

2012 IL App (2d) 100941-U
No. 2-10-0941
Order filed May 17, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-4065
)	
ANDRE L. ALEXANDER,)	Honorable
)	John R. Truitt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: (1) Witness identifications of defendant were reliable and sufficient to prove defendant guilty beyond a reasonable doubt of home invasion; (2) defendant failed to establish that trial counsel rendered ineffective assistance; and (3) one of defendant's convictions of and sentences for home invasion would be vacated on one-act, one-crime principles.

¶ 1 Following a jury trial in the circuit court of Winnebago County, defendant, Andre L. Alexander, was found guilty of four counts of home invasion (720 ILCS 5/12-11(a)(1), (a)(3) (West 2008)). Prior to sentencing, the trial court vacated two of the convictions. Thereafter, the court sentenced defendant to a term of 33 years' imprisonment on each of the remaining two convictions,

with the sentences to run concurrently. Defendant appeals *pro se*, raising three principal arguments. First, he claims that the State failed to prove him guilty beyond a reasonable doubt of home invasion. Second, he raises various claims of ineffective assistance of counsel. Finally, he contends that one of his two convictions and sentences should be vacated under one-act, one-crime principles. We agree with defendant's third argument and vacate one of his convictions and sentences. We otherwise affirm.

¶ 2

I. BACKGROUND

¶ 3 On January 27, 2010, defendant was charged by indictment with four counts of home invasion. 720 ILCS 5/12-11(a)(1), (a)(3) (West 2008). The charges stemmed from a break in on December 29, 2009, at 1122 Greenmount Street, Rockford, Illinois, the residence of Brittany Staten and her daughter, Naziya Morehead (Naziya). Count I of the indictment alleged that defendant unlawfully entered Staten's residence "and while armed with a firearm intentionally threatened the imminent use of force upon *** Staten while in that dwelling whether or not injury occurred." 720 ILCS 5/12-11(a)(3) (West 2008). Count II of the indictment alleged the same conduct but named Naziya as the victim and noted that Naziya was under 12 years of age at the time of the offense. Count III alleged that defendant unlawfully entered Staten's residence "and while armed with a dangerous weapon other than a firearm intentionally threatened the imminent use of force upon *** Staten while in that dwelling whether or not injury occurred." 720 ILCS 5/12-11(a)(1) (West 2008). Count IV of the indictment alleged the same act but substituted Naziya's name for that of Staten and noted that Naziya was under 12 years of age at the time of the offense.

¶ 4

A. Pretrial Motions

¶ 5 Prior to trial, defendant filed a motion to suppress physical evidence, in particular, a ski mask recovered from an apartment in the building in which defendant was apprehended. Defendant also moved to suppress identification evidence provided by Staten and Robert Morehead (Morehead), Naziya's father, who was staying at Staten's apartment on the night of the alleged home invasion.

¶ 6 i. Motion to Suppress Physical Evidence

¶ 7 At the hearing on defendant's motion to suppress physical evidence, Detective Dwayne Beets of the Rockford police department testified that he was involved in the investigation of a possible home invasion which occurred on December 29, 2009, at 1122 Greenmount. To that end, at around 8:30 a.m. on December 31, 2009, Beets and other members of the department went to a duplex at 921 11th Street to serve an arrest warrant on defendant. When the officers arrived, they knocked on the front (east) and side (north) doors of the building, but no one answered either door. Nevertheless, when Beets looked through a window, he observed a child and a woman. The woman, later identified as Starletta Bennett, told Beets that she would open the door, but, as far as Beets was aware, never did. After knocking for 10 to 15 minutes, the landlord arrived and opened the north door, which led into a common hallway for the upper and lower units of the duplex. Beets testified that as the officers filed in, an individual resembling defendant was seen descending the stairs from the upper unit. Beets asked the individual his name, but the man did not respond, and he was taken into custody. Beets testified that he communicated the arrest only to two officers that were standing nearby.

¶ 8 Detective Mark Jimenez testified that police had information that defendant was staying at an apartment located at 921 11th Street. Jimenez testified that when the officers arrived at the building, he went to the east side of the building and rang the doorbell, but received no response.

Beets told Jimenez that he observed a female inside the residence and that he had motioned for her to open the door. Beets reported that the woman walked towards the door but then walked away. Jimenez continued to ring the doorbell, but no one responded. After five or ten minutes, another officer called the landlord. After speaking with the police, the landlord opened a door that led to a common hallway. Jimenez stated that the door to the lower unit was about eight feet from the point where he entered the hallway. At that time, the door to the lower unit was “wide open” and several officers had already entered the apartment. Jimenez testified that the landlord opened the door from the exterior to the common hallway, but he did not know if the landlord opened the door from the common hallway to the lower unit. Jimenez testified that a black ski mask was recovered from the floor of the lower unit’s southwest bedroom. Jimenez testified that he had been in the apartment for a couple of minutes before he learned that defendant had been arrested. He also testified, however, that defendant was taken into custody prior to the discovery of the ski mask.

¶9 On cross-examination, Jimenez testified that the police had two addresses for defendant, the 11th Street address and an address on Illinois Avenue. Jimenez explained that defendant was on parole at the time of his arrest and that defendant was using the latter address as his parole address. Jimenez testified that when he arrived at the 11th Street address, he was positioned at the east-side entrance. However, the landlord opened the north-side door and that was the door that Jimenez entered. Jimenez explained that upon entering the north-side entrance, there is a stairway to the right leading to the upper unit and a door on the left to the lower unit. Jimenez reiterated that the door to the lower unit was open when he entered the building, although he did not know who opened it. Once inside the lower unit, the officers conducted a “sweep” looking for defendant. Officers identified three individuals in the apartment: a male (Odie Patton), a female (Bennett), and a child.

Jimenez testified that after he discovered the ski mask, Bennett told him that it belonged to one of her children. Jimenez later spoke with Bennett at the police station and asked her for permission to search the lower unit at 921 11th Street. Jimenez testified that he presented Bennett with a consent-to-search form, that Bennett read the document, that she stated that she understood it, and that she gave permission to search the lower unit. Jimenez stated that because the consent to search was signed “retroactively,” Bennett was giving police permission to “go back into her apartment.” On redirect, Jimenez acknowledged that the consent-to-search form was signed four hours after the initial search took place. He also stated that the police did not have a search warrant for Bennett’s apartment.

¶ 10 John Mershon, a parole agent for the Illinois Department of Corrections, testified that defendant is one of the parolees he is assigned to supervise. Mershon testified that as a condition of parole, defendant is required to provide him with a permanent home address. According to Mershon, the address defendant provided as his “post site” in December 2009 was 840 Illinois Street in Rockford. Mershon noted that the failure to provide an accurate address presents a basis for the revocation of one’s parole. Mershon further testified that as a condition of parole, defendant must consent to the search of his person and his residence at any time that he is asked by law enforcement personnel. Furthermore, according to Mershon, mandatory supervised release rules state that a parolee shall consent to searches. Mershon was not aware that defendant occasionally spent the night at an address on 11th Street. However, on cross-examination, he acknowledged that there is no rule that would prohibit a defendant from spending the night at an address other than his “post site.” Mershon also admitted that there has been no “violation” filed as a result of defendant’s conduct.

¶ 11 Sergeant Joseph Stevens of the Rockford police department testified that in an attempt to execute a warrant for defendant's arrest, officers went to 921 11th Street on December 31, 2009. Stevens testified that when he entered the north door of the building, defendant was observed descending the stairway from the upper unit. Stevens and Beets apprehended defendant at that time. Stevens testified that when he entered the building, the door to the lower unit was open. Stevens instructed other officers to enter the lower unit because he was concerned that the female in the apartment may have been in danger, as she was observed in the apartment and stated that she would open the door, but did not. At that time, defendant was already under arrest. Stevens further testified that although the written consent to search the lower unit was obtained at the police station, Bennett verbally agreed to a search of the apartment at the scene.

¶ 12 Bennett testified that in December 2009, she and her children resided in an apartment on 11th Street. Bennett testified that occasionally defendant and Patton would also stay there. According to Bennett, defendant would keep some of his clothes at her apartment and some at his mother's house. Bennett testified that at approximately 8:50 a.m. on December 31, 2009, the police came to the building. Bennett, her daughter, defendant, and Patton were in the apartment at the time. Bennett became aware of the police presence when officers began knocking on a window. Bennett denied being in a "hostage situation" when the officers arrived. Bennett testified that when the police tapped on her window, they asked her to open the door. According to Bennett, however, by the time she got to the door, between 15 and 20 officers were already inside the apartment. Bennett testified that the police were "ripping *** the sheets off the windows, flipping the mattresses, going through the things like they was [*sic*] looking for something." Bennett testified that the police never asked her if she was in danger and they never asked for consent to search the apartment. Bennett

further testified that the police threatened to contact DCFS if she did not call somebody to pick up her daughter. Thereafter, Bennett was escorted outside, handcuffed, and placed in a “paddy wagon.” Bennett was later released.

¶ 13 Bennett testified that at the police station, the officers had her sign a piece of paper. She stated, however, that she was never informed that the document was for “searching.” According to Bennett, she did not read the form and the officers did not tell her what it was. Bennett thought the document was “for [her] coming down [to the police station].” Bennett noted that she signed the document several hours after the police first came to her apartment.

¶ 14 On cross-examination, Bennett admitted that her name is not on the lease for the apartment on 11th Street. According to Bennett, defendant’s name is on the lease and he rented the apartment for her and her children. Bennett also admitted that she knew defendant was on parole. Bennett testified that she did not read any of the papers that the police asked her to sign. She did acknowledge, however, that the police read her rights to her. Bennett also acknowledged that she was upset that the police were questioning her about defendant’s activities. On redirect, Bennett testified that when she spoke with the officers at the police station, they told her that they were going to take her to jail for obstructing justice and that they were going to take her children away and get DCFS involved.

¶ 15 Following Bennett’s testimony, defense counsel argued that the conditions of parole did not justify the search because the State did not introduce a certified copy of the conditions of defendant’s parole. He also argued that because defendant was outside of the residence, the search of the apartment could not constitute a “protective sweep” and that, in any event, there was no evidence that anyone in the apartment was in danger. The trial court denied the motion, finding that Bennett

had the authority to consent to the search of the apartment. The court noted that Bennett was staying in the apartment with her children and there was no evidence that the bedroom in which the ski mask was found was under the sole and exclusive possession of defendant. In addition, the court found the testimony of the police officers to be more credible than that of Bennett and that, in fact, Bennett did verbally consent to the search.

¶ 16 ii. Motion to Suppress Morehead's Identification

¶ 17 At the hearing on the motion to suppress Morehead's identification, Morehead testified that he was incarcerated in the Winnebago County jail on charges of intent to deliver heroin. He also stated that there was a petition pending to vacate his probation in an intent to deliver case.

¶ 18 Morehead testified that in the early morning hours of December 29, 2009, he was at the Greenmount Street home of his girlfriend, Staten. According to Morehead, at about 3:30 a.m., he and Staten were awoken by two men kicking in the front door and screaming "police." Morehead stated that the men then kicked in the bedroom door as he and Staten attempted to hold it shut. Eventually, one man entered the bedroom holding a gun while the other man remained in the living room. Morehead testified that the man who entered the bedroom held him and Staten at gunpoint and demanded money. Morehead told the man to take \$20 that was on a dresser in the bedroom. Morehead stated that although the room was dark when the men broke into the apartment, Staten turned on the overhead bedroom light as the bedroom door was being kicked in. Morehead testified that the man who entered the bedroom was dressed in black and was wearing a mask. Morehead described the mask as follows: "It was a mask covering the mouth and the head but not the forehead. The forehead and the nose and the eyes were showing. The only thing covered was the mouth." Morehead also testified that the intruder's hair was covered by the mask. Morehead did not

recognize the intruder's voice. Morehead estimated that the man was in the bedroom for about 10 minutes before he and the other intruder left the apartment. The police arrived about 10 minutes after the two men left.

¶ 19 When the police arrived, Morehead told them that he knew the person who entered the bedroom, but that he "couldn't put a name to the face." According to Morehead, the police were able to locate the car used to flee because there was a tracking device in a cell phone that was taken from the apartment. Morehead accompanied the police during the search to identify the vehicle. After identifying the car, Morehead, still unable to recall the intruder's first or last name, contacted his sister. Morehead described the individual to his sister and told her where he knew him from. In response, Morehead's sister provided him with a name. Morehead recounted that when his sister told him the name, he "knew exactly who it was." Morehead provided the name to the police, but was told that they already knew the offender's identity. Morehead testified that after he provided the name to the police he searched for the name on the Illinois Department of Corrections website. Morehead acknowledged that the statement he gave to police indicates that he remembered the intruder's first name was "Andre" and that his sister provided the intruder's last name. Morehead denied telling Staten the intruder's name or letting her know about the website he viewed.

¶ 20 Morehead testified that on December 29, 2009, at approximately 11:10 a.m., he looked at a photo array at the police station. Morehead explained that the officers showed him "a paper of six individuals on it [*sic*]" and asked him if he was able to identify the individual who committed the home invasion. Morehead identified the photograph of defendant. Morehead testified that prior to the home invasion, he last talked to defendant a month or two earlier at a gas station.

¶ 21 On cross-examination, Morehead testified that the prosecutor did not speak to him in any way about the charges pending against him. Morehead recounted that he was able to observe the men flee the apartment in a small black car and the police told him that they were using a GPS tracking device in the cell phone to track the location of the intruders. Morehead accompanied police to an area on 11th Street near Ninth Avenue where he identified a vehicle similar to the one used by the intruders to flee. Morehead further testified that he recognized the man that held him and Staten at gunpoint from his nose, eyes, and forehead. He told police that he thought the man had a child by a woman named Starkesha. However, it was not until Morehead spoke with his sister that he learned defendant's last name. Morehead also testified that prior to the police showing him any photographs, he read and signed a "Lineup/Photo Spread Notice." Per the terms of the notice, Morehead understood that the suspect might not be in the photo spread, that he was not required to make any identification, and that he was not to assume that the person administering the spread knew which photograph belonged to the suspect. On redirect, Morehead was asked whether the suspect had any distinguishing facial characteristics. Morehead responded that he "was looking at [the offender] dead in his eyes the whole time that he was in the [bed]room, and [he] knew that [he] knew him."

¶ 22 Defense counsel waived argument on the motion to suppress Morehead's identification. Thereafter, the trial court announced its decision. The trial court noted that the photo spread shown to Morehead consisted of six photographs of African-American males. The court noted that all of the men had relatively short hair and that five of the six men had facial hair. The court acknowledged that defendant appeared "slightly lighter in complexion than the other five males," but found that this fact itself did not necessarily render the spread suggestive. Ultimately, the court concluded that there was nothing about the composition of the spread that was necessarily suggestive

and that there was no evidence of conduct by the police that rendered it suggestive. The court noted that Morehead testified that he had almost 10 minutes to observe the offender, that the light was on at the time of the crime, that he had contact with defendant as recently as a month or two prior to the break in, and that he knew defendant from prior dealings. The court also cited other factors, including Morehead's degree of attention (he testified that he was looking at his eyes the whole time), the level of certainty (the court did not hear any evidence other than the fact that Morehead circled defendant's photo on the spread), and the length of time between the crime and the confrontation (minimal, being between seven and eight hours). Accordingly, the court concluded that the identification was reliable and there was nothing about the manner in which the police conducted the spread which was unnecessarily suggestive. Thus, as to the identification made by Morehead, the motion was denied.

¶ 23 iii. Motion to Suppress Staten's Identification

¶ 24 At the hearing on the motion to suppress Staten's identification, Staten testified that she used to live in an apartment on Greenmount in Rockford. In the early morning hours of December 29, 2009, Staten was at home with Morehead and her daughter. Staten's daughter was asleep on a couch in the living room while Staten and Morehead were in bed in Staten's bedroom. Staten testified that at around 3 a.m., she heard a "loud hit" on the front door. Staten and Morehead got up to see what was going on when they heard someone shout "police, police." As they opened the bedroom door, two individuals entered the front door of the apartment, and Staten "immediately noticed [they] were not police." Staten testified that the lights in the apartment were off at this time. Staten further testified that she and Morehead attempted to keep the bedroom door shut to prevent the individuals from coming in, but the intruders broke the door.

¶ 25 Staten testified that one of the intruders was a “taller dark skinned guy with a mask.” Staten described the other intruder as “shorter and light skinned” with “a mask and a gun.” Staten testified that the shorter man entered her bedroom while the taller man went elsewhere in the home. Staten described the mask as “a black mask [which] only covered his mouth and upper forehead.” Defense counsel asked whether the mask covered the intruder’s cheeks. In response, Staten gestured and the trial court explained:

“She’s drawing a circle. She started with both—I think it was her index fingers right above her lips, and then she moved both fingers up toward her forehead in a circular fashion and then closing the fingers somewhere around midforehead.”

According to Staten, the nose, eyes, and a part of each cheek were visible. Staten stated that the man who entered the bedroom had “[r]eally thick eyebrows.” She also stated that he was not much taller than her (Staten testified that she is 5' 4") and that he was shorter than his partner. Staten testified that the man who entered the bedroom was not wearing eyeglasses.

¶ 26 Staten testified that the man in the bedroom “began to wrestle around for a while” and that she, Morehead, and the intruder “were all just kind of running around the room.” During the commotion, Staten was able to make a 911 call using her cell phone. After the intruder noticed what Staten was doing, he grabbed her and pointed a gun at her. At that point, Morehead was “handing [the intruder] stuff,” including keys to his truck and some cash. The intruder threatened to take Staten, but she was eventually released and the intruders left the home. Staten testified that the lights remained off during these events. Staten could not recall when the lights came on.

¶ 27 Staten testified that, before the break in, she had never seen the intruder who entered the bedroom. Staten testified that Morehead later told her that he thought he knew the intruder who

entered the bedroom from school but could not remember his name. Staten further testified that at some point, Morehead told her that the individual's name was "Andre," although she could not recall when this occurred. The police later provided Staten with defendant's last name. Staten also acknowledged that at some point, Morehead looked at a website containing photographs. However, she stated that Morehead never shared with her any of the photographs he viewed on the website.

¶ 28 Staten testified that a day or two after the break in, the police came to her home to show her a photo spread. The officer told Staten that he was going to show her some photographs and that he did not know if the actual intruder was among the individuals depicted in the spread. The officer also had Staten sign a form. Thereafter, Staten was shown six photographs on a single piece of paper. Staten explained that, using her fingers, she covered the mouth and the forehead of some of the individuals depicted to try to visualize the intruder. After examining the photographs for a few minutes, Staten placed a circle around one of them. Staten explained that the photograph she circled was the person she thought committed the crime. Staten testified that she looked at each and every picture before circling one and that she did not immediately go to the photograph she circled. Staten admitted that between the time of the break in and the time she was shown the photo spread, she had already been given defendant's name.

¶ 29 On cross-examination, Staten testified that because her apartment was near a busy thoroughfare, streetlights often illuminated the interior of her apartment. Staten also explained that two televisions were on and provided light inside the apartment. Staten testified that the shorter of the two men broke through the bedroom door waiving a gun. The man was looking for something, but the only things Staten and Morehead had to offer him was some cash that was on the dresser and keys to Morehead's truck. At that point, the man stated that he would take Staten. Staten further

testified that when the intruder saw her with a cell phone, he took it away from her. Staten stated that there was a struggle during which she was no farther than arm's length from the intruder. Staten testified that she looked at the intruder "right in the eye" and that she "g[ot] a good look at his face." The intruder left with the cash, keys, and Staten's cell phone. Staten testified that she did not get an adequate look at the other individual involved in the break in. After the intruders left, Staten called 911 on another phone and informed the operator that the intruders took her cell phone, which could be tracked. Staten testified that Morehead did not share with her anything that happened between him and the police. Staten also testified that she went outside after the break in occurred, but did not remember it being dark. She stated that it appeared to be bright because the streetlights were on.

¶ 30 On redirect examination, Staten testified that she has white blinds as window treatments. She acknowledged that because it was night, the blinds were drawn. However, she stated that the light from the streetlights streamed through the blinds. Staten could not recall if the lights in the apartment were on. Staten also testified that she assumed that one of the suspects was on the photo spread she was shown by police.

¶ 31 Following Staten's testimony, defense counsel argued his motion with respect to the identification by Staten. Defense counsel noted that the photo spread consisted of six photographs on one piece of paper. He suggested that the procedure would have been less suggestive if the police had shown six individual photographs instead of a single piece of paper with six photographs on it. He also argued that the photo spread was suggestive in that defendant's photograph was the only "light skinned person" depicted.

¶ 32 The trial court denied the motion to suppress the identification by Staten. The court noted that Staten made the identification within 36 hours after the crime occurred. The court also noted

that Staten testified about the lighting condition, the opportunity to observe, the arm's length "tussle," and her ability to look at the offender's face during this time. The court pointed out that there was no evidence that Morehead shared with the Staten the information he found on the internet. Moreover, the court did not find the photo spread procedure suggestive. The court noted that Staten testified that the officer related the procedure to her and asked her if she recognized either of the intruders from the photos included in the spread. The court also concluded that the fact that the police presented Staten with a single piece of paper with six photographs did not, by itself, render the procedure unnecessarily suggestive. The court noted that while Staten indicated that one of the intruders was lighter skinned, there was no indication that the skin tone was what made her pick defendant from the photo spread. Rather, Staten testified that what made her select defendant was visualizing that area of the face above the lip and below the midpart of the forehead.

¶ 33

B. Trial

¶ 34 At trial, Daniel McNames, a 911 dispatcher for the City of Rockford, testified that at about 3:40 a.m. on December 29, 2009, he received an "open 911 call" from a cell phone. McNames explained that an "open 911 call" occurs when someone dials 911 and leaves the phone line open by, for instance, setting the phone down. McNames testified that where an open call indicates some type of problem, dispatchers are instructed to keep the call on the line. With respect to the call in question, McNames believed that "something major" was going on. He testified that he heard "a bunch of screaming." He also recalled hearing a male voice say, "Take the money. This is all I've got." McNames testified that because the call came from a cell phone equipped with a tracking device, he was able to locate the vicinity of the phone and he relayed this information to the police. During McName's testimony, a recording of the open 911 call was played for the jury.

¶ 35 Staten testified that in December 2009, she resided in an apartment at 1122 Greenmount Street in Rockford with her then six-year old daughter, Naziya. On the evening of December 28, 2009, Naziya fell asleep on the living room couch while watching television. Staten retired to her bedroom with Morehead, who was spending the night at the apartment. According to Staten, when she went to bed, televisions in both the living room and her bedroom remained on and the Christmas tree was still up.

¶ 36 Staten recounted that in the early morning hours of December 29, 2009, the family was awoken by loud banging on the front door and someone yelling “police.” Staten testified that she and Morehead got out of bed and went to the front door. As they did so, the front door opened and two masked men entered. Staten testified that the men were dressed entirely in black. Although the men were wearing ski masks, Staten indicated that the center of the intruders’ faces, from the top of the forehead to just above the lips, was exposed. Staten testified that both men were African-American and that the skin tone of one of the men was lighter than the other. She also testified that the lighter-skinned intruder was shorter than the intruder with the darker complexion. Although Staten could not recall if the intruders’ hands had anything on them, she noted that they both had guns.

¶ 37 Having observed the men break into the apartment, Staten and Morehead returned to the bedroom and tried to hold the bedroom door shut to prevent the men from entering that room. Despite their efforts, the lighter-skinned intruder broke the door and entered the bedroom. Staten testified that she, Morehead, and the intruder “tussled around” in the bedroom. During the tussle, Staten was able to call 911 on her cell phone. When the intruder noticed, he took the phone away from her. At some point, the intruder pointed a gun at Staten and asked her and Morehead for

money. Staten told the intruder that she had nothing to give him, so the intruder grabbed Staten and stated that he would take her instead. At that time, the intruder was only 1½ to 2 feet from Staten. Morehead told the man to take his truck and gave him his keys. The men left with Staten's phone, Morehead's truck keys, and some money that was on top of a dresser in the bedroom. After the men left, Staten comforted her daughter, while Morehead ran outside. Staten then used Morehead's cell phone to call the police.

¶ 38 Staten testified that she did not get a good look at the taller, darker-skinned man. However, she did get a good look at the lighter-skinned intruder. Staten noted that although there were no lights on in the apartment, illumination from the television sets and light filtering into the apartment from outside allowed her to observe the man who entered her bedroom. The following day, Staten identified defendant from a photo lineup as one of the intruders. Staten testified that she recognized the eyes and eyebrows in particular. Staten testified that the officer did not indicate whether he knew if any of the men in the array was one of the intruders. Staten made an in-court identification of defendant as the intruder.

¶ 39 On cross-examination, Staten testified that there were no overhead lights or lamps on in the apartment at the time of the home invasion. She also acknowledged that five of the six photos on the one-page array have brownish backgrounds while one of the photos has a bluish background. Staten testified that the photo she picked was the one with the bluish background. Staten also testified that one of the individuals in the array has lighter skin than the others. Staten testified that the photo that she picked was the individual with the lightest skin. Staten further testified that although the officer told her that he did not know if the suspect was in the photo lineup, she assumed

that he was. Staten did not know how long she looked at the lineup before selecting defendant's photograph, but she stated that she looked at each photo before doing so.

¶ 40 Morehead testified that he first became aware of the intruders when they started kicking the bedroom door. According to Morehead, Staten turned on the bedroom light as she and Morehead were attempting to hold the bedroom door shut to prevent the intruders from entering in the bedroom. Morehead testified that one of the men was able to kick through the bedroom door. Morehead described the individual who entered the bedroom as “[s]hort, light skinned, heavysset.” He was dressed in black and held a black revolver. Morehead did not notice anything on the individual's hands. Morehead testified that he could see the man's eyes, nose, and forehead, but his lips and chin were covered by the mask. Morehead testified that the men left the apartment after they realized that the police had been called. Morehead followed the men out of the apartment and observed them drive off in a small black car. Morehead estimated that the intruders were in the house for about 10 minutes.

¶ 41 When Morehead returned to the house, Staten was on the phone with law enforcement. Morehead testified that when the police arrived, he accompanied them to a location on 11th Street to identify a vehicle. The police showed Morehead two cars. Morehead identified the second car he was shown as the vehicle used by the intruders to flee. The police then returned Morehead to Staten's apartment.

¶ 42 Morehead testified that while waiting for the arrival of the police, he realized that he knew the intruder who had been in the bedroom but was unable to “put a name with the face.” Morehead testified that he went to school with the individual. He recalled that the person's first name was “Andre,” but he was unable to recall a last name. Morehead stated that he ran into Andre at a gas

station two months prior to the break in. At that time, the two greeted each other but did not have a long conversation. Morehead testified that when he returned to the apartment after accompanying the police to identify the vehicle, he contacted his sister for help in recalling Andre's last name. Morehead explained that his sister went to the same school and knew the mother of Andre's child. After Morehead contacted his sister, he told the police the intruder's name. Subsequently, Morehead used a computer at Staten's house to find a picture of the intruder. Morehead testified that he did not tell Staten about the photograph he found online.

¶ 43 Morehead testified that later on December 29, 2009, he met with a detective at the Rockford police department to provide a statement. During the course of the interview, Morehead was asked to look at some photographs. Morehead was asked to sign a notice before looking at the photos. He understood that the photos he would be presented may or may not depict the intruders, that he was under no obligation to identify anyone, and that the person conducting the array may or may not have known who the suspect was. After being shown a photo array, Morehead identified defendant as one of the intruders. He also made an in-court identification of defendant as the intruder. Morehead admitted that he told Staten that he went down to the police station "and made a statement." However, he stated that he did not share any details of what happened when he made the statement. In addition, he denied telling Staten that he identified one of the intruders from a photo lineup. Morehead admitted that, at the time of his testimony, he was in the custody of the Winnebago County jail and was facing charges for, *inter alia*, the manufacture and delivery of heroin and unlawful use of a weapon by a felon. He testified that he was not made any promises in exchange for his testimony against defendant.

¶ 44 Officer Brandon Pofelski of the Rockford police department testified that at about 3:40 a.m. on December 29, 2009, he was dispatched to the area of 11th Street and Ninth Avenue in reference to a home invasion. Pofelski located two small black vehicles in the area, one behind a building at 913 11th Street and one behind a building at 929 11th Street. Morehead was transported to the area by another officer to identify the vehicle and confirmed that the vehicle behind 929 11th Street was the suspect vehicle. Pofelski looked into the vehicle and observed a silver security badge on the front passenger seat. Pofelski testified that as a tow truck was arriving to transport the suspect vehicle to an impound garage, a white male came around a building at 921 11th Street. According to Pofelski, the man appeared “frantic” and stated, “Thank, God. You found my car.” Pofelski later identified the man as Michael Cannella. Pofelski followed the car to the impound and then returned to the area where the car was found. Pofelski tried to make contact with the residents of 921 11th Street, but no one answered his or her door. Pofelski then ran the license plates of vehicles in the building’s driveway and garage area. Pofelski testified that one of the vehicle he checked, a 1985 Chevy, was registered to defendant. Pofelski provided the information to his supervisor.

¶ 45 Detective Patrick Girardi of the Rockford police department testified that on December 29, 2009, he was assigned to process the crime scene at 1122 Greenmount Street. When Girardi arrived, he was briefed by another officer about what had occurred. Thereafter, Girardi examined the scene, took photographs, and collected evidence. Girardi testified that the front entrance door was damaged and that a hollow-core door to one of the bedrooms was “almost completely destroyed.” Girardi also checked for fingerprints, but did not find any. Girardi explained that many of the surfaces were not suitable for fingerprinting and he was told that the suspects were wearing gloves. Girardi took photographs of the scene, including the victims’ injuries, and made a diagram of the apartment.

Girardi further testified that on January 7, 2009, he was assigned to process a Toyota Paseo at the impound garage. Girardi testified that he was unable to find suitable fingerprints in or on the car. However, while processing the vehicle, Girardi located a silver badge on the front passenger seat that said "Special Officer." Girardi photographed the badge and collected it. Girardi did not find any fingerprints on the badge. On cross-examination, Girardi acknowledged that he had no information that a badge was displayed during the crime. Girardi also testified that he did not find a cell phone, a gun, or any money.

¶ 46 Detective Jimenez testified that on December 31, 2009, shortly before 9 a.m., he and several other officers went to 921 11th Street to look for a suspect in a home invasion case. Jimenez identified the suspect as defendant. Jimenez testified that officers found defendant, Bennet, and Patton in a building at 921 11th Street. He also testified that a black ski mask was recovered from an apartment in the building. Jimenez further testified that at the police station, he recovered an asthma inhaler and black gloves from defendant. Jimenez testified that on December 29, 2009, defendant was not a peace officer in the state of Illinois or any other state. On cross-examination, Jimenez acknowledged that it was winter at the time of the investigation. He also acknowledged that he did not find a gun, a cell phone, or any other property belonging to the complaining witnesses at the building. Jimenez testified that \$340 in cash was found on defendant.

¶ 47 Detective Jason Bailey of the Rockford police department testified that as part of the investigation of a possible home invasion at 1122 Greenmount, he met with Morehead at the police station on December 29, 2009, at around 11:10 a.m. Bailey testified that he presented Morehead with a "Line-Up/Photo Spread Notice," which Morehead signed and dated. Bailey explained that the notice informs the witness that he is about to view photographs of individuals, that the suspect

might not be in the photo spread and therefore the witness is not obligated to make an identification, and that the witness should not assume that the person administering the photo spread knows which person is the suspect in the case. Thereafter, Bailey presented a photo spread to Morehead that was assembled by Detective Jimenez. Bailey explained that a photo spread is created by obtaining a photograph of the suspect from a database and then obtaining photographs of subjects similar in appearance. Bailey stated that the police try to find other subjects that appear to be the same age, race, and sex and that have similar hairstyles, facial hair, and skin tone. Bailey testified that the photo array shown to Morehead consisted of a single sheet of paper with photographs of six different individuals on it. After examining the array, Morehead identified defendant as one of the men who broke into Staten's apartment.

¶ 48 Bailey further testified that on December 30, 2009, he met with Staten at her residence on Greenmount. Bailey told Staten that he had some photographs he wanted her to view. Bailey presented Staten with the "Line-Up/Photo Spread Notice," which she signed and dated. Bailey then showed Staten the photo array. Bailey testified that Staten identified defendant as the suspect that entered her bedroom on December 29, 2009. Bailey testified that on December 29, 2009, defendant was not a law-enforcement officer in the line of duty entitled to enter the Staten apartment.

¶ 49 On cross-examination, Baily testified that he did not tell Staten or Morehead that he did not know if the suspect was in the photo array or not, but he pointed out that that is written in the notice. Bailey was asked to describe the background color of the photographs in the arrays presented to Morehead and Staten. Bailey testified that three were gray, two were "grayish tan," and defendant's was "greenish yellow." Bailey admitted that defendant had the lightest skin of all of the individuals

depicted. Bailey also admitted that defendant's photograph was placed in the same position in both photo arrays.

¶ 50 The State then recalled Detective Jimenez. Jimenez testified that he assembled the lineups shown to Morehead and Staten. Jimenez explained that in selecting photographs for the lineup, he focused on the appearance of the individuals, including facial features, hair, and skin tone. He denied focusing on the background color of the photograph. Following Detective Jimenez's recall testimony, the State rested. Defense counsel moved for a directed verdict. The trial court denied the motion.

¶ 51 Defendant called Officer James Presley of the Rockford police department. Presley testified that during the early morning hours of December 29, 2009, he responded to a possible home invasion at 1122 Greenmount in Rockford and wrote a report. Presley testified that he arrived around 4 a.m. He described the area at that time as "dark" and stated that the only street light he could recall was located approximately one block east of the residence. When Presley arrived at the address, he spoke to Morehead and Staten. According to Presley, Morehead did not describe the build of the lighter-skinned assailant as stocky or heavysset.

¶ 52 Presley testified that he had two conversations with Morehead, one after Morehead went to view the cars on 11th Street and one before he went to view the cars. Presley testified that during the first conversation (before Morehead went to look at the cars), Morehead told him that he knew one of the intruders. However, Morehead did not tell Presley that he knew the individual's first name was Andre. Presley acknowledged that his report does not reflect that, during their first conversation, Morehead told him that he knew the individual. Rather, the report reflects that Morehead told Presley that he knew the intruder after Morehead returned from looking at the cars.

Moreover, Presley testified that Morehead told him that he called “several friends,” not his sister, to learn the suspect’s name. Presley also testified that Staten did not tell him that she was able to see the suspect’s forehead.

¶ 53 On cross-examination, Presley testified that Greenmount Street dead ends at North Second Street, which is a multilane highway illuminated by streetlights. Presley also stated that his report is a summary of what happened the evening in question and it does not contain every single detail. Presley added that before Morehead left the scene to look at the vehicles, he told Presley that he thought he recognized one of the intruders. Presley stated that although he did not put it in the report, Morehead stated that he knew the man from school or his grandmother’s house, that he was unable to recall a name, and that he was going to call some people. Presley testified that when Morehead returned from the vehicle search, he was still calling around. Shortly later, Morehead approached Presley in his squad car and stated “I think I got the guy. This is the guy.” Presley testified that Morehead then gave him defendant’s name.

¶ 54 The parties stipulated that if recalled to testify, Detective Jimenez would testify that at the time of defendant’s arrest, defendant was wearing eyeglasses. The defense then rested. Defense counsel filed a motion for directed verdict at the close of all the evidence. The trial court heard and denied the motion. The parties presented closing argument. Following deliberations, the jury found defendant guilty on all four counts.

¶ 55 Defendant filed a motion for a new trial, which the trial court denied. On August 27, 2010, following a hearing, the trial court pronounced sentence. Initially, the trial court vacated the two convictions of home invasion while armed with a dangerous weapon other than a firearm (counts III and IV). It entered judgments of conviction on the two counts of home invasion while armed with

a firearm (counts I and II). See 720 ILCS 5/12-11(a)(3) (West 2008). The court sentenced defendant to a term of 33 years' imprisonment on each of the two remaining convictions, with the sentences to run concurrently. The sentences included a 15-year enhancement, which was triggered by the jury's finding that defendant was armed with a firearm at the time he committed the offenses. On September 8, 2010, defendant filed an amended motion for a new trial and a motion to reconsider his sentence. The trial court denied both motions. This appeal followed.¹

¶ 56

II. ANALYSIS

¶ 57

A. Reasonable Doubt

¶ 58 We first address defendant's argument that the State failed to prove him guilty of home invasion beyond a reasonable doubt. In particular, defendant questions the reliability of Staten's and Morehead's identifications of him. Defendant stresses that there was conflicting testimony about the lighting conditions at the time of the break in; the witnesses' testimony established that the scene of the crime was chaotic; Staten's descriptions of the offender, including her testimony regarding the visible portions of the offender's face, were vague; Morehead did not identify a single distinguishing facial characteristic of the offender; and the photo spreads were "unnecessarily and

¹ On appeal, defendant was originally represented by the Officer of the State Appellate Defender (OSAD). OSAD filed a brief on defendant's behalf, raising a single issue—that one of defendant's convictions of home invasion should be vacated on one-act, one-crime principles. Subsequently, defendant moved to discharge OSAD and have new counsel appointed. We allowed defendant's request in part and discharged OSAD as counsel, but denied his request for the appointment of a new attorney. Thereafter, defendant elected to proceed *pro se*. We then allowed defendant to adopt OSAD's brief and granted his motion to file a supplemental brief.

grossly suggestive” in that defendant had the lightest skin of those depicted and the background color of defendant’s photo was different from the background color of the other photos.

¶ 59 When reviewing a challenge to the sufficiency of the evidence, “ ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is the responsibility of the trier of fact to determine the credibility of witnesses and draw conclusions after reviewing all of the evidence. *People v. Smith*, 165 Ill. App. 3d 905, 910 (1988). As such, a court of review will not substitute its judgment for that of the trier of fact on issues involving the credibility of witnesses. *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998). “Unless vague or doubtful, eyewitness identification of an accused, even that of a single witness, will sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification.” *Negron*, 297 Ill. App. 3d at 529. In evaluating identification testimony, Illinois courts consider various factors, including the following developed by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the opportunity the witness had to view the suspect at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the suspect; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification. See *People v. Standley*, 364 Ill. App. 3d 1008, 1014 (2006). Discrepancies and omissions as to facial and other physical characteristics are not fatal, but merely affect the weight to be given the identification testimony. *Negron*, 297 Ill. App. 3d at 530. Such discrepancies and omissions do not

in and of themselves generate a reasonable doubt as long as a positive identification has been made. *Negron*, 297 Ill. App. 3d at 530.

¶ 60 Here, the evidence establishes that the two eyewitnesses had ample opportunity to view the offender at the time of the crime and that their attention was fixed on the intruder. Morehead estimated that the intruders were in the house for about 10 minutes. Although the witnesses' testimony differed as to the source of light in the bedroom, they both indicated that there was sufficient illumination and they both agreed that the intruder was short with a light complexion. While the scene was chaotic, Staten noted that during the "tussle" that occurred in the bedroom, the intruder came within 1½ to 2 feet of her and was close enough to grab her arm. Morehead recognized the intruder as a former school classmate and recounted that he saw defendant and had a brief interaction with him at a gas station just two months prior to the break in. Moreover, both Staten and Morehead independently identified defendant as one of the intruders when presented with a photo lineup. Morehead's identification occurred within hours of the break in while Staten's occurred less than 36 hours after the break in. Subsequently, both Staten and Morehead unequivocally identified defendant as the intruder in court. Given this evidence, we find that an application of the *Neil* factors compels us to find that Staten's and Morehead's identifications of defendant were reliable. With respect to defendant's claim that the photo spreads were unduly suggestive, we point out that the jury was made aware of defendant's allegations via defense counsel's questioning of Staten and Officer Bailey. Further, the jury was given the photo spreads to review during deliberations. Nevertheless, they rejected defendant's allegations. Indeed, our research reveals that potentially more prejudicial photo spreads have been found not to be so suggestive as to merit reversal. See *People v. Smith*, 160 Ill. App. 3d 89, 92-93 (1987) (and cases

cited therein). Accordingly, after viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Therefore, we reject defendant's argument that Staten's and Morehead's identifications were insufficient to prove him guilty of home invasion beyond a reasonable doubt.

¶ 61

B. Ineffective Assistance of Counsel

¶ 62 Next, defendant claims that his attorney rendered ineffective assistance during pre-trial proceedings and at trial.² The sixth amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. U.S. Const., amend VI; see *People v. Hattery*, 109 Ill. 2d 449, 460 (1985). Effective assistance of counsel means competent, not perfect, representation (*People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006)) and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance (*People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001)). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). The defendant must establish both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that, but for this substandard performance, there is a reasonable probability that the outcome of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984), citing *Strickland*, 466 U.S. at 687-94. "Because [a]

² Defendant also alleges ineffective assistance of appellate counsel. However, as the State points out in its brief, this court allowed defendant to dismiss appellate counsel. Defendant then elected to proceed *pro se*, adopted the brief filed by OSAD prior to its dismissal, and filed a supplemental brief. Since defendant elected to represent himself, there is no ineffective assistance of appellate counsel.

defendant must satisfy both prongs of the test, the failure to satisfy either element precludes a finding of ineffective assistance of counsel under *Strickland*.” *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). In applying the *Strickland* test, a reviewing court examines the totality of counsel’s representation in light of all the relevant circumstances and the strong presumption of adequacy and reasonableness. *People v. Buchanan*, 211 Ill. App. 3d 305, 317 (1991).

¶ 63 We first address defendant’s contention that trial counsel was ineffective during the hearing on the motion to suppress physical evidence. Defendant claims that counsel erred in failing to call as a witness the landlord of Bennett’s building. Defendant asserts that the landlord would have testified that “he opened the interior doors to the apartment allowing the police entrance to the apartment.” According to defendant, this testimony would have “coincided” with Bennett’s testimony that she never consented to a search of the apartment.

¶ 64 Decisions concerning which witnesses to call at trial and what evidence to present on defendant’s behalf ultimately rest with trial counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79; *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000). It is well established that these types of decisions are considered matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *Wilborn*, 2011 IL App (1st) 092802, ¶ 79. Moreover, we fail to see how defendant was prejudiced by any failure to call the landlord. In denying defendant’s motion to suppress physical evidence, the trial court relied on its findings that (1) Bennett had the authority to consent to the search because she was staying with her children in the apartment and (2) Bennett consented to a search. With respect to the latter finding, the court found more credible the testimony of the police that Bennett verbally consented than Bennett’s testimony that she did not verbally consent to the search. Whether the landlord opened the door to Bennett’s apartment would not

negate the trial court's findings that Bennett verbally consented to a search and that her testimony to the contrary was not credible. As such, it would not have changed the ruling on the motion to suppress evidence. Therefore, we find that trial counsel was not ineffective for not calling the landlord at the hearing.

¶ 65 Defendant also contends that trial counsel was ineffective at the hearings on the motions to suppress identification. Defendant cites three reasons in support of this claim. First, he argues that trial counsel should have called Officer Presley at the hearings on his motions to suppress identification. Second, he criticizes counsel for failing to present oral argument at the hearing on his motion to suppress Morehead's identification. Finally, he argues that counsel erred when he argued at the hearing on the motion to suppress Staten's identification that the single photographic method was more reliable than a photo spread containing six pictures. We address each contention in turn.

¶ 66 Defendant argues that counsel erred when it failed to call Officer Presley at the hearings on his motions to suppress identification because, had he been called, Presley would have "strongly contradicted and impeached Morehead and Staten's testimony." Initially, we again note that the decision which witnesses to call is a matter of trial strategy and generally immune from claims of ineffective assistance of counsel. *Wilborn*, 2011 IL App (1st) 092802, ¶ 79. In addition, we fail to see how defendant was prejudiced by the failure to call Presley at the hearings on his motion to suppress identification.

¶ 67 Defendant claims that had Presley been called to testify at the hearing to suppress Morehead's identification, "[Presley's testimony] would have shown the court that Morehead never made mention of a name, or assert[ed] that he allegedly recognized [defendant] until after he made several

phone calls and looked him up on the computer.” With respect to this claim, the record demonstrates that it was counsel’s strategy to challenge Morehead’s credibility regarding when Morehead learned of defendant’s name without calling Presley. During the suppression hearing, Morehead testified that he did not know defendant’s first or last name when he initially spoke to the police. Thereafter, the following exchange occurred between defense counsel and Morehead:

“Q. All right. And you wrote ultimately—do you recall telling police officers that you didn’t think of his name until you were speaking with the police officers and recalled that his name was Andre?

A. Yeah.

Q. Okay. Did you—did you not indicate a few minutes ago that you didn’t have a first name? You didn’t have any name until you called your sister; is that right?

A. When I talked to my sister, the police officer was doing his reports in the car. I went outside and talked to him, and I told him the name. The officer said to me we already have his name.

Q. Who gave the name first, you to the police or the police to you?

A. Me to the police.”

Counsel further emphasized Morehead’s changing testimony by asking Morehead if he remembered giving a written statement to the police. Morehead responded affirmatively. Counsel then asked Morehead, “[d]id you indicate here in the statement that you thought that you remembered the name Andre first and that your sister got you the last name?” Morehead responded in the affirmative. The foregoing demonstrates that trial counsel determined, as part of his trial strategy, that emphasizing

the difference between Morehead's testimony and his written statement would be more effective in attacking Morehead's credibility.

¶ 68 We also find that had counsel called Presley at the hearing on the motion to suppress, Presley's testimony would have undermined counsel's challenge to Morehead's credibility. At trial, Presley testified that when he first spoke with Morehead, Morehead told him that he knew one of the intruders, but that he did not know the individual's name. At the suppression hearing, Morehead testified that he initially told police that he recognized the intruder who entered the bedroom, but that he "couldn't put a name to the face." Thus, Presley's testimony would have corroborated Morehead's testimony that he initially told the police that he did not know defendant's first name. Similarly, defendant's assertion that Presley would have stated that Morehead did not recognize defendant until after he spoke to his sister and looked him up on the computer is refuted by the record. At the suppression hearing, Morehead testified that although he could not recall a name, he recognized the intruder who entered the bedroom before he spoke with anyone. Therefore, Presley's testimony would not have contradicted Morehead's statement. We therefore find that defendant has failed to establish prejudice by defense counsel's failure to call Presley at the hearing on his motion to suppress Morehead's identification and that defense counsel was therefore not ineffective for failing to do so.

¶ 69 Defendant also insists that counsel was ineffective for failing to call Officer Presley at the hearing on his motion to suppress Staten's identification. According to defendant, Presley would have testified that "Staten never made mention of any other portions of the face that were visible except for the eyes and nose." However, Presley's testimony at trial showed that his testimony would not have contradicted Staten's testimony at the suppression hearing. At trial, Presley testified

that Staten told him that the gunman wore “a black ski mask with the eyes and nose exposed.” At the hearing on the motion to suppress identification, Staten testified that the intruder wore “a black mask, and it only covered his mouth and upper forehead.” Defense counsel then asked Staten whether the mask covered the intruder’s cheeks. In response, Staten made a gesture with her hands, which the trial court described as follows: “She’s drawing a circle. She started with both—I think it was her index fingers right above her lips, and then she moved both fingers up toward her forehead in a circular fashion and then closing the fingers somewhere around midforehead.” As the foregoing illustrates, Staten’s testimony at the suppression hearing was not inconsistent with Presley’s testimony at trial that Staten told him she could see the eyes and nose of the gunman. Therefore, counsel did not err when he did not call Presley at the hearing on the motion to suppress Staten’s identification because Presley’s testimony would not have contradicted Staten’s testimony.

¶ 70 Next, defendant argues that trial counsel was ineffective for not presenting oral argument at the close of the hearing on the motion to suppress Morehead’s identification. Initially, we note that defendant has not cited any case law that supports his contention that counsel is required to present oral argument in order to provide effective assistance. Moreover, defendant’s position ignores the fact that counsel filed a written motion to suppress challenging the photographic spread procedure and identification of him. The motion contained detailed reasons why the photographic spread was flawed, including an allegation that there was a significant disparity in age, height, dress, complexion, and other distinguishing characteristics between defendant’s photograph and the photographs of the other individuals included in the spread. Counsel further questioned Morehead regarding the circumstances surrounding his ability to make an identification and the nature of the spread.

¶ 71 Defendant insists that by not presenting oral argument, “counsel failed to highlight the evidence most favorable to the defense,” including Morehead’s impeachment at the hearing on the motion, the manner in which Morehead learned of defendant’s name, that defendant had the lightest skin of the individuals depicted in the photo spread, and that the background of defendant’s photograph was a different color than the other photographs. We fail to see how oral argument would have changed the outcome of the hearing on the motion to suppress Morehead’s identification. The hearing on the motion to suppress Morehead’s identification was held over the course of one part of an afternoon. Morehead was the only witness at the hearing. As noted above, during questioning, defense counsel challenged Morehead’s credibility by noting that he was incarcerated on charges of intent to deliver heroin. Defense counsel also brought out inconsistencies between Morehead’s testimony and the statement he gave police. Further, the State also waived oral argument and the trial court announced its decision shortly after Morehead finished his testimony. The court acknowledged that defendant appeared “slightly lighter in complexion” than the other five men depicted in the spread. Nevertheless, the court found that this did not necessarily render the spread suggestive. The court further emphasized that Morehead had 10 minutes to observe the offender, the light was on at the time of the crime, Morehead had contact with defendant as recently as a month or two before the break in, Morehead knew defendant from prior dealings, Morehead testified that he was looking at defendant’s eyes the whole time, Morehead did not hesitate when selecting defendant from the photo spread, and the short time that passed between the time of the break in and the time of Morehead’s identification. Given the immediacy of the trial court’s ruling in relation to Morehead’s testimony coupled with its cogent reasoning, we fail to see how oral argument would have changed the outcome of the ruling, and we therefore reject defendant’s claim

that defense counsel was ineffective for failing to present oral argument at the close of the hearing on the motion to suppress Morehead's identification.

¶ 72 Defendant argues that counsel was ineffective at the hearing on his motion to suppress Staten's identification because counsel argued that the single photograph method is more reliable than a photo array of six. According to defendant, counsel made this argument "despite what the leading cases have ruled and set forth as a standard for admissibility for identifications." However, defendant miscomprehends counsel's argument at the suppression hearing. Defendant cites to cases that discourage police from (1) displaying to a witness only a photograph of a single individual or (2) showing pictures or conducting a lineup of several persons among which a single individual recurs or is in some way emphasized. See, e.g., *Foster v. California*, 394 U.S. 440, 442-43 (1969); *Simmons v. U.S.*, 390 U.S. 377, 383-84 (1968). That is not what counsel argued in this case. Here, counsel insisted that the police should have given Staten six individual photographs instead of one piece of paper with six photographs on it. This argument does not make trial counsel deficient in performance.

¶ 73 Defendant next argues that trial counsel was ineffective for failing to highlight inconsistencies between Morehead's testimony at the motion to suppress identification and his testimony at trial. In particular, defendant complains that at trial, Morehead testified that he initially told police that he knew one of the intruders by the name of "Andre," whereas at the hearing on the motion to suppress identification, Morehead indicated that he knew who the intruder was but could not put a name to the face. Defendant claims that had the jury been informed of this inconsistency along with others involving Morehead's description of the intruder, there is a reasonable probability that the result of the proceedings would have been different. We disagree.

¶ 74 While counsel may not have asked Morehead at trial about inconsistencies between his testimony at the motion to suppress identification and his testimony at trial, he challenged Morehead's credibility in other ways. For instance, defense counsel emphasized that Morehead had charges pending against him and that a petition to revoke probation was pending against him at the time of the break in. Counsel also emphasized inconsistencies in Morehead's testimony regarding whether he was able to identify defendant's voice on the recording of the 911 call. In addition, through the testimony of Officer Presley, trial counsel established that Presley had two conversations with Morehead. Presley testified that during the first conversation, Morehead indicated that he recognized one of the intruders, but could not remember his name. Presley further testified that, during the second conversation, Morehead told him that he had called some friends, not his sister, to come up with the suspect's name. Thus, the jury was made aware that Morehead's credibility was at issue and that Morehead provided inconsistent accounts regarding whether he knew defendant's first name when he initially spoke with the police. It was counsel's choice of trial strategy to challenge Morehead's credibility by calling Presley to refute Morehead's testimony about what he told police instead of using Morehead's testimony at the hearing on the motion to suppress Morehead's identification. In other words, this was a tactical decision. Therefore, counsel was not deficient.

¶ 75 Lastly, defendant suggests that counsel was ineffective for failing to challenge certain aspects of the testimony of Morehead and Officer Presley on the grounds that it constituted inadmissible hearsay. Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). Defendant claims that

Morehead's testimony that he called his sister to find out defendant's last name constituted inadmissible hearsay. We disagree. Morehead did not testify regarding what his sister told him. Rather, he testified why he called his sister and what actions he took after he called her. See *People v. Malave*, 230 Ill. App. 3d 556, 561 (1992) (holding that where witness testified that she spoke with out-of-court declarant but did not relate contents of the conversation there was no hearsay issue). Since there was no basis for counsel to object to this testimony on hearsay grounds, counsel's failure to do so could not constitute ineffective assistance. We also note that the trial court did sustain an objection by defense counsel when the State asked Morehead a question that could have elicited what his sister said to him.

¶76 Defendant further contends that Officer Presley's testimony on cross-examination constituted hearsay. Defense counsel called Officer Presley to point out inconsistencies between Morehead's testimony at trial and his statements to police. On cross-examination, the State questioned Officer Presley about the two conversations he had with Morehead. Presley testified that during the second conversation, Morehead identified defendant by name as one of the intruders after Morehead spoke with a third party. Defendant insists that counsel should have challenged this testimony because it constituted "double hearsay" since Officer Presley testified about what Morehead was told by a third party. See *People v. Flewellen*, 273 Ill. App. 3d 1044, 1051 (1995) ("A police officer may testify that he had a conversation with a complainant, but he may not testify as to the substance of conversation, as it is impermissible hearsay."). Defendant contends that counsel's failure to object to the testimony or to raise the matter in a posttrial motion resulted in ineffective assistance. Defendant further contends that any error was compounded when, during closing argument, the State referred to Officer Presley's testimony and counsel failed to object.

¶ 77 However, the admission of hearsay is harmless if there is no reasonable probability that the verdict would have been different had the complained-of evidence been excluded. See *People v. Sample*, 326 Ill. App. 3d 914, 924-25 (2001). Defendant claims that Officer Presley’s testimony “was highly prejudicial” to him. He insists that the State’s case “was not so overwhelming” and that “[t]he jury surely used it to find [him] guilty.” We disagree. Morehead identified defendant both in the photo spread and in court as one of the perpetrators of the home invasion. Staten also independently identified defendant in a photo spread and in court as one of the intruders. Further, as discussed above, the identification testimony was reliable. This evidence leads us to conclude that any error in admitting the alleged hearsay testimony was not prejudicial. Since defendant cannot show that there is a reasonable probability that the outcome of the proceeding would have been different, his claim of ineffective assistance of counsel based on this alleged error must fail.

¶ 78 C. One-Act, One-Crime Rule

¶ 79 Finally, defendant argues that one of his two home invasion convictions must be vacated because the State’s evidence proved only one illegal entry into Staten’s apartment. The State concedes that, pursuant to *People v. Cole*, 172 Ill. 2d 85, 102 (1996), and *People v. Dryden*, 363 Ill. App. 3d 447, 453 (2006), one of defendant’s convictions should be vacated. We agree. Under the one-act, one-crime rule, more than one offense may not be carved out of a single physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). In this case, the evidence shows that there was only a single entry to the residence in question. In *Cole*, the supreme court held that a single entry will support only one conviction under the home invasion statute, regardless of the number of occupants in the dwelling. *Cole*, 172 Ill.2d at 101-02; see also *People v. Sims*, 167 Ill. 2d 483, 523 (1995); *People v. Braboy*, 393 Ill. App. 3d 100, 112-13 (2009); *People v. Morgan*, 385 Ill. App. 3d 771, 773

(2008). Since the victim named in count II of the indictment was a person under the age of 12 and the victim named in count I was not, we vacate defendant's conviction of and sentence for count I (the home invasion naming Staten as the victim) and affirm the conviction of and sentence for count II (the home invasion naming Naziya as the victim). See *People v. Thomas*, 384 Ill. App. 3d 895, 900-01 (2008), citing *People v. Garcia*, 179 Ill.2d 55, 71 (1997) ("When multiple convictions of greater and lesser offenses are obtained for offenses arising from a single act, a sentence should be imposed on the most serious offense and the convictions on the less serious offenses should be vacated").

¶ 80

III. CONCLUSION

¶ 81 For the reasons set forth above, we vacate defendant's conviction of and sentence for home invasion as alleged in count I. We otherwise affirm the judgment of the Circuit Court of Winnebago County.

¶ 82 Affirmed in part and vacated in part.