

No. 1-11-0838

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 2674
)	
MARVIN THURMAN,)	Honorable
)	Noreen V. Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* The identification by two witnesses of defendant along with circumstantial evidence was sufficient to prove defendant guilty beyond a reasonable doubt. Defendant's ineffective assistance of counsel claim must fail because he cannot establish how he was prejudiced by trial counsel's failure to file a motion to suppress. Defendant was properly subject to the three-year term of mandatory supervised release that accompanies a Class X felony because he was sentenced, based upon his background, as a Class X offender.
- ¶ 2 Following a bench trial defendant Marvin Thurman was convicted of attempted aggravated kidnaping, aggravated battery and two counts of vehicular invasion. He was sentenced, due to his background, to Class X prison terms of 12 years for the three counts of

attempted aggravated kidnaping and vehicular invasion and 7 years for the aggravated battery, all sentences to be served concurrently. Defendant appeals, contending that he was not proven guilty beyond a reasonable doubt because the identification evidence in this case was unreliable. He further contends that he was denied the effective assistance of counsel when his attorney failed to file a motion to suppress based on lack of probable cause to search him. Defendant finally contends that the trial court improperly imposed the three-year term of mandatory supervised release (MSR) that accompanies a Class X felony when he was convicted of the Class 1 felonies of attempted aggravated kidnaping and vehicular invasion. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant and codefendant Rickey Terry were arrested after a January 2010 incident during which two men attempted to push the victim Juana Godinez (Godinez) into her SUV.¹ The matter proceeded to a simultaneous, yet separate, bench trial.

¶ 5 At trial, the victim testified that as she exited her SUV, two men tried to push her back inside the vehicle. These men were wearing black puffy jackets, jeans and masks. The taller male wore a "complete" mask. The victim looked this individual in the eyes and determined that he was Caucasian. The shorter individual, who was wearing a mask that was similar to a scarf, was an African-American male. After the taller male attempted to push the victim, she fell to the ground. The victim began to scream and offered the men her purse and keys. At the same time, the shorter individual obtained her cellular phone and kicked it under the SUV. This shorter male, who had been assisting the taller male in attempting to push the victim into the SUV, went to the passenger side, opened the door and tried to pull her into the vehicle from that side. She was half-in the SUV screaming when she heard a "mean lady voice" inquire what was going on. The African-American male said something to the Caucasian male and commenced running in

¹ Codefendant is not a party to this appeal.

the direction of Harlem and Cermak. After pushing her one last time, the Caucasian individual also ran away.

¶ 6 The victim spoke to the police within minutes and then accompanied officers five blocks away to a bus. There, she identified defendant and codefendant who were wearing the same clothes, were the same height and had the same complexions, as the men from the parking lot. The police also exhibited the two masks, which she identified.

¶ 7 Jacquelyn Boyce testified that as she walked toward a store she noticed two men. The taller male was wearing a puffy jacket with a hood, blue jeans, and a full face mask. Through the holes in the mask, she observed that this individual was Caucasian. The shorter individual was African-American and wearing a dark puffy coat, darker blue jeans, a skull cap, and a half-mask. When Boyce later left the store, she heard screaming. She recognized the two men she observed earlier standing on either side of a SUV. The taller male was grabbing a screaming woman, and the shorter individual was on the passenger side. Boyce yelled to leave the woman alone. After two or three minutes, the shorter individual, who was standing on the passenger side of the vehicle, said something and the two men ran away. Although Boyce saw these men enter a bus shelter, she did not see them board a bus. When she later spoke to a police officer, she said that the men had "probably" boarded the bus.

¶ 8 When the officer inquired of Boyce whether she could identify the men, she responded that she had not seen their faces, but knew what they were wearing. Within two to five minutes, an officer escorted her and the victim to a stopped bus. Three men were then removed from the bus, defendant who is African-American, codefendant who is Caucasian, and a Hispanic male. Although the defendant and codefendant were not wearing masks, Boyce recognized their dark-colored puffy jackets and their jeans as those worn by the men in the parking lot. The officers later presented to Boyce two masks which she identified as those worn by the men in the parking

lot. During cross-examination, she admitted that she informed the officers that defendant fit the general description of one of the men, but was not positive if he was the same person.

¶ 9 Cynthia Esters, a Chicago Transit Authority (CTA) bus driver, testified that when the bus stopped at Harlem and Cermak five individuals entered the bus. One was an African-American male wearing a heavy down coat with a hood and a ski mask which covered the nose and mouth. The next passenger was a Caucasian male wearing a ski mask and a heavy hooded coat. Esters noticed that although these men had been waiting for the bus, both were breathing very heavily. These men went to the rear of the bus and sat on opposite sides of the bus, but later sat next to each other. None of the three other individuals were wearing masks. She saw codefendant take off his mask and put it in his pocket. Esters then continued on her route until she was stopped by police. She pointed out the individuals who had boarded the bus at the last stop to the police officers and watched as defendant and codefendant were taken off the bus. A video surveillance recording from the bus was then published.

¶ 10 Officer Richard Volanti testified that after speaking to Esters, he went to the rear of the bus where he saw defendant and codefendant. Although the men were not wearing masks, they were wearing outfits that matched an earlier description he received from dispatch, *i.e.*, puffy hooded jackets. Once the victim and Boyce arrived, a show-up was conducted which included defendant, codefendant and another man. Although the victim could not positively identify codefendant and defendant because the men in the parking lot had worn masks, she indicated that codefendant and defendant were the same height and were wearing the same jackets. After the show-up, the officers were "looking for masks" and searched codefendant. A winter hat was removed from codefendant's head. When this hat was "unraveled," Volanti discovered that it was a knit ski mask. He subsequently recovered a Nyloprene "type of hat," that is, "a mask that covered up to the nose" from around defendant's neck where it had been covered by a scarf.

When he presented these masks to the victim and Boyce, both women identified them as those worn by the men in the parking lot. Defendant and codefendant were then arrested.

¶ 11 Officer Ricky Smith testified that when he spoke with the victim, she described the men as tall and thin wearing black clothes and puffy jackets, and that the Caucasian individual was slightly taller. At "that exact moment," the victim was unsure of the second man's ethnic background.

¶ 12 Ultimately, the court found defendant guilty of attempted aggravated kidnaping, aggravated battery and two counts of vehicular invasion, and sentenced as described above.

¶ 13 On appeal, defendant first contends that he was not proven guilty beyond a reasonable doubt because the identification evidence in this case was unreliable. He argues that the victim and Boyce identified him by his puffy winter coat and half-face mask, rather than his face, and that such an identification is unreliable because many Chicagoans wear puffy coats and face masks in January.

¶ 14 ANALYSIS

¶ 15 I. Circumstantial Evidence

¶ 16 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272; see also *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (it is the trier of fact's responsibility to determine the appropriate weight to afford each witness's testimony, resolve any conflicts or inconsistencies in the evidence, and draw reasonable inferences from the testimony at trial). A

defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 17 The State has the burden of proving beyond a reasonable doubt the identity of the person who committed a crime. See 720 ILCS 5/3-1 (West 2010). A single witness's identification is sufficient when that witness viewed the defendant under circumstances that permitted a positive identification; such testimony does not need to be corroborated or unequivocal. *People v. Tatum*, 389 Ill. App. 3d 656, 661 (2009). Factors to be considered when evaluating an identification include: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989), citing *Neil v. Biggers*, 409 U.S. 188 (1972).

¶ 18 Initially, this court notes that defendant relies in part on studies regarding the reliability of eyewitness testimony, none of which appear to have been introduced at trial. Although the law in this area is evolving in some jurisdictions, Illinois continues to reject expert testimony on the reliability of eyewitnesses. See, e.g., *People v. McGhee*, 2012 IL App (1st) 093404, ¶¶ 53-55.

¶ 19 Here, taking the evidence in the light most favorable to the State, as we must, the evidence for conviction was strong when two witnesses identified defendant as one of the men who tried to pull the victim into her SUV. The victim testified that she identified defendant because he was wearing the same clothes, was the same height and had the same complexion as the shorter individual from the parking lot. Boyce also testified that she recognized defendant's dark puffy jacket and jeans. Both women subsequently identified the half-mask worn by defendant in the parking lot.

¶ 20 Although neither the victim nor Boyce saw the men from the parking lot get on the bus, circumstantial evidence suggests that they did. Circumstantial evidence is proof of facts or circumstances that give rise to reasonable inferences of other facts that tend to establish the guilt or innocence of a defendant. *People v. Dent*, 230 Ill. App. 3d 238, 243 (1992). A fact finder does not have to be satisfied beyond a reasonable doubt as to each link in a "chain" of circumstantial evidence as long as the evidence, taken as a whole, satisfied the fact finder beyond a reasonable doubt. *Dent*, 230 Ill. App. 3d at 243. Here, the victim testified that after the men stopped pushing her they ran in the direction of Harlem and Cermak, Boyce testified that she observed the men go into the bus shelter, and Esters testified that an African-American male wearing a down coat and a half-mask boarded the bus at Harlem and Cermak. A half-mask recovered from defendant was subsequently identified by the victim and Boyce. It was for the trial court, as the trier of fact, to draw reasonable inferences from the evidence at trial. *Ross*, 229 Ill. 2d at 272. Ultimately, viewing the evidence in a light most favorable to the State, this court cannot say that no rational trier of fact could have found defendant guilty when his complexion and outfit matched that of one of the men from the parking lot, he was located on a bus which picked up two men wearing puffy coats and masks from the bus shelter that the men were observed entering, and two witnesses identified a half-mask recovered from his possession. *Ross*, 229 Ill. 2d at 272.

¶ 21 Defendant, on the other hand, contends that the identifications in this case were unreliable because neither of the eyewitnesses described his face. Initially, this court rejects defendant's argument that identifications are *per se* unreliable when a witness is unable to see a defendant's face as to accept such a position would prevent identifications in any case where a defendant covered his face. Although neither witness saw the faces of the men in the parking lot, that did not doom their identifications of defendant.

¶ 22 Our supreme court has held that "a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification." *Slim*, 127 Ill. 2d at 308-09. Rather, an identification can be sufficient even when it is "a general description based on the total impression" made by person's appearance. *Slim*, 127 Ill. 2d at 309. This court has previously held that the identification of distinctive clothing worn by a defendant may be sufficient to sustain his conviction, and in those cases where other evidence of guilt exists, a positive facial identification is not required. See *People v. Ward*, 66 Ill. App. 3d 690, 693 (1978). Here, both the victim and Boyce observed the men in the parking lot at the time of the incident, spoke with the police within minutes and gave consistent descriptions of the two men. Although neither woman observed defendant's face, both recognized defendant's outfit and identified the half-mask recovered from defendant; this general description based on the total impression made by defendant in the parking lot was sufficient to support the identifications. *Slim*, 127 Ill. 2d at 308-09; see also *People v. Watson*, 87 Ill. App. 2d 453, 456 (1967) (although an identification based on a defendant's general build and clothing may "by itself seem weak," this weakness did not render the identification valueless; additionally, there was circumstantial evidence of the defendant's guilt). Here, the men from the parking lot were seen approaching a bus stop and when the bus was stopped several blocks away defendant and codefendant, who matched the same general description, were located on the bus.

¶ 23 This court is unpersuaded by defendant's reliance on *People v. Hughes*. 59 Ill. App. 3d 860 (1978). In *Hughes*, two men ran up behind the victim, rammed her head into a tree and took her purse. On appeal this court found the defendant had not been proven guilty of robbery beyond a reasonable doubt when the victim only saw, while "in an admittedly staggered condition," the backs of the men who robbed her and their clothing from a distance. See *Hughes*, 59 Ill. App. 3d at 861-62. Here, the victim and Boyce were able to observe defendant during the

altercation in the parking lot and as he ran away, Esters saw a man wearing a puffy coat and half-mask get on the bus, and a half-mask was later recovered from defendant.

¶ 24 Ultimately, issues of witness credibility are for the finder of fact to determine. *Ross*, 229 Ill. 2d at 272. Here, the trial court found the victim and Boyce's identifications to be credible; this court will not substitute its judgment for that of the trial court on this issue. *Ross*, 229 Ill. 2d at 272. Because this is not one of those cases where the evidence was so improbable or unsatisfactory that it created a reasonable doubt as to defendant's guilt (*Siguenza-Brito*, 235 Ill. 2d at 225), this court affirms his convictions.

¶ 25 II. Ineffective Assistance of Counsel

¶ 26 Defendant next contends that he was denied the effective assistance of counsel by counsel's failure to file a motion to quash arrest and suppress evidence. Although defendant concedes that his initial detention by the police was a valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968), he contends that the subsequent searches of his person were improper evidentiary searches that were not supported by probable cause. He further argues that because the search which recovered the half-mask was improper, a motion to suppress would have had a reasonable probability of success and it was therefore unreasonable for trial counsel not to file such a motion.

¶ 27 Initially, this court notes that the State argues that defendant's argument is inappropriate based upon the record before this court because the record was not developed for the purpose of preserving or litigating this claim. Although it is certainly true that in some cases the trial record is incomplete or inadequate to evaluate such a claim (see *People v. Henderson*, 2013 IL 114040, ¶ 22 (May 23, 2013)), in the case at bar the record contains a CTA surveillance video and testimony from the officers, the type of evidence which would have been elicited at a suppression

hearing. Therefore, the record is sufficient such that this court may review the merits of defendant's claim.

¶ 28 To establish ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced him. *Henderson*, 2013 IL 114040, ¶ 11, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to succeed on an ineffective assistance of counsel claim, a defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70. The decision whether to file a motion to suppress is generally considered a matter of trial strategy that will typically not support a claim of ineffective assistance of counsel. *Snowden*, 2011 IL App (1st) 092117, ¶ 70. Because a defendant's failure to establish either prong of the *Strickland* test dooms a claim of ineffective assistance of counsel (*Henderson*, 2013 IL 114040, ¶ 11), we need not determine whether counsel's performance was deficient before examining whether the alleged deficiency caused prejudice to the defendant. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (a court does not need to determine whether counsel was deficient before analyzing the prejudice suffered as a result of the alleged deficiencies). In order to establish prejudice under *Strickland*, the defendant must demonstrate that the failure to present a motion to suppress was meritorious and that a reasonable probability exists that the outcome at trial would have been different had the evidence been suppressed. *Henderson*, 2013 IL 114040, ¶ 15.

¶ 29 Probable cause to arrest exists when the facts known to the police officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the individual to be arrested has committed a crime. *People v. Wear*, 229 Ill. 2d 545, 563 (2008). In other words, whether probable cause to arrest exists depends on the totality of the circumstances at the time of the arrest. *Wear*, 229 Ill. 2d at 564. The standard for determining whether probable cause exists

is the probability of criminal activity, not proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005); see also *Wear*, 229 Ill. 2d at 564 (probable cause does not require a showing that the officer's belief that the suspect has committed a crime is "more likely true than false"). Although mere suspicion is not enough to establish probable cause, the evidence which is ultimately relied upon by the arresting officer need not be sufficient to prove the defendant guilty beyond a reasonable doubt or even be admissible at trial. See *People v. Rodriguez-Chavez*, 405 Ill. App. 3d 872, 876 (2010) ("possible innocent explanations for the individual circumstances or even for the totality of the circumstances does not necessarily negate probable cause"). Whether probable cause existed in a certain situation is "governed by" commonsense practical considerations and an analysis of the totality of the circumstances at the time of arrest. *People v. Sims*, 192 Ill. 2d 592, 615 (2000).

¶ 30 Here, when viewing the totality of the circumstances at the time of the search, a reasonable person in Volanti's position would have believed that defendant had committed a crime. Volanti was looking for two suspects in dark puffy jackets and masks who may have boarded the bus at a certain stop. After speaking to Esters, he knew that defendant and codefendant were among the passengers who boarded the bus at the stop and although they were not masked they were wearing outfits that matched the description he had received from dispatch. While defendant is correct that neither the victim nor Boyce identified defendant's face in the show-up, the women indicated that defendant was wearing the same dark puffy jacket and jeans as one of the men from the parking lot. In other words, defendant fit the general description of one of the fleeing suspects and was located within minutes five blocks away. See *People v. Jones*, 374 Ill. App. 3d 566, 575-76 (2007) (when dealing with "serious crime" the chance of apprehending the perpetrator are slight unless he is taken into custody in the vicinity of the crime). These circumstances alone support a finding of probable cause. See *Jones*, 374 Ill.

App. 3d at 575 ("less of a factual basis" is needed to establish probable cause when the police are acting in response to a serious crime than when the officers do not know if a crime has been committed). Here, because the time and location of defendant corresponded, in time and location, to the incident in the parking lot and defendant fit the general description given by two witnesses, the facts at the time of the search of defendant would have led a reasonably cautious person to believe that defendant had committed a crime, and probable cause to arrest defendant existed (*Wear*, 229 Ill. 2d at 563-64).

¶ 31 Defendant, on the other hand, relies on *Chimel v. California*, 395 U.S. 752 (1969), to argue that because the search was separated from his arrest by an intervening act, that is, the masks were shown to the victim and Boyce, the search cannot be justified as a search incident to arrest. However, a search incident to arrest may precede the arrest, so long as an arrest would have been lawful when the search occurred. See *People v. Fitzpatrick*, 2011 IL App (2d) 100463, fn. 3, *aff'd*, 2013 IL 113449, citing *Rawlings v. Kentucky*, 448 U.S. 98, 110-11, (1980). In *Rawlings*, the Supreme Court held that once there is probable cause to arrest a defendant, it is not important whether the search preceded the arrest or vice versa. *Rawlings*, 448 U.S. at 111, fn. 6 (noting that the fruits of the search in that case were not necessary to support probable cause). Here, as discussed above, the officers had probable cause to arrest defendant, who matched the general description of one of the men from the parking lot and was located on a bus a few blocks away minutes after the incident, at the time of the challenged search. See *People v. Moorman*, 369 Ill. App. 3d 187, 201-02 (2006) (once probable cause develops, an officer may act outside the scope of *Terry*, regardless of whether a formal arrest has occurred).

¶ 32 Accordingly, because defendant has not established that the unargued suppression motion was meritorious, he cannot establish prejudice (*Henderson*, 2013 IL 114040, ¶ 15), and his claim of ineffective assistance of counsel must fail (*Edwards*, 195 Ill. 2d at 163).

¶ 33 III. Mandatory Supervised Release

¶ 34 Defendant finally contends that the trial court improperly imposed the three-year term of MSR that accompanies a Class X felony when defendant was convicted of the Class 1 felonies of aggravated kidnaping and vehicular invasion.

¶ 35 Before addressing the merits of defendant's contention regarding his MSR term, this court notes that he has forfeited review of this issue by failing to object at sentencing or in a motion to reconsider sentence. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Although defendant acknowledges that he failed to object to the three-year term of MSR before the trial court, he contends this issue is not forfeited because the MSR term is void. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (a void sentence may be challenged at any time). We disagree.

¶ 36 Section 5-4.5-95(b) of the Unified Code of Corrections provides that a defendant, over the age of 21, who is convicted of a Class 1 or Class 2 felony shall be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-4.5-95(b) (West 2010). The MSR term attached to a Class X sentence is three years. 730 ILCS 5/5-8-1(d)(1) (West 2010).

¶ 37 This court has previously held that when Class X treatment is accorded to a defendant, the MSR term applicable to such a sentence is automatically imposed (*People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995)), *i.e.*, a Class X offender receives both an enhanced prison term and an enhanced MSR term (*People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000)). See also *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009).

¶ 38 Defendant acknowledges that *Anderson*, *Smart*, and *Watkins* reached a result contrary to his argument, but argues they were wrongly decided in light of our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). However, this court's decisions in *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011), and *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010),

considered, and rejected, similar arguments. Thus, we continue to adhere to this court's decision in *Anderson*. Accordingly, as defendant was sentenced as a Class X offender he received both an enhanced term of imprisonment and an enhanced MSR term (see *Smart*, 311 Ill. App. 3d at 417-18). Because the three-year term of MSR was properly imposed by the trial court, defendant's failure to raise this issue at sentencing and in a motion to reconsider sentence has resulted in its forfeiture on appeal. See *People v. McKinney*, 399 Ill. App. 3d 77, 79, 83 (2010).

¶ 39

CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 41 Affirmed.