2019 IL App (1st) 162832-U

No. 1-16-2832

Order filed October 8, 2019

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 9824
	)	
PARKER BENSON,	)	Honorable
	)	Pamela M. Leeming,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's conviction for robbery is affirmed where the court did not err in denying his pretrial motion to quash arrest, trial counsel was not ineffective for failing to renew defendant's pretrial motion to suppress identification testimony, and the court did not err in sentencing him to 25 years in prison. Defendant's sentence for unlawful restraint is vacated because the offense was carved from the same physical act as his robbery conviction.

¶ 2 Following a bench trial, defendant Parker Benson was found guilty of robbery and unlawful restraint, and sentenced to concurrent terms of 25 years and 5 years in prison,

respectively. He now appeals, arguing that (1) the trial court erred in denying his pretrial motion to quash arrest, (2) his trial counsel was ineffective for failing to renew his previously denied motion to suppress identification testimony after evidence of police suggestion was adduced at trial, (3) the trial court erred at sentencing by considering improper factors in aggravation and by not considering certain mitigating factors, and (4) his conviction for unlawful restraint should be vacated because it was predicated on the same physical act as his conviction for robbery. We vacate defendant's unlawful restraint conviction, but affirm his conviction and sentence for robbery.

¶ 3 Defendant and codefendant Dondra Woods[1] were each charged with one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2010)) in connection with the May 2011 robbery of a 7-Eleven gas station/convenience store[2] in Forest Park, Illinois. Defendant's bench trial was held simultaneously to, but separately from, Woods's jury trial.

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and suppress evidence, arguing that the police stopped his minivan without "probable cause." At the hearing on the motion, Forest Park police officer Jose Flores testified that he was on patrol in a vehicle on May 25, 2011. At around 12:25 a.m., Flores received a call that "2 [black] males armed with a handgun" had robbed a 7-Eleven on Roosevelt Road. The call did not indicate whether the suspects fled on

[1] Woods was also charged in the same indictment with one count of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). After a jury trial, he was convicted of armed robbery and aggravated unlawful restraint, and sentenced to concurrent prison terms of 21 years and 5 years, respectively. On appeal, this court affirmed Woods's armed robbery conviction, but vacated his conviction for aggravated unlawful restraint. See *People v. Woods*, 2019 IL App (1st) 162580-U. He is not a party to this appeal.

[2] The victimized property was a combination gas station and 7-Eleven convenience store. Consistent with the proceedings below and the characterization in defendant's briefs on appeal, we will refer to it as a 7-Eleven.

foot or in a vehicle. Upon receiving the call, he turned onto Roosevelt, which was less than a block away, and headed westbound toward the 7-Eleven. As Flores approached the store, he observed "2 people" inside a minivan driving southbound on Troost Avenue. The van then turned onto Roosevelt and traveled eastbound, away from the store. Flores passed the minivan and made a U-turn to get behind it. He did not observe any "bad driving" as he followed the van, and agreed that he "did not have any personal knowledge that the vehicle was in violation of the law or anyone operating that vehicle was in violation of the law." However, Flores testified that he wanted to investigate whether the van was connected to the 7-Eleven robbery or if the occupants had "seen anything" useful to the investigation.

¶ 5 After following the van for approximately two blocks, Flores activated his emergency lights. The van began to pull over, but the passenger, later identified as Woods, exited the vehicle and fled on foot before it came to a complete stop. Flores exited his own vehicle and handcuffed the driver of the van, later identified as defendant. Through the window, Flores saw numerous packs of cigarettes between the front seats of the van.

¶ 6 On cross-examination, Flores testified that he was approximately 10 blocks from the 7-Eleven when he received the call about the robbery. He was "speeding down Roosevelt" to reach the store quickly and arrived within "[s]econds." He was familiar with the area, and explained that the stretch of Roosevelt in question was a mixture of residential buildings and businesses. Because it was after midnight, none of the businesses in the area were open except for the 7-Eleven. Flores did not see pedestrians in the area, and defendant's van was the only other vehicle on the road. The portion of Troost where Flores first saw the van was "[l]ess than a block" from

the 7-Eleven. Although the van was originally traveling southbound, that part of Troost was a one-way street going northbound.

¶ 7 In ruling on the motion, the trial court found that Flores observed defendant's minivan driving away from the crime seconds after Flores was dispatched on an armed robbery call. The court also stated that it was after 12:25 a.m. and "[a] few businesses may have been open in this area," but that "there's undisputed evidence" no other vehicles or pedestrians were in the vicinity. Thus, the court concluded that Flores was justified in stopping the van, and denied defendant's motion.

¶ 8 Defendant also filed a pretrial "MOTION TO SUPPRESS IDENTIFICATION TESTIMONY" from Azeem Ahmed, a 7-Eleven clerk who identified defendant in a show-up immediately following his arrest. The motion argued that the show-up was unduly suggestive, and that the court should therefore suppress "[a]ny reference to the pre-trial identification of the accused," and the "in-court identification of the accused *** inasmuch as such identification is the product of the improper pre-trial identification."

¶ 9 At the suppression hearing, Forest Park police officer Robert Kendall testified that he responded to the 7-Eleven after midnight on the night of the robbery. Upon arrival, he "briefly" spoke to Ahmed, the sole employee on duty. Ahmed described the offenders only as two black men, at least one of whom was armed. After his conversation with Ahmed, Kendall drove to where other officers had curbed defendant's van. He then returned to the 7-Eleven and asked Ahmed "if he could identify some subjects we had stopped." Ahmed agreed to view the suspects, and Kendall drove him to them. Defendant stood outside of another police vehicle as Ahmed viewed him from the backseat of Kendall's vehicle. After a "short amount of time" Ahmed

identified defendant as one of the offenders based on his clothing and "some other features." According to Kendall, Ahmed was "certain about the identification."

¶ 10 Flores testified that he initiated a traffic stop of defendant's van, handcuffed him, and detained him in the backseat of his police vehicle. Once Kendall radioed that he and Ahmed were en route to conduct a show-up, Flores had defendant exit the vehicle and stand outside. Kendall arrived approximately 20 seconds later and illuminated defendant with a spotlight on the squad car. Kendall then radioed that Ahmed identified defendant as one of the offenders. There were no other suspects present at the time. On cross-examination, Flores testified that the show-up was conducted approximately 14 minutes after the dispatch call.

¶ 11 After arguments, the court denied defendant's motion to suppress. In so ruling, the court stated that single-subject show-ups are "inherently suggestive," but were permissible under existing case law. The court then concluded that Ahmed's identification was sufficiently reliable based on the totality of the circumstances, including the timing, his opportunity to view defendant in the store, and the fact that he was "unequivocal" in identifying defendant. The court also noted that "ample case law" dictated that the use of handcuffs and a spotlight, while suggestive, was not necessarily fatal to a finding that the show-up was reliable.

¶ 12 At trial, Ahmed testified that he was working alone at the 7-Eleven at about 12:18 a.m on the night of the robbery when a man entered the store wearing a black jacket and a hoodie. He pointed a firearm at Ahmed and told him to open the cash register and lie on the floor. A second man entered the store a few minutes later, but Ahmed "d[id]n't see a lot" of him. The two men took money, cigarettes, and lottery tickets before running away. Ahmed called the police, who took him to view two male suspects. Ahmed identified the suspects as the offenders and then

returned to the 7-Eleven. A detective arrived later that morning and showed Ahmed a photograph of a firearm. Ahmed identified the firearm, signed the photograph, and wrote "this is the gun I see."[3] He also gave the detective security footage from the store.

¶ 13 The State published the security footage, which is included in the record on appeal and depicts the area surrounding the cash registers from multiple angles. The video shows Ahmed standing behind the counter at approximately 12:18 a.m. on the video's timestamp when a man wearing a dark hooded jacket enters the store and points what appears to be a firearm at him. The man orders Ahmed to open one of the cash registers, "lay down all the way," and "don't f*** move." Ahmed obeys, and the man climbs over the counter to take the money from the cash register. The man then tells Ahmed to open the other cash register. Ahmed complies and lies back down. The man empties the second register and takes lottery tickets and cigarettes from the shelves behind it. A second man, who is black, bald, and wearing dark clothing, enters the store and walks behind the cash register while holding up his T-shirt to conceal part of his face. The second man looks in the cash drawer, and takes additional cigarettes off the shelf. The men leave the store at around 12:22 a.m. The video does not clearly depict the face of either man.

¶ 14 On cross-examination,[4] Ahmed testified that he was not sure if the offenders were in the courtroom. Ahmed was "not watching" what the first offender did and "didn't see" the second offender because he was lying on the floor with his head down during most of the robbery. He agreed that, when the police took him to view defendant, "they told [him] basically that's the guy

[3] The writing on the photograph, which is in the record on appeal, actually states "This is the gun I saw with Robber Tonight."

[4] Defendant's counsel expressly adopted the cross-examination conducted by Woods's counsel.

that robbed [him].” He also agreed that, afterwards, police showed him a photograph of “the gun,” “told [him] this was the gun,” and “told [him] to circle it.”

¶ 15 Flores testified that he received the dispatch call about the robbery just before 12:30 a.m. As he drove toward the 7-Eleven, he saw a minivan, the only other vehicle in the area, turn onto Roosevelt “[w]ithin a block” of the store. Flores passed the van and made a U-turn to follow it. He ran the license plate and decided to pull the van over to see if the occupants had witnessed the robbery. Flores activated his emergency lights. The van slowed down, and Woods, the passenger, jumped out and fled on foot. Flores exited his vehicle and ordered defendant, the driver, to exit the van. Flores handcuffed defendant and placed him in the back of his squad car. He then returned to the van and noticed 13 sealed packs of Newport cigarettes in plain view throughout the front seat.

¶ 16 Over the radio, Flores heard that Officer Harold Grimes was attempting to apprehend Woods. Flores ran to Grimes’s location and saw him struggling with Woods, who was wearing a black hooded jacket and “some sort of *** mock turtleneck” that appeared to be a sleeve ripped from a dark-colored T-shirt. Once Woods was arrested, Flores returned to his squad car and was present when Kendall brought Ahmed for the show-up. Afterwards, Flores took defendant to the police station.

¶ 17 Kendall testified that he responded to the robbery call at around 12:25 a.m. and spoke to Ahmed at the 7-Eleven. He left the store after two or three minutes because he heard over the radio that a suspect had fled on foot after an attempted traffic stop. Kendall helped search for the suspect, and returned to the store once the suspect was in custody. He then drove Ahmed to Flores’s vehicle and asked Ahmed “if he could identify the subject we were about to show him.”

Kendall did not tell Ahmed that defendant was one of the robbers. Defendant was escorted out of Flores's vehicle, and Ahmed "immediately" identified him as one of the offenders. Kendall later drove Ahmed to a second location about a block away, where Ahmed identified Woods as the second offender.

¶ 18 Grimes testified that he and Officer Mike Harrison chased Woods on foot after he fled from the traffic stop. Woods discarded several items from his pockets as he ran. Flores arrived and helped detain Woods after a brief chase. Once Woods was in custody, police recovered lottery tickets, two packs of Newport cigarettes, $107 in cash, and a lighter bearing the 7-Eleven logo from his pockets. Upon retracing his steps, Grimes also recovered an unloaded .38 caliber revolver "a few houses down" from where Woods was apprehended. Harrison inventoried all of the recovered items at the police station. Later that morning, Grimes returned to the area of the chase and recovered additional cash, lottery tickets, unopened packs of Newport cigarettes, and another lighter bearing the 7-Eleven logo.

¶ 19 The State entered a stipulation that a forensic scientist examined the recovered firearm for latent fingerprints, but found none suitable for comparison.

¶ 20 Forest Park police detective Jarlath Heveran testified that he met Ahmed at the 7-Eleven after the robbery and made a copy of the surveillance footage. He then drove to the police station and interviewed Woods. After the interview, Heveran returned to the 7-Eleven and showed Ahmed a photograph of the firearm that Grimes recovered. Ahmed told Heveran "that was the gun that was used in the robbery," and signed and circled the photograph.

¶ 21 Assistant State's Attorney Brad Dickey testified that he read defendant the *Miranda* rights and interviewed him at the police station hours after the robbery. Afterwards, defendant

agreed to give a written statement and sat next to Dickey as Dickey typed a summary of defendant's oral statements. Defendant reviewed the written statement and signed it on each page.

¶ 22 The State published the statement, which is included in the record on appeal. According to the statement, defendant and Woods watched a basketball game at defendant's house on May 24, 2011. Woods left and returned sometime later that evening. Defendant and Woods then drove around in defendant's minivan until they saw the 7-Eleven at around midnight. Woods had an unloaded revolver, so they decided to rob the store. Defendant parked his van on a side road about a half block away. He and Woods then approached on foot, taking separate paths to ensure that there was nobody else in the area. By the time defendant walked around the store and entered the front, Woods, who had entered through the backdoor, was already behind the counter. Defendant pulled his shirt up to his nose to conceal part of his face. Woods told defendant that he "had already gotten everything," so defendant walked behind the counter and grabbed several packs of Newport cigarettes. They then left the store and drove away in defendant's van. About five minutes later, the police pulled the van over on Roosevelt. Woods fled on foot, but defendant stayed in the van and was arrested.

¶ 23 The State rested, and the defense called Henry Gee, defendant's former employer, as a character witness. Gee testified that defendant was "an honest guy."

¶ 24 Defendant testified that he attended a nightclub on the evening of May 24, 2011. He left the club between 11:30 and 11:45 p.m. because Woods called him asking for a ride home. Defendant picked up Woods on Roosevelt and proceeded towards Woods's house. A police officer followed them and pulled them over two or three blocks later. When defendant curbed his

vehicle, the officer approached the driver's side with his firearm drawn and ordered defendant and Woods to put their hands up. Defendant put his hands on the steering wheel, and Woods placed his hands on the dashboard. The officer opened the driver's door and demanded that defendant exit the vehicle. Defendant complied, and was handcuffed. Woods remained in defendant's vehicle. The officer placed defendant into the back of his squad car and then walked back towards defendant's vehicle "to retrieve Dondra Woods." However, defendant did not see Woods again because defendant "just laid back and waited to see what was going on."

¶ 25 The officer returned to the squad car and took defendant to the police station. While defendant waited in a holding cell, a different police officer asked him if he wanted to speak with a prosecutor. Defendant said no, and the officer asked him again about 15 minutes later. Defendant declined, but asked for "a phone call to talk to a lawyer." The officer later came to the holding cell a third time and told defendant that he would be allowed to make a call if he agreed to speak to a prosecutor. Defendant agreed, and was escorted to a room where Dickey was waiting. Dickey asked defendant questions, but defendant refused to say anything. Defendant was taken back to the holding cell and was allowed to make two phone calls. He denied signing a written statement and did not "have the slightest idea" whose signatures appeared on the statement identified by Dickey.

¶ 26 On cross-examination, defendant denied that there were cigarettes in his van at the time of his arrest, and stated that they "[m]agically appeared." He was intoxicated when he picked up Woods on the night of the robbery because he had consumed 6 to 12 shots of tequila at the nightclub beforehand.

¶ 27 Over the defense's objection, the trial court allowed the State to introduce, for impeachment purposes, a certified copy of defendant's 1988 conviction for aggravated criminal sexual assault, for which he was released from prison in 2006.

¶ 28 After hearing arguments, the court stated that "[w]ithin minutes of the robbery" police observed defendant's minivan about a block from the crime scene and discovered proceeds from the offense inside. The court also found that defendant made an "admission to the robbery" in his interview with Dickey, and that the surveillance video showed a man with a "physical build, *** height, *** bald head, and *** side profile" similar to defendant's. Thus, the trial judge concluded that the evidence "leaves me with no doubt that it was Defendant Benson inside of the store." However, the court also found that the State had not proven that the weapon Woods used in the robbery was an actual firearm because the court had "no confidence in the statement or testimony of *** Ahmed" because he only "identified the picture of the gun because the police showed it to him, just as he identified Defendant Benson in a show-up." Consequently, the court found defendant guilty of the lesser included offenses of robbery and unlawful restraint.

¶ 29 Defense counsel filed a motion for a new trial, arguing that (1) the trial court erred when it denied defendant's motion to quash arrest and suppress evidence because the police lacked "probable cause" to stop defendant's van, (2) "[t]he trial court erred when it denied defendant's motion to suppress identification," and (3) the State failed to prove defendant guilty beyond a reasonable doubt. The trial judge denied the motion, stating, "I stand by my rulings."

¶ 30 The case proceeded to a sentencing hearing, where the court acknowledged receipt of defendant's presentence investigation (PSI) report. According to the report, defendant claimed that he had an "excellent" childhood and was raised by his mother in a "stable home." He

attended a special education program for "learning issues" during grade school, and earned mostly C's and D's as a student. He dropped out of school in the ninth grade because he was unable to read or write, and had worked as a forklift operator from 2006 until the time he was incarcerated in the present case. Defendant had never seen a psychiatrist or psychologist, and denied ever being diagnosed with a psychological, learning, or behavior disorder. He also denied ever undergoing a court-ordered behavioral clinical exam.

¶ 31 In aggravation, the State emphasized defendant's criminal history, including his 1983 convictions for armed robbery and armed violence (for which he was sentenced to 6 years in prison), a separate 1983 conviction for aggravated battery (for which he was sentenced to 4 years in prison), and 1988 convictions for aggravated criminal sexual assault and armed robbery (for which he was sentenced to 35 years in prison). Accordingly, the State noted that defendant was eligible for sentencing as a Class X offender, and requested a sentence "in excess of 20 years."

¶ 32 In mitigation, defense counsel argued that defendant committed his prior offenses at a young age, that Gee provided a positive character reference, and that defendant "has a problem with alcohol *** that may have led to some poor decision making" on the day of the robbery. Counsel requested a sentence of "something less than 10 years."

¶ 33 In allocution, defendant denied any involvement in the robbery. He stated that he had "done enough time" and had not reoffended since being released from prison on previous offenses.

¶ 34 Before announcing the sentence, the court asked defendant how old he was. When defendant replied that he was 51 years old, the court noted that Woods was "[m]uch younger"

than defendant, and that defendant had been "polite" and a "gentleman" throughout the proceedings. However, the court also stated in part that:

> "I can't help myself to ask this question: What were you thinking and what were you doing? *** You know *** at your age, with your *** life experience, you should have known better. And it's not even a matter of bad judgment. It was a crime that you committed, and you're here for sentencing, so I'm going to sentence you accordingly."

The court then imposed concurrent sentences of 25 years for robbery and 5 years for unlawful restraint.

¶ 35 Defendant asked the court why he received a longer sentence than Woods. The court responded that "[o]ne reason is because you have a criminal history," whereas Woods "d[id]n't have the criminal history that you have." The court also noted that defendant had another case pending, but stated that, "I didn't consider it, and I'm not considering it now." Defendant filed a motion to reconsider sentence, which the court denied.

¶ 36 On appeal, defendant first argues that the trial court erred in denying his motion to quash arrest because Flores did not have a reasonable suspicion to justify stopping his van.

¶ 37 When considering a challenge to a trial court's denial of a motion to quash arrest and suppress evidence, a reviewing court applies a two-part standard of review. *People v. Grant*, 2013 IL 112734, ¶ 12. The trial court's factual findings are entitled to great deference, and will be disturbed only if they are against the manifest weight of the evidence. *Id.* However, the trial court's ultimate legal ruling on the motion is reviewed *de novo*. *Id.*

¶ 38 The fourth amendment to the United States Constitution protects individuals from "unreasonable" searches and seizures. U.S. Const., amend. IV; see also Ill. Const. 1970, art. I,

§ 6. A traffic stop is considered a seizure for purposes of the fourth amendment. *Heien v. North Carolina*, 574 U.S. 54, ___, 135 S. Ct. 530, 536 (2014). Seizures are generally "reasonable" within the meaning of the fourth amendment only where the police have obtained a warrant supported by probable cause. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). However, in *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court recognized a limited exception to the warrant requirement that allows a police officer to conduct a brief, investigatory stop of a vehicle if the officer has a "reasonable suspicion" of criminal activity. See also 725 ILCS 5/107-14 (West 2010) (providing that a police officer may perform an investigatory stop of a person where "the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense").

¶ 39 To justify a *Terry* stop, the officer must be able to point to "specific and articulable facts" that gave rise to a reasonable suspicion. *Terry*, 392 U.S. at 21. Such facts need not rise to the level of probable cause, but must create more than a mere hunch. *People v. Thomas*, 198 Ill. 2d 103, 110 (2001). The existence of reasonable suspicion cannot be "reduced to a neat set of legal rules," but must instead be determined by considering the totality of the circumstances known to police at the time of the stop. *People v. Timmsen*, 2016 IL 118181, ¶ 18. "[R]easonable suspicion determinations must be made on commonsense judgments and inferences about human behavior." *Id.* ¶ 14. Factors a reviewing court should consider include, but are not limited to (1) the specificity of the descriptions of the offenders, (2) the suspect's proximity to a known crime scene, (3) the amount of time between the crime and the stop, (4) the probable direction of the offenders' flight, (5) the number of people in the area around the crime scene, and (6) the

observed activity of the suspect to be stopped. See *People v. Mendez*, 371 Ill. App. 3d 773, 776 (2007).

¶ 40 Here, the totality of the circumstances justified stopping defendant's van. Flores testified that he first observed the van just seconds after receiving a dispatch call about an armed robbery. Although, as defendant notes, there was no testimony at the hearing to establish how much time elapsed between the robbery and the call, it was reasonable for Flores to infer that the crime occurred shortly before the call. See *People v. Hubbard*, 341 Ill. App. 3d 911, 936 (2003) (*Terry* stop may be justified by reasonable inferences drawn from the facts known to police). Flores also observed two "people" in the van, which matched the number of offenders indicated in the call. While Flores did not have a detailed description of the offenders and he did not specifically testify that he knew the occupants of the van were men when he curbed the vehicle, this does not prevent a finding of reasonable suspicion in light of other factors. For example, Flores testified that the minivan was the only other vehicle in the area, no pedestrians were on the street, and all the local businesses were closed by that time of night. See *People v. Brown*, 88 Ill. App. 3d 514, 509-10 (1980) ("[T]he police are justified in making a stop at an early morning hour with a much less comprehensive description of suspects than would be adequate if the stop were made at midday."). Although the court found that "[a] few businesses may have been open," it clearly credited Flores's testimony that defendant and Woods were the only other people in the area. Moreover, Flores first saw defendant's van less than a block from the 7-Eleven, on a one-way street he knew to be accessible from an alley behind the store. He then observed defendant's van turn and travel away from the store. Thus, based on the totality of the circumstances, we find that the court did not err in denying defendant's motion to quash arrest. See *Hubbard*, 341 Ill. App.

3d at 915-16 (although the police did not have any description of the offender, *Terry* stop was justified where the defendant was the only motorist on the road at 2:25 a.m., was 1.4 miles from the location of the offense, and was coming from the "general direction" of the crime scene).

¶ 41 Defendant next argues that his trial counsel provided ineffective assistance by failing to renew his motion to suppress Ahmed's identification testimony during trial. In particular, defendant contends that there was a reasonable probability that his motion would have been granted had the court been able to consider Ahmed's trial testimony that (1) he did not have the opportunity to view defendant in the store, and (2) the police told him that defendant was one of the robbers before conducting the show-up.

¶ 42 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. To succeed on such a claim, a defendant must establish that his counsel's performance was objectively unreasonable and that he suffered prejudice as a result. *Id.* Failure to demonstrate either *Strickland* prong precludes a finding that counsel was ineffective. *People v. Cherry*, 2016 IL 118728, ¶ 31. When, as here, a claim of ineffective assistance is predicated on counsel's failure to renew an unsuccessful pretrial motion, the defendant must show that (1) the renewed motion would have been successful, and (2) there is a reasonable probability that it would have affected the outcome of the trial. See *People v. Causey*, 341 Ill. App. 3d 759, 766 (2003).

¶ 43 Here, we find no reasonable probability that defendant was prejudiced by counsel's performance. As defendant notes, the trial court expressly discredited Ahmed's identifications, stating "I truly believe he identified the picture of the gun because the police showed it to him,

just as he identified Defendant Benson in a show up." Thus, the record shows that the trial court gave no weight to the identification, but instead convicted defendant based on the other evidence, including the surveillance video, his signed confession, and the proceeds of the robbery found in his van. Accordingly, there is no reasonable probability that the trial would have ended differently had defendant's motion been granted. His claim of ineffective assistance of counsel therefore fails.

¶ 44 Defendant next argues that the trial court abused its discretion in imposing his robbery sentence. In particular, defendant contends that the court erred by (1) relying on "the fact of the crime" in aggravation, (2) focusing "almost exclusively" on his age, and (3) ignoring mitigating factors such as his rehabilitative potential and "mental limitations."

¶ 45 The Illinois Constitution requires that all sentences be imposed according to the seriousness of the offense and the goal of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. Clemons*, 2012 IL 107821, ¶¶ 38-39. In balancing these objectives, a trial court is required to consider a number of aggravating and mitigating factors, including the defendant's demeanor, credibility, moral character, age, social environment, habits, and mentality. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). Because the trial court has the superior opportunity to evaluate such factors, its decisions are entitled to great deference, and a reviewing court will not substitute its own judgment merely because it would have weighed the factors different. *Id.* at 212. The trial court is presumed to have properly considered all relevant mitigating factors, and this presumption is rebutted only by affirmative evidence to the contrary, other than the sentence itself. *People v. Jones-Beard*, 2019 IL App (1st) 162005, ¶ 21. A sentence will not be disturbed absent an abuse of the trial court's discretion, such as when the

sentence is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 46 Robbery is a Class 2 felony typically punishable by three to seven years in prison. 720 ILCS 5/18-1(c) (West 2010); 730 ILCS 5/5-4.5-35 (West 2010). However, because of his criminal history, defendant was eligible for a mandatory Class X sentence of 6 to 30 years in prison. 730 ILCS 5/5-4.5-95(a)(7)(b) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). Thus, defendant's 25-year sentence fell within the statutory guidelines and is presumed proper. *Jones-Beard*, 2019 IL App (1st) 162005, ¶ 22. Defendant does not dispute the applicable sentencing range, but instead argues that the record affirmatively shows that the court relied on improper aggravating factors and did not consider the mitigating factors.

¶ 47 In support of his argument that the court considered the fact of the crime in aggravation, defendant notes that, in announcing the sentence, the court rhetorically asked him, "What were you thinking and what were you doing?" Defendant also relies on the court's statement that, "[Y]ou should have known better. And it's not even a matter of bad judgment. It was a crime that you committed." Initially, we note that it is improper to focus on a few words or isolated statements from the court, and that the court's comments should instead be read as a whole. *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986). In any event, the comments cited by defendant do not affirmatively rebut the presumption that the court considered only proper factors. Rather, the record shows that the court was responding to defendant's proclamation of innocence and to defense counsel's argument that defendant exhibited "some poor decision making" on the night of the robbery.

¶ 48 Nor does the record support defendant's assertion that the trial court "focused almost exclusively" on his age in imposing a sentence. We note that a defendant's age is a proper factor for a trial court to consider when fashioning a sentence. *People v. Charleston*, 2018 IL App (1st) 161323 ¶ 20. Moreover, the court's references to age consisted of (1) asking defendant how old he was before announcing the sentence, (2) noting that Woods was "[m]uch younger" than defendant, and (3) telling defendant that "at your age, with your *** life experience, you should have known better" than to commit the robbery. There is nothing inappropriate about these comments, and they do not show that the court relied heavily on defendant's age in aggravation.

¶ 49 We are similarly unpersuaded by defendant's argument that the court improperly considered his criminal history. More specifically, defendant claims that it was error for the court to consider his previous convictions in aggravation because they were already used to subject him to a Class X sentencing range. However, it is not improper for a trial court to consider a defendant's criminal history merely because it qualified the defendant for an enhanced sentencing range. See *People v. Thomas*, 171 Ill. 2d 207, 224-25 (1996). We also note that, in any event, defendant's criminal history included other felonies in addition to those that were necessary to qualify him for a Class X sentence.

¶ 50 There is also no merit to defendant's assertion that his criminal history "carries less weight" because the court did not mention it until after announcing the sentence. Rather, the court was not required to explain how it weighed the aggravating factors (*People v. Abrams*, 2015 IL (1st) 133746, ¶ 32), and the court only mentioned defendant's criminal history in direct response to his question about why he received a longer sentence than Woods. Additionally,

defendant's claim that the court considered his pending charge in aggravation is refuted by the record, as the court stated, "I didn't consider it, and I'm not considering it now."

¶ 51 With respect to the mitigating factors, it is unclear whether defendant argues that the court weighed them too lightly or failed to consider them altogether. To the extent that defendant argues the former, it was the trial court's role to assign weight to each factor, and we must not substitute our own judgment. *Alexander*, 239 Ill. 2d at 212. To the extent that defendant argues the latter, defendant must provide affirmative proof to show that the court did not consider all the relevant factors. *Jones-Beard*, 2019 IL App (1st) 162005, ¶ 21. We also note that factors defendant argues are mitigating, such as his employment history and learning disability, were contained in the PSI report. See *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 20 (trial court is presumed to have considered the PSI report). As defendant has offered no evidence, apart from the sentence itself, to rebut the presumption that the court considered these factors, his arguments fails. Thus, we cannot say that the trial court erred in imposing the sentence.

¶ 52 Finally, defendant argues, and the State concedes, that his unlawful restraint conviction violated the one-act, one-crime rule because it was based on the same physical act as his robbery conviction. Although defendant has forfeited his one-act, one-crime challenge by not raising the issue in the trial court, we may nevertheless consider it under the plain-error exception to the general forfeiture rule. See *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009). Our review of one-act, one-crime violations is *de novo*. *Id.* at 369.

¶ 53 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on precisely the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). The threshold inquiry is whether the defendant's conduct consisted of separate acts or a single act.

People v. Rodriguez, 169 Ill. 2d 183, 186 (1996). If the defendant committed only one act, multiple convictions are improper. *Id.*

¶ 54 Turning to the present case, we agree with the parties that defendant's convictions for unlawful restraint and robbery violated the one-act, one-crime rule. Because restraining Ahmed was "inherent" in accomplishing the robbery, defendant's convictions were carved from the same physical act. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶¶ 5, 55 (vacating the defendant's unlawful restraint conviction on one-act, one-crime grounds where he restrained the victim by holding him at gunpoint "from the beginning until the end of the armed robbery").

¶ 55 When a defendant erroneously receives multiple convictions for the same physical act, a reviewing court must vacate the less serious offense. *In re Samantha V.*, 234 Ill. 2d at 379. Unlawful restraint, for which defendant received 5 years in prison, is a Class 4 felony, whereas robbery, for which he received 25 years in prison, is a Class 2 felony. 720 ILCS 5/10-3(b) (West 2010); 720 ILCS 5/18-1(c) (West 2010). Thus, we vacate defendant's sentence for unlawful restraint, and direct the clerk of the circuit court to amend the mittimus accordingly. *People v. Sandifer*, 2017 IL App (1st) 142740, ¶ 78.

¶ 56 For the foregoing reasons, we vacate defendant's unlawful restraint conviction, but affirm the judgment of the circuit court in all other respects.

¶ 57 Affirmed in part; vacated in part.