, the only employee with a cell phone, gave it to him. Defendant then left down the stairs. When Greenwood heard defendant leave the store he got up and called 9-1-1. Police officers responded quickly and questioned the employees. About a half an hour later, police officers returned and had the employees view a suspect. Greenwood's testimony was substantially similar to his earlier testimony, although he testified at trial that he was the first to identify defendant as the robber.

¶ 22 Greenwood further testified that $5,000 was stolen from the safe. Sometime within 10 days after the incident, he transferred video footage of the robbery from the store's surveillance system onto a DVD and gave it to the Chicago Heights police department, but was he unable to remember which officer to whom he gave it. Six years after the incident, he spoke with an investigator for about 15 to 20 seconds as he worked. He told the investigator, "I would never forget that incident. And, I'd never forget that face."

¶ 23 Jones testified that defendant, whom he identified in court, entered the CVS right after he opened the store at 7 a.m. Defendant wore a hooded coat and commented on the cold weather. Although his hood was up, Jones could see defendant's face. Defendant walked past Jones and into one of the aisles. As he walked past a battery display, he placed a package of batteries in his pocket. Jones continued opening the store until Greenwood called him over a moment later. Jones turned around and saw defendant standing behind Greenwood with a

large firearm pointed at Greenwood's abdomen. Hernandez, who was also at the front of the store, began to cry. Defendant led the employees in a line to the store's office. Jones walked behind the other employees and defendant held a gun to his back. In the office, defendant told the employees to get on the floor and told Greenwood to open the safe. He told Greenwood to retrieve the money and asked everyone for their cell phones. Defendant then left and Greenwood called the police. The police arrived and questioned the employees. About 25 minutes later, police officers said "they got the guy" and brought in an individual. Jones's trial testimony regarding the showup was substantially similar to his hearing testimony, although he did not remember the color of defendant's jacket. He also testified that he had spoken to an investigator in 2013. The investigator "kinda chuckled and stated that well it has been so long you probably won't remember him now. And, [Jones] said, well probably not, but I know I'll never forget what happened that day."

¶ 24 Hernandez testified that she was working in the pharmacy's photo lab as the store opened, and she saw a man in a black, hooded coat walk in. A couple minutes later Greenwood called Hernandez and Jones to come over. When Hernandez turned she saw the man in the hooded coat standing behind Greenwood and holding a "[v]ery big old-fashion gun" towards Greenwood's back. Hernandez could not see the man's face. The man made them go up to the office and made Hernandez and Jones get down on the floor with their heads down. He asked Greenwood for money. He then said he wanted cell phones. Hernandez did not have a phone, but the man continued to ask her for one. She eventually turned to show him that she did not have a phone and saw the man's face for the first time. In court, she identified the man as defendant. She viewed him from about three and a half feet away for about five seconds. Defendant then left and Greenwood called the police. Police officers responded and

eventually brought defendant into the store as Hernandez and the other employees watched from the office. She identified defendant as the robber.

¶ 25 Officer Biedenharn's trial testimony was largely consistent with his hearing testimony, although he testified at trial that his partner, Officer Gibson, recovered the firearm and other items from the van. Gibson testified that he was Biedenharn's partner during the stop of defendant's van. Following the stop, Gibson patted down defendant and recovered a package of CVS batteries. He eventually went into defendant's van and recovered a white cloth bag, a large revolver, cash, and coins.

¶ 26 Sergeant Joseph Brunei testified that he and his partner interviewed defendant following his arrest. When the officers asked defendant about the armed robbery, he replied, "I did it." Brunei further testified that, prior to trial, he was asked to locate a CVS surveillance tape. He checked evidence property sheets and the evidence log and found no indication of a video. He also checked the evidence room and could not find any such video.

¶ 27 Gunther Polak, an investigator retained by defendant, testified that he interviewed Greenwood on June 17, 2013. Polak asked him if he remembered the robbery and Greenwood replied that he would never forget it. When Polak asked him if he could identify the man who did it, Greenwood said that he could not. Polak similarly interviewed Jones on June 15, 2013. Jones also said that he remembered the incident, and that he would never forget it. Polak then asked if Jones would recognize the robber and Jones said he would not.

¶ 28 Defendant testified that he drove past the CVS in question on December 3, 2006, and noticed police cars in the parking lot. About a block later, a police car began to follow him and eventually pulled him over. Defendant denied speeding or failing to stop at any stop signs. Police officers got out of the car, drew their weapons, and ordered him out of his van

through a megaphone. One officer searched him while the other officer searched his van without his consent. Defendant was arrested and taken to the CVS. He denied committing a robbery and denied confessing to the police. Defendant testified that he had $5,000 in the van that he had withdrawn from the bank. His van had full window blinds in each window that were down during the traffic stop.

¶ 29 Following the witness testimony, a jury instruction conference was held. Defendant proffered several instructions regarding inferences to be drawn from missing evidence. The trial court refused the instructions, though it explained, "There certainly can be argument made by defense counsel regarding the issue of this missing video and what it means."

¶ 30 In closing arguments, defense counsel argued that the surveillance video was missing and that the jury did not need to "fill in the gaps" of what was missing. He argued that the video would have painted a clearer picture of what happened during the robbery, and that the witnesses' showup and in-court identifications were not credible.

¶ 31 The jury found defendant guilty of armed robbery. He was subsequently sentenced to three concurrent terms of 40 years' imprisonment.

¶ 32 II. ANALYSIS

¶ 33 A. The Search of Defendant's Van

¶ 34 Defendant first contends that the trial court erred in denying his motion to quash arrest and suppress evidence because Officer Biedenharn's testimony was contradicted by photographs of his van. He argues that the photographs show that blinds fully covered the van's windows, and thus Biedenharn's testimony that he could plainly see the recovered firearm and currency was incredible and against the manifest weight of the evidence. He further asserts that the officer therefore had no probable cause to search the van or

subsequently arrest him, and consequently the recovery of the items as well as the subsequent showup must be suppressed. The State responds that the plain view doctrine supported Biedenharn's actions during a lawful traffic stop.

¶ 35 We review the trial court's ruling on a motion to quash arrest and suppress evidence as a mixed question of fact and law. *People v. Colquitt*, 2013 IL App (1st) 121138, ¶ 21. The trial court's ultimate conclusion regarding the suppression of evidence is a legal determination that is reviewed *de novo*. *Id.* ¶ 22. However, the trial court's findings of fact are entitled to great deference, and we will only reverse such findings if they are against the manifest weight of the evidence. *People v. Close*, 238 Ill. 2d 497, 504 (2010). A court's factual findings are against the manifest weight of the evidence "only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *People v. Harris*, 2015 IL App (1st) 133892, ¶ 20. A defendant bears the burden of presenting a *prima facie* case that his or her arrest was not supported by probable cause. *People v. Walter*, 374 Ill. App. 3d 763, 765 (2007).

¶ 36 Both the federal and Illinois constitutions protect the right against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. The primary focus of a fourth amendment inquiry is the reasonableness of government action. *People v. Jones*, 215 Ill. 2d 261, 268-69 (2005). We note that defendant does not contest the constitutionality of the officers' initial stop of his van following several traffic infractions. Instead, defendant solely argues that the search of his vehicle was unconstitutional, rendering his subsequent arrest devoid of probable cause. Accordingly, we first consider the constitutionality of the search of defendant's van.

¶ 37 A warrantless search is *per se* unreasonable unless one of a limited number of exceptions applies. *People v. Cregan*, 2014 IL 113600, ¶ 25 (2014) (citing *Arizona v. Gant*, 556 U.S. 332, 338 (2009)). One such exception is the automobile exception, which allows for the warrantless search of a vehicle when a government agent has probable cause to believe that the vehicle contains evidence of criminal activity. *People v. Stroud*, 392 Ill. App. 3d 776, 803 (2009); see also *People v. Hamilton*, 74 Ill. 2d 457, 464 (1979). The exception is based upon the reduced expectation of privacy in a vehicle and the exigency caused by an automobile's ready mobility. *People v. Slavin*, 2011 IL App (2d) 100764, ¶ 13.

¶ 38 An officer has probable cause to search a vehicle "where the totality of the facts and circumstances known to the officer at the time of the search, in light of the officer's experience, would cause a reasonably prudent person to believe that a crime occurred and that evidence of the crime is contained in the automobile." *Stroud*, 392 Ill. App. 3d at 803. Probable cause is a not a technical concept; rather, it is a fluid construct dependent upon the assessment of probabilities in a particular factual context. *Jones*, 215 Ill. 2d at 274, 294. In order to determine whether probable cause for a search existed, the reviewing court must examine the events leading up to the search or seizure from the perspective of an objectively reasonable law enforcement officer. *Id.*

¶ 39 An officer's looking through an automobile's windows while it is on a public street does not constitute a search under the fourth amendment. See, *e.g.*, *People v. Davis*, 93 Ill. App. 3d 217, 223 (1981). Additionally, courts have routinely found that an officer's observation of evidence of a crime in plain view[1] through a vehicle's window is sufficient to provide

[1] We note that although we are concerned with Officer Biedenharn's observations of objects in plain view, the associated plain view doctrine is not implicated in this case. See *People v. Hassan*, 253 Ill. App. 3d 558, 569 (1993) (noting the distinction "between the plain view doctrine which permits the seizure of an object and the mere observation of an object left in plain view.")

probable cause for a search of that vehicle. See *People v. Moore*, 328 Ill. App. 3d 1047, 1054 (2002) (Officers had probable cause to enter vehicle where they observed gun case through window of known felon's car.); *People v. Hilt*, 298 Ill. App. 3d 121, 126 (1998) (Officer's observation of narcotics container through car window provided probable cause to search.); *People v. Scronce*, 115 Ill. App. 3d 293, 296 (1983) (Officer's observation of open beer bottle through truck window justified subsequent search of the vehicle.)

¶ 40 Officer Biedenharn testified that he received a dispatch indicating that a black male wearing a hooded coat and armed with a "large caliber handgun" had robbed a nearby pharmacy. Shortly thereafter, he observed a van speeding away from the general direction of the robbery, driven by defendant, a black male wearing a hooded coat. The officer subsequently viewed a "large caliber handgun," multiple rolls of coins, and cash in plain view through the van's window. Under these circumstances, a reasonably prudent individual could conclude that the handgun and currency clearly visible in defendant's van were connected to the report of an armed robbery. As such, the officers had probable cause to enter the van and retrieve the potential evidence.

¶ 41 Defendant argues that we must find Biedenharn's testimony to be incredible because photographs show that the van had blinds covering its windows and defendant testified that the photographs depicted the van as it was at the time of the traffic stop. He asserts that the photographs present incontrovertible proof that the window Biedenharn looked through was blocked by blinds. We disagree. Although the photographs depict blinds in many of the van's windows, both the trial court and Biedenharn stated that it was unclear whether blinds were present in the window behind the driver's seat. Having reviewed the photographs in the

record, we must also agree.[2] Defendant also argues for numerous reasons that "common sense" requires an inference that the window in question was similarly obstructed by blinds. Putting aside the speculative nature of defendant's arguments, even if we were to agree that the photograph depicted the presence of blinds, our decision would not be different. The fact that the blinds may have been down and obstructing the van's windows at the time the picture was taken does not necessarily prove that they were down at the time of the traffic stop. Although defendant testified that the pictures depicted the van and the position of its blinds as they were during the traffic stop, officer Biedenharn offered contradicting testimony that no blinds obstructed his view. The trial court heard both witnesses and found Biedenharn to be credible. We cannot say that that finding was against the manifest weight of the evidence.

¶ 42 As we defer to the trial court's credibility findings and hold that the officers had probable cause to search defendant's van, we similarly hold that defendant's subsequent arrest was supported by probable cause. A public arrest supported by probable cause does not require an arrest warrant. *People v. Jackson*, 232 Ill. 2d 246, 274-75 (2009). An officer has probable cause to arrest an individual when he or she knows facts at the time of the arrest that would lead "a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Grant*, 2013 IL 112734, ¶ 11. All of the evidence supporting a finding of probable cause to search defendant's van equally supports a finding of probable cause to arrest defendant. Accordingly, the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 43 B. The Showup Identifications

[2] The angle of the photograph and reflections on the glass render it impossible to see whether there are blinds present.

¶ 44 Defendant next contends that the trial court erred in failing to suppress the initial identifications by the CVS employees because they were the result of a suggestive group showup. He argues that the showup was "extremely suggestive" because defendant was wearing handcuffs and the witnesses made their identifications simultaneously. He further asserts that Jones' trial testimony that an officer stated they "got the guy" prior to the showup and Hernandez's trial testimony that police said someone was "captured" also indicate the procedures used were overly suggestive.

¶ 45 The State responds that the showup was not overly suggestive, and alternatively that the identifications were independently reliable. It also argues that we may not consider trial testimony in considering the trial court's pretrial ruling because defendant did not renew his objection to the identifications at trial.

¶ 46 Our standard of review remains the same, determining whether the trial court's factual determinations are against the manifest weight of the evidence and reviewing its ultimate conclusion *de novo*. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). A reviewing court may generally consider trial testimony when affirming the denial of a motion to suppress. See *People v. Slater*, 228 Ill. 2d 137, 149 (2008). Our supreme court has noted, however, that the analysis is different where a defendant seeks to overturn a trial court's denial of the motion to suppress. See *People v. Brooks*, 187 Ill. 2d 91, 127 (1999). When a reviewing court affirms a trial court's suppression ruling based on evidence that came out at trial, "it is akin to a harmless error analysis." *Id.* at 127. Such a court "is essentially saying that whether the court's decision was supported by sufficient evidence at the suppression hearing becomes irrelevant when evidence to support the trial court's decision is introduced at trial. One reason this is so is that the pretrial ruling on a motion to suppress is not final and may be changed or

reversed at any time prior to final judgment." *Id*. This reasoning does not apply equally when a defendant asks us to rely upon trial evidence to reverse a trial court's decision on a pretrial suppression ruling, "particularly when the defendant fails to object when the relevant evidence is introduced" at trial. *Id*. at 127-28; see also *People v. Ramos*, 339 Ill. App. 3d 891, 898 (2003) (a defendant cannot challenge the propriety of the trial court's denial of the defendant's pretrial motion to suppress by citing subsequent trial testimony where the defendant failed to renew his objection at trial).

¶ 47 Defendant seeks to use the trial testimony of Jones and Hernandez, which each referred to police statements not mentioned during the pretrial hearing, to argue that his motion to suppress should have been granted. When such trial testimony was introduced, defense counsel "should have asked the court to reconsider its decision on the motion to suppress." *Brooks*, 187 Ill. 2d at 128. As stated, that decision was subject to change until final judgment, but by not asking the court to reconsider its ruling when that evidence was introduced at trial, "defendant has waived his right to argue it on appeal." *Id*. Defendant argues that he has not waived the issue because he raised it in his post-trial motion. However, raising the issue in a post-trial motion was not sufficient. Defendant was required to contemporaneously raise an objection when the evidence was introduced. *Id.*; see also *People v. Lewis*, 223 Ill. 2d 393, 400 (2006) ("To preserve an issue for review, a defendant must both object at trial and raise the issue in a written posttrial motion.") Accordingly, we consider only the testimony before the trial court during the suppression hearing.

¶ 48 The weight to be given to identification evidence is presumptively a question for the trier of fact. *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994). Only where a pretrial encounter resulting in an identification is so "unnecessarily" or "impermissibly suggestive" so as to

create "a very substantial likelihood of irreparable misidentification" is evidence of that and any subsequent identifications excluded by operation of law under the principles of due process. *Id.* at 796-97 (citing *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)). Our due process analysis has two steps. First, defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *People v. Williams*, 313 Ill. App. 3d 849, 859-60 (2000). If the defendant meets this burden, the burden then falls to the State to establish that the identification is independently reliable. *Id.* The factors to be weighed in determining the independent reliability of the identification include the opportunity of the witnesses to view the criminal at the time of the crime, the witnesses' degree of attention, the accuracy of their prior description of the criminal, the level of certainty demonstrated by the witnesses at the confrontation, and the length of time between the crime and the confrontation. *Id.* at 860.

¶ 49 We must therefore first consider whether defendant has met his burden of showing that the showup was unnecessarily suggestive and conducive to irreparable misidentification. See *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 236. Illinois courts have long held that an immediate show-up identification near the scene of the crime is proper police procedure. *People v. Thorne*, 352 Ill. App. 3d 1062, 1076 (2004); *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). Although courts have noted the practice is disfavored and even condemned, it is justified where "prompt identification was necessary for the police to determine whether or not to continue their search." *People v. Manion*, 67 Ill. 2d 564, 569-70 (1977); see also *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003); *People v. Hicks*, 134 Ill. App. 3d 1031, 1036 (1985).

¶ 50 Simultaneous showup identifications of a restrained suspect by multiple witnesses have been found acceptable by this court. *People v. Howard*, 376 Ill. App. 3d 322, 331-32 (2007) (Showup identification was not unduly suggestive where two witnesses "almost simultaneously" viewed the handcuffed defendant who was flanked by officers.); see also *Ramos*, 339 Ill. App. 3d at 898 (Showup not unduly suggestive where two victims viewed the defendant simultaneously.); *People v. Rodriguez*, 387 Ill. App. 3d 812, 832 (Showup not unduly suggestive where two witnesses viewed the defendant simultaneously.)

¶ 51 In the case at bar, the police officers were justified in conducting a one man showup because a prompt identification was necessary to inform police officers whether they needed to continue their search to find an armed and dangerous offender. Defendant has failed to show that the procedure used by the officers was impermissibly suggestive. Although a separate viewing would have been the better practice, the particular facts of this case do not show that the showup in question was conducive to irreparable misidentification. There was no indication in the record that the witnesses discussed the appearance of the armed robber together. Moreover, each agreed that defendant was the man who had robbed them at roughly the same time, thus diminishing the chance that an unsure witness felt pressured by another witness's earlier identification. Accordingly we cannot find that defendant has shown the showup was impermissibly suggestive.

¶ 52 Defendant cites *People v. Blumenshine*, 42 Ill. 2d 508, 513 (1969), for the proposition that is improper to have a suspect viewed for identification simultaneously by multiple witnesses. In *Blumenshine*, police officers brought multiple witnesses from entirely separate incidents and offenses together to identify the defendant in a police station several weeks after the crime occurred. *Id.* 509-10. Our supreme court held that the showup was

impermissibly suggestive, explaining that there were no circumstances to justify the showup when it was conducted three weeks after the alleged crime. *Id.* at 513. The court also noted that it was "improper to have had the appellant viewed for possible identification at the same time and place by witnesses to the robbery and by witnesses to other offenses." *Id.* Given the stark differences between the facts in the present case, we find *Blumenshine* inapposite.

¶ 53 Finally, we briefly note that even if we were to agree, *arguendo*, that the showup procedures were improperly suggestive, the record reflects that the witnesses' identifications were independently reliable. Each witness testified that they had sufficient interaction with the defendant during the robbery to view his face, there was no indication that there was anything to distract the witnesses from the man giving them orders, the witnesses expressed no uncertainty in their identification during the showup or at trial, and the showup was conducted less than an hour after the robbery. Consequently, we find the trial court did not err in denying defendant's motion to suppress the identifications.

¶ 54 C. The Proposed Jury Instruction

¶ 55 Defendant next contends the trial court erred in refusing his proposed instruction regarding missing evidence. He argues that testimony regarding the existence of surveillance footage was presented at trial, that reasonable inferences could be made from that video's absence, and therefore the jury was entitled to be instructed on how to interpret the missing evidence. The relevant proposed non-pattern jury instruction stated:

> "If a party to this case has failed to offer evidence within his power to produce, you may infer that the evidence would be adverse to that party if you believe each of the following elements:

1. The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The evidence was not equally available to an adverse party.

3. A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him.

4. No reasonable excuse for the failure has been shown."

¶ 56 Jury instructions are necessary to inform the jury of the relevant legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Where the trial court determines that the jury requires instruction on a subject for which no Illinois pattern instruction exists, the court may give a non-pattern jury instruction. *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). However, the decision to give or refuse a non-pattern instruction is well within the discretion of the trial court and will not be overturned absent an abuse of discretion. *People v. Nutall*, 312 Ill. App. 3d 620, 633 (2000). An abuse of discretion occurs where the court refuses to give a non-pattern instruction when there is no applicable pattern instruction applicable regarding a subject on which the jury required instruction and the jury was consequently left to deliberate without proper instructions. *Id.*

¶ 57 We cannot find that the trial court abused its discretion in determining that defendant's proposed non-pattern instruction was unnecessary. Defendant's contention rests solely on Greenwood's statement, made years after the robbery, that he remembered making a DVD copy of a surveillance video of the robbery and giving it to an unidentified police officer. Officer Brunei testified conversely that he had received no video and that police records showed no indication that such a DVD had ever been received. There was no evidence

indicating that the State could have produced the tape through reasonable diligence and no evidence that defendant's attorney could not have obtained a copy of any surveillance video from the CVS through investigation prior to the eve of trial. Greenwood's sparse testimony that a surveillance video had been given to a police officer did not render the proposed instruction necessary for the jury to fully understand the legal principles applicable to defendant's case.

¶ 58 In arguing that the proposed instruction was required, defendant relies on a concurrence opinion by Justice Stevens in the United States Supreme Court case *Youngblood v. Arizona*, 488 U.S. 51, 59-60 (1988) (Stevens, J. concurring), as well as the Illinois cases *People v. Danielly*, 274 Ill. App. 3d 358 (1995), and *People v. Camp*, 352 Ill. App. 3d 257 (2004). In all three cases, it was noted that an instruction similar to that offered by defendant would have offered an effective protection to a defendant where police had undeniably lost or destroyed evidence. See *Youngblood*, 488 U.S. at 59-60; *Danielly*, 274 Ill. App. 3d at 368; *Camp*, 352 Ill. App. 3d at 262. However, although the opinions noted that such an instruction would provide protection to a defendant, none of the cases held that such an instruction was required. We find these cases inapposite.

¶ 59 Moreover, even if the trial court had been required to give the proffered instruction, its failure to do so would be harmless error given the overwhelming evidence against defendant. See *People v. Lewis*, 165 Ill. 2d 305, 352 (1995) ("[I]nstructional error is harmless and may not support a reversal when the evidence in support of conviction is so clear and convincing that the jury's verdict would not have been different even had the proper instruction been given.") The evidence presented against defendant was overwhelming. An officer testified that defendant confessed. Three eyewitnesses identified defendant as the man who robbed

them. Police officers stopped defendant as he drove away from the direction of the robbery at a high rate of speed. Once stopped, they found a large amount of cash and a large-caliber handgun, like that used in the robbery, in defendant's van. Given the overwhelming evidence of defendant's guilt, any instructional error was harmless.

¶ 60 D. One-act, One-crime Principles

¶ 61 Defendant finally contends that two of his three convictions for armed robbery must be vacated under one-act, one-crime principles because they all arise from the singular act of taking money from the CVS safe. The State concedes that one of the counts must be vacated, but argues a separate count of armed robbery is supported by defendant's taking of Greenwood's cellphone.

¶ 62 Defendant acknowledges that he forfeited the issue by failing to raise it at the trial level, but urges us to apply a plain error analysis. A reviewing court may consider an error, despite forfeiture, when a clear and obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error is so serious as to challenge the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Our supreme court has ruled that a violation of the one-act, one-crime doctrine challenges the integrity of the judicial process and therefore passes the second prong of plain error analysis. *In re Samantha V.*, 234 Ill. 2d 359, 378 (2009). One-act, one-crime challenges are subject to *de novo* review. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 63 Under one-act, one-crime principles, a defendant cannot be convicted of multiple offenses "carved from the same act." *People v. King*, 66 Ill. 2d 551, 566 (1977). When offenses stem from multiple related acts, multiple convictions with concurrent sentences are permitted so long as the offenses are not lesser included offenses. *Id.* An act is "any overt or

outward manifestation that will support a different offense." *Id.* Multiple acts may be found even where the acts are interrelated. *People v. Dixon*, 91 Ill. 2d 346, 355-56 (1982) (finding that the individual blows of a club within a single beating constituted multiple acts under *King*.) However, even where multiple acts exist to support multiple charges, the State must apportion each act among the multiple charges in the charging instrument. See *People v. Crespo*, 203 Ill. 2d 335, 345 (2003). It is improper for the State to apportion separate counts to separate acts for the first time on appeal. *Id.*

¶ 64 A person commits armed robbery when he or she knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force while armed with a firearm. 720 ILCS 5/18-1 (West 2006); 720 ILCS 5/18-2(a)(2) (West 2006). An individual cannot be convicted of multiple counts of armed robbery where there is only a singular taking of money from the same source. *People v. Mack*, 105 Ill. 2d 103, 134-35 (1984), *judgment vacated on other grounds, Mack v. Illinois*, 479 U.S. 1074 (1987).

¶ 65 Defendant was charged with three separate counts of armed robbery, all predicated on his taking of "U.S. currency." However, the testimony at trial established that defendant only performed one taking of money from the pharmacy safe, as the State concedes. Although we agree with the State that the taking of Greenwood's cell phone could constitute a second overt act, that is not how the State charged the crime nor how they argued their theory of the case at trial. To permit the State to separately apportion the taking of the money and of the cell phone for the first time on appeal "would be profoundly unfair." *Crespo*, 203 Ill. 2d at 343. Accordingly, as defendant's three convictions arise from a singular taking of money, two of those convictions must be vacated. See *People v. Jackson*, 2016 IL App (1st) 133823, ¶ 68.

¶ 66 III. CONCLUSION

¶ 67 For the foregoing reasons we find that the trial court did not abuse its discretion in denying defendant's motion to quash arrest and suppress evidence, denying his separate motion to suppress the victims' identifications of defendant, and refusing his non-pattern jury instruction. However, two of defendant's three armed robbery convictions must be vacated where they violate one-act, one-crime principles. Accordingly, the judgment of the circuit court of Cook County is affirmed in part and vacated in part.

¶ 68 Affirmed in part; vacated in part.