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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 Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 22386
)	
DWAYNE BURKE,)	
)	The Honorable
Defendant-Appellant.)	John Joseph Hynes,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* defendant's armed robbery and armed habitual criminal convictions affirmed where the State established his guilt beyond a reasonable doubt and where he received effective assistance of trial counsel; defendant's life sentence affirmed where the sentence mandated by the Illinois Habitual Criminal Act did not violate Illinois's proportionate penalties clause or the eighth amendment's prohibition against cruel and unusual punishment.

¶ 2 Following a jury trial, defendant Dwayne Burke was convicted of armed robbery and armed habitual criminal and was sentenced to life imprisonment without the possibility of parole. Defendant appeals his convictions and the sentence imposed thereon, arguing: (1) the State failed

to establish his guilt beyond a reasonable doubt; (2) he was denied his constitutional right to effective assistance of trial counsel; and (3) his mandatory life sentence imposed in accordance with the Illinois Habitual Criminal Act (730 ILCS 5/5-4.5-95 (West 2008)) (Habitual Criminal Act or Act) is unconstitutional. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4

On August 20, 2009, a Speedway gas station located at 3040 West 95th Street in Evergreen Park, Illinois, was robbed. An investigation into the robbery ensued and several months later, defendant was arrested in connection with the crime and charged with multiple offenses including armed robbery (720 ILCS 5/18-2 (West 2008)) and armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)). Defendant ultimately elected to proceed by way of a jury trial.

¶ 5

Trial

¶ 6

At trial, Homewood Police Department Sergeant Craig Sline¹ testified that following the Speedway armed robbery, the Evergreen Park Police Department circulated a critical reach flyer that contained a description of the offender as well as a partial still image of the suspect that had been obtained from the surveillance footage at the gas station. In the flyer, the suspect was described as an African American male with facial hair. The flyer indicated that he had been wearing a dark hat, sunglasses, and a dark colored backpack at the time of the offense. On September 4, 2009, while he was on routine patrol, Sergeant Sline noticed an individual standing outside of a local gas station who matched the description of the suspect contained in the critical reach flyer. The man was "a male black in his upper 30s to lower 40s. He had a black baseball

¹ Although Sline was a detective back in 2009, he had been promoted to sergeant at the time of the trial. We will refer to him using his current title in this disposition.

cap, sunglasses, dark jacket, [and a] backpack." Sergeant Sline observed the man standing outside of the gas station smoking a Newport cigarette. When the man discarded his cigarette on the ground, Sergeant Sline's partner recovered the cigarette. The individual who had been smoking the cigarette was subsequently identified as defendant and his identity was subsequently relayed to the Evergreen Park Police Department. On cross-examination, Sergeant Sline denied that any other individual had been near the area where defendant dropped the cigarette. He acknowledged, however, that a lot of people "possibly" matched the description of the suspect that was provided in the critical reach flyer.

¶ 7 Sergeant Dan McKeown² of the Evergreen Park Police Department testified that he was assigned to investigate August 20, 2009, the armed robbery of the Speedway gas station in Evergreen Park. The robbery happened around 2 p.m., and Sergeant McKeown responded to the scene and spoke to four individuals. One of those individuals was Mary Cannon, an employee at the gas station and an eyewitness to the crime. Sergeant McKeown confirmed that during the course of his investigation, a critical reach flyer was generated that contained a description of the man suspected of committing the offense as well as a partial still image of the suspect. The flyer was then disseminated to other agencies. Sergeant McKeown further confirmed that he was contacted by members of the Homewood Police Department sometime in November 2009 and was given information about a potential suspect. Based on the information he received, a lineup was conducted at the Homewood Police Department on November 18, 2009. Defendant was included in that lineup. Sergeant McKeown testified that Cannon identified defendant from the lineup.

² McKeown was also a detective during the investigation into the 2009 Speedway robbery and had received a promotion by the time of trial. We will refer to him using his current title throughout this disposition.

¶ 8 Mary Cannon testified that she was working as a cashier at the Speedway gas station at the time of the August 20, 2009, armed robbery. Three other employees were working with her that day including Jennifer Berry, another cashier, Nick Harrison, the manager, and Jennifer Gossage, the assistant manager. She confirmed that the gas station was equipped with a surveillance camera that was pointed in the direction of the two cash registers located inside of the store. At approximately 1:40 p.m., Cannon and Berry were manning their cash registers and Gossage was behind the counter counting cigarettes. At that time, an African American man with a goatee entered the store and approached the counter. Cannon identified the man as defendant. She testified that she "stopped [what she was doing] and looked" at him. Defendant was wearing a baseball cap and sunglasses and was holding a gun in his right hand and a backpack in his left hand. Cannon described the gun as "black" and indicated that it "looked real to [her.]" When he was approximately five feet away from Cannon, defendant instructed her to "give [him] the money." She opened her cash register and allowed defendant, who had come behind the counter, to reach in and remove the money. He put the money in his backpack and then moved onto Berry's register and repeated the process. Cannon testified that she was "pretty close" to defendant during the entire encounter and had a "full view" of him. After taking money from both registers, Cannon testified that defendant grabbed a pack of cigarettes and exited the premises. Gossage immediately placed a call to the Evergreen Park Police Department to report the crime.

¶ 9 Cannon testified that police officers arrived on scene shortly thereafter and that she provided them with a statement detailing what had just occurred. On November 18, 2009, Cannon received a phone call from Sergeant McKeown and was asked to view a physical lineup. When she first arrived at the police station, Sergeant McKeown provided her with a lineup

advisory form, which she read and signed. She was then taken into a "little small room" by another police officer where she viewed the six person lineup. Cannon identified defendant from that lineup. Cannon recalled that defendant was person "number 3" and testified that he looked the same as he did at the time of the crime except that he had grown "a little bit more facial [hair]."

¶ 10 On cross-examination, Cannon testified that she had never observed defendant prior to the day of the robbery and that the crime lasted less than a minute. She also testified that she experienced various emotions during the event including fear and anger. In addition, Cannon acknowledged that she provided investigating officers with a description of defendant shortly after the crime. She described him as an African American male in his 30's and estimated that he was approximately 5'7" to 5'9" tall and weighed somewhere between 160 to 180 pounds. Cannon did not recall whether she told any of the investigating officers that defendant had a goatee; however, she told them that she believed she would be able to identify defendant if she saw him again.

¶ 11 When asked about the November 18, 2009, lineup, Cannon acknowledged that the six people who were part of the lineup did not look alike. She explained that person number four was considerably older and heavier than defendant and had no facial hair. Person number one, in contrast, was considerably younger than defendant. Person number two did not appear noticeably younger or older than defendant, but he had braids in his hair. Finally, person number five was also considerably older than defendant. Cannon admitted that when she was called to view the lineup, she believed that there had been a break in the case and that the robber would likely be included in the lineup; however, she testified that she identified defendant because she "recognized" him as the offender.

¶ 12 After calling the aforementioned witnesses, the State proceeded by way of stipulation. Pursuant to the stipulation, the jury was informed that "prior to August 20, 2009, [defendant] had been convicted of two qualifying felonies under the Illinois Armed Habitual Criminal Statute." Those two prior qualifying offenses were also armed robberies; however, the jury was not informed of the nature of defendant's two prior Class X convictions. Defendant then moved for a directed verdict, which the circuit court denied. Defendant elected not to testify and the defense called no witnesses. Both parties subsequently delivered closing arguments, and the circuit court then provided the jury with a set of relevant jury instructions. Following deliberations, the jury returned with a verdict finding defendant guilty of the offenses of armed robbery and armed habitual criminal.

¶ 13 At defendant's sentencing hearing, the parties stipulated to defendant's "extensive criminal history," which included multiple other offenses in addition to his aforementioned two Class X armed robbery convictions. Based on defendant's two prior Class X convictions, the State argued: "it is mandatory that the court sentence the defendant to a term of natural life" imprisonment. The circuit court agreed, concluding: "I find that the defendant is adjudged then a habitual criminal, and based on the habitual criminal sentencing he will be sentenced to his natural life in prison."

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Sufficiency of the Evidence: Unreliable Identification Testimony

¶ 17 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the identification testimony provided by Mary Cannon was "unreliable" and therefore insufficient to prove his guilt beyond a reasonable doubt.

¶ 18 The State responds that defendant's challenge to the sufficiency of the evidence is without merit because Cannon's identification was sufficiently reliable to establish defendant's identity as the offender beyond a reasonable doubt.

¶ 19 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 20 In addition to establishing the elements of the charged offense, the State also bears the burden of proving beyond a reasonable doubt the identity of the person who committed that crime. 720 ILCS 5/3-1 (West 2008); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d

332, 341 (2010). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing a witness's identification testimony, courts employ the factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and adopted by our supreme court in *People v. Slim*, 127 Ill. 2d 302 (1989), which include: (1) the opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the certainty of the witness's identification; and (5) the length of time between the offense and the witness's identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08. No one single factor is dispositive; rather, the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87. Ultimately, where, as here, a defendant's guilt and identity as the offender is dependent upon eyewitness testimony, the relevant inquiry on appeal is whether the trier of fact could reasonably accept the eyewitness identification testimony as true beyond a reasonable doubt. *People v. Williams*, 2015 IL App (1st) 131103, ¶ 69.

¶ 21 Turning to the first factor—the opportunity the witness had to view the perpetrator at the time of the offense—we find that Cannon's testimony demonstrated that she had sufficient opportunity to observe defendant during the armed robbery. When evaluating this factor, the key inquiry is " 'whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation.' " *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40 (quoting *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979)). In this case, Cannon testified she first observed defendant when he entered the store. He was wielding a gun in his right hand and Cannon testified that she stopped what she was doing and looked at him. When defendant was

approximately five feet away from her, he ordered her to give him the money from the cash register. As she opened the register, defendant moved around the counter and emptied the cash register himself. At that point, she was "pretty close" to defendant and had a "full view" of him. Cannon continued to watch defendant when he moved to the other cash register and removed the proceeds from that machine. The store was illuminated and there was no evidence that Cannon's ability to view the perpetrator was impeded. Although defendant is correct that the armed robbery happened quickly, we observe that the mere brevity of a witness's ability to view an offender does not render the witness's subsequent identification so fraught with doubt that it creates reasonable doubt as to a defendant's guilt. See, e.g., *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (finding that the witness had sufficient opportunity to view his assailant where the witness testified that he viewed the offender's face for a "few seconds" in a dimly lit store); *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998) (identification testimony sufficient even though the witnesses "did not have more than several seconds to identify their attackers"). After reviewing Cannon's testimony, we find that she was afforded a sufficient opportunity to view defendant at the time of the offense.

¶ 22 With respect to the second factor—the witness's degree of attention—we note that there is nothing in the record that suggests that Cannon's attention was unduly compromised during the armed robbery. As stated previously, Cannon testified that she was afforded a "full view" of defendant during the course of the offense. Although defendant argues that the "frightening experience of being robbed with what looked to her to be a 'real gun' " would have reduced Cannon's degree of attention, we note that the frightening nature of such an encounter does not necessarily decrease a witness's degree of attention or her powers of observation. See, e.g., *People v. Robinson*, 206 Ill. App. 3d 1046, 1052 (1990) ("Excitement, rather than detract from

an identification, could increase the powers to observe”). Ultimately, there is nothing in the record to suggest that the degree of attention that Cannon paid to the offender during the course of the armed robbery was insufficient to enable her to positively identify defendant as the perpetrator.

¶ 23 We turn now to the third relevant factor and evaluate the accuracy of Cannon's prior description of defendant. Immediately following the armed robbery, Cannon described the offender as an African American male in his 30's. She estimated his height to be between 5'7" and 5'9" and his weight to be somewhere between 160 and 180 pounds. Cannon's initial description did not include any mention of facial hair. Based on the record, defendant is a 5'11" tall African American male with a goatee. He weighs approximately 175 pounds and he was 41 years' old at the time of the offense. Although Cannon's description was not entirely accurate, we disagree that the minor discrepancies are fatal to her identification testimony. See *People v. Williams*, 221 Ill. App. 3d 1061 (1991) ("Where the witness makes a positive identification, precise accuracy in the preliminary description is not necessary. [Citations]. This is true even where there are discrepancies or inaccuracies as to height and weight"). Courts have consistently recognized that vague or discrepant descriptions do not necessarily render identifications unreliable because very few witnesses are trained to be keen observers. See, e.g., *People v. Williams*, 118 Ill. 2d 407, 413-14 (1987) (witness' failure to mention the defendant's mustache and facial hair did not render her identification unreliable); *People v. Nims*, 156 Ill. App. 3d 115, 121 (1986) (victim's failure to mention the defendant's facial scars did not render her identification unreliable); see also *People v. Bias*, 131 Ill. App. 3d 98, 104-05 (1985) (recognizing that inaccuracies pertaining to the "presence or absence of a beard, mustache, or tattoo, whether the assailant had missing teeth, and the assailant's height, weight and complexion

do not render an identification utterly inadmissible”). In doing so, courts have emphasized that “ [t]he credibility of an identification does not rest upon the type of facial description or other physical features which the complaining witness is able to relate. *** It depends rather upon whether the witness had a full and adequate opportunity to observe the defendant.’ ” *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1991) (quoting *People v. Witherspoon*, 33 Ill. App. 3d 12, 19-20 (1975)). Here, we are unable to conclude that Cannon's initial description of the offender invalidated her subsequent positive identification of defendant.

¶ 24 The fourth factor pertains to the degree of certainty the witness displayed in identifying the defendant. At trial, Cannon was unequivocal in her identification of defendant. She also evidenced certainty when she identified defendant as the offender when she viewed a six-person physical lineup. Cannon testified that she "recognized" defendant as the offender and recalled that he was "number 3" in the lineup. Defendant, however, suggests that the length of the lineup procedure showed that Cannon was "uncertain" of her identification. We note that on cross-examination, Cannon estimated that the lineup procedure took somewhere between 20 to 25 minutes. She later clarified that her time estimate included meeting with Sergeant McKeown, reading and signing the lineup advisory form, walking to the viewing room and making the identification. She then explained that the lineup itself "wasn't that long" and maybe lasted "5 to 10 minutes." Upon review, we disagree that Cannon's time estimations pertaining to the duration of the lineup diminished the certainty that she displayed when she identified defendant.

¶ 25 Turning to the fifth and final factor—the length of time between the crime and the identification—we note that the crime occurred on August 20, 2009, and that Cannon identified defendant from a physical lineup on November 18, 2009. Cannon's identification thus occurred nearly three months after the crime occurred. Although this period of time is not immaterial, we

observe that courts have upheld identifications made after considerably longer periods of time passed after the crime. See, e.g., *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (identification made two years after the crime); *People v. Dean*, 156 Ill. App. 3d 344, 352 (1987) (identification made 2 ½ years after the crime). The mere passage of time, alone, thus does not render Cannon's identification suspect and unreliable.

¶ 26 Ultimately, we reiterate that the reliability of a witness's identification of a defendant is a matter for the trier of fact (*In re Keith C.*, 378 Ill. App. 3d at 258) and that the testimony of a single credible witness who makes a positive identification is sufficient to sustain a criminal conviction (*People v. Barnes*, 364 Ill. App. 3d 888, 895 (2006)). After reviewing the relevant factors, we cannot conclude that Cannon's identification testimony was insufficient to prove defendant's guilt beyond a reasonable doubt; rather, we conclude that a reasonable trier of fact could have found that her testimony was sufficient to establish defendant's identity as the offender. This is true even though there was no physical evidence or DNA evidence linking defendant to the crime. See *People v. Williams*, 182 Ill. 2d 171, 192 (1998) ("Proof of physical evidence connecting a defendant to a crime has never been required to establish guilt").

¶ 27 Sufficiency of the Evidence: Use of a Firearm or Dangerous Weapon

¶ 28 Alternatively, defendant argues that his "conviction for armed habitual criminal should be reversed and his conviction for armed robbery should be reduced to robbery because the State failed to establish that the item used in the robbery was a firearm or dangerous weapon." He notes the State did not enter a gun into evidence at trial and contends that "there was no circumstantial evidence capable of establishing that the object in the offender's hand was a 'firearm' rather than a toy or replica gun."

¶ 29 The State responds that Cannon's testimony was sufficient to establish that defendant was armed with a firearm during the robbery. Therefore, the State argues that defendant's convictions for armed robbery and armed habitual criminal should be affirmed.

¶ 30 The offenses of armed robbery and armed habitual criminal both require proof that the defendant possessed a firearm. 720 ILCS 5/18-2(a)92), 24-1.7(a) (West 2008); *People v. Fields*, 2014 IL App (1st) 110311, ¶ 34. A firearm, in pertinent part, is defined as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (1) (West 2008). Paint ball and BB guns, however, are expressly excluded from that definition and do not constitute a firearm for purposes of the armed robbery and armed habitual criminal statutes. 430 ILCS 65/1.1 (2) (West 2008). Courts have consistently held that expert testimony is not required to establish that the defendant held a firearm during the commission of the offense; rather, unequivocal testimony from a lay witness may provide the requisite evidence to satisfy this requirement. See *People v. Davis*, 2015 IL App (1st) 121867, ¶ 12 ("Both the supreme court and this court have consistently held that eyewitness testimony that the offender was armed with a gun, combined with circumstances under which the witness was able to see the weapon, is sufficient to allow a reasonable inference that the weapon was a real gun"); *People v. Fields*, 2014 IL App (1st) 110311 (2012), ¶ 36 ("[U]nequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery").

¶ 31 In this case, there is no dispute that a gun was never recovered during the police investigation into the Speedway robbery and no firearm was entered into evidence at defendant's trial. Mary Cannon, however, testified that she observed a gun in defendant's right hand during the offense. She described the gun as "black" and testified that it "looked real to [her]." Her

testimony further established that she was in close proximity to defendant throughout the offense and thus had sufficient opportunity to observe the weapon. Although defendant is correct that Cannon "did not testify that she had any particular expertise in firearms or weaponry," we reiterate that expert testimony is not required. Instead, unequivocal testimony from a lay witness who had a sufficient opportunity to view the weapon is sufficient to satisfy the State's burden of proof. See, e.g., *Fields*, 2014 IL App (1st) 110311, ¶ 36 (finding that the eyewitness's testimony that the defendant "held a black gun by his side during the robbery" was sufficient to establish that the defendant was armed with a firearm and guilty of armed robbery); *People v. Washington*, 2012 IL 107993, ¶ 36 (affirming the defendant's armed robbery conviction where the victim's "testimony and the circumstances under which he was able to view the gun," could have led the jury to "reasonably infer[] that [the] defendant possessed a real gun"). Although we find that Cannon's unequivocal testimony alone was sufficient to establish that defendant was armed with a firearm, we note that her testimony was corroborated by the surveillance video that documented the offense. The video clearly shows defendant in possession of what appears to be an actual black handgun during the robbery. Defendant argues that the gun described by Cannon and depicted in the surveillance video could have been a BB gun or a toy gun; however, there is no evidence in the record to suggest that the gun was anything other than a real firearm. As such, viewing the evidence in the light most favorable to the State, we find that Cannon's testimony, which was corroborated by surveillance video, was sufficient to establish that defendant was armed with a gun that met the statutory definition of a firearm. See, e.g., *People v. Malone*, 2012 IL App (1st) 110517, ¶ 52 (finding that a witness's testimony that the defendant was holding a gun, which was corroborated by surveillance video, was sufficient to prove the defendant used a real gun in the commission of the crime). We therefore reject defendant's

challenges to the sufficiency of the evidence and affirm his armed robbery and armed habitual criminal convictions.

¶ 32 Ineffective Assistance of Counsel

¶ 33 Defendant next argues that he was denied his constitutional right to effective assistance of trial counsel. Specifically, he argues that his attorney was deficient when he failed to present evidence that police recovered no physical evidence from the gas station that connected him to the crime. Defendant contends that "but for counsel's deficient representation in this area, the jury's verdict could well have been different."

¶ 34 The State responds that defendant's ineffective assistance of counsel claim is without merit. The State observes that defense counsel argued repeatedly to the jury that no physical evidence linked his client to the crime and that it was a case of mistaken identity. Given that counsel presented his theory of the case to the jury, the State argues that defendant was not prejudiced by his attorney's performance.

¶ 35 It is well-established that every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the

defendant must overcome the “strong presumption” that counsel’s action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). “In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel’s conduct, and with great deference accorded counsel’s decisions on review.” *Wilborn*, 2011 IL App. (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002)); see also *People v. Mitchell*, 105 Ill. 2d 1, 15 (1984) (“The issue of incompetency of counsel is always to be determined by the totality of counsel’s conduct.”) To satisfy the second prong, the defendant must establish that but for counsel’s unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). Courts may resolve an ineffective assistance of counsel claim by reaching only the prejudice component of the *Strickland* test because “lack of prejudice renders irrelevant the issue of counsel’s performance.” *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 36 In this case, we find that defendant’s ineffective assistance of counsel claim fails because he cannot show that he was prejudiced by his attorney’s trial performance. At trial, defense counsel sought to elicit testimony from Sergeant McKeown that no physical evidence recovered at the crime scene was matched to defendant. Specifically, counsel inquired whether Sergeant McKeown was “aware” if any fingerprint, DNA or other physical evidence recovered at the crime scene was matched to defendant. The State, however, objected to counsel’s questions and

¶ 39 The State responds that the mandatory life sentence imposed on defendant in accordance with the requirements of the Habitual Criminal Act does not violate the protections of the proportionate penalties clause or the eighth amendment because defendant was "previously convicted twice of armed robbery and his criminal history demonstrated he cannot be rehabilitated."

¶ 40 The constitutionality of a statute is an issue of law that is subject to *de novo* review. *People v. Sharpe*, 216 Ill. 2d 481, 486-87 (2005); *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 25. Because statutes carry a "strong presumption" of constitutionality, it is the burden of the party challenging the constitutionality of a given statute to "clearly establish" that the statute violates constitutional protections. *Sharpe*, 216 Ill. 2d at 487. The relevant statute at issue here is the habitual criminal sentencing provision, which provides that every criminal defendant who is convicted of three separate Class X offenses in 20 years, excluding the time he spent in custody, is subject to a sentence of mandatory life imprisonment without the possibility of parole. 720 ILCS 5/5-4.5-95 (West 2008); *People v. Ligon*, 2016 IL 118023, ¶ 13.

¶ 41 The proportionate penalties clause of the Illinois State Constitution mandates that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The eighth amendment, in turn, prohibits the imposition of "cruel and unusual punishments." U.S. Const. amend VIII. The proportionate penalties clause is "coextensive with" the eighth amendment's cruel and unusual punishment clause. *People v. Patterson*, 2014 IL 115102, ¶ 106.

¶ 42 "To succeed on a proportionate penalties claim, a defendant must show either that the penalty imposed is cruel, degrading, or [that it is] so wholly disproportionate to the offense that it shocks the moral sense of the community ***." *People v. Klepper*, 234 Ill. 2d 337, 348-49

(2009). Although the legislature is afforded broad discretion in setting criminal penalties, including mandatory sentences (*Sharpe*, 216 Ill. 2d at 487), the legislature's power is not unlimited because the sentences it prescribes must accord with constitutional constraints (*People v. Morris*, 136 Ill. 2d 157, 161 (1990)). The relevant inquiry is " 'whether the legislature has set the sentence in accord with the seriousness of the offense.' " *Ligon*, 2016 IL 118023, ¶ 10 (quoting *People v. Guevara*, 216 Ill. 2d 533, 543 (2005)).

¶ 43 Defendant acknowledges that Illinois courts have repeatedly upheld the constitutionality of the Habitual Criminal Act and its mandatory sentencing requirements. See, e.g., *People v. Dunigan*, 165 Ill. 2d 235, 244-48 (1995); *People v. Bryant*, 278 Ill. App. 3d 578, 587 (1995); *People v. Robinson*, 268 Ill. App. 3d 1019, 1025-26 (1994). In *Dunigan*, our supreme court observed that the legislature clearly considered the rehabilitative potential of offenders when enacting the Habitual Criminal Act's mandatory life sentence requirement because it limited the application of the statute to those offenders convicted of a third serious felony conviction within a prescribed time period. *Dunigan*, 165 Ill. 2d at 246. That is, "[t]he Act may be invoked only after a defendant has twice demonstrated that conviction and imprisonment do not deter him from a life of crime." *Id.* Because "the Act unquestionably represents a careful legislative consideration of both the seriousness of the offense and the rehabilitative potential of offenders subject to its terms," the court found that it did not violate the proportionate penalties clause of the Illinois constitution. *Id.* at 246-47. The court further found that the Act did not violate the tenets of the eighth amendment. *Id.* at 247-48. Relying on *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 26809, 115 L.Ed. 2d 836 (1991), a case in which the United States Supreme Court rejected an eighth amendment challenge to a Michigan statute providing for a mandatory life sentence in a drug possession case, our supreme court noted that "severe penalties have been

imposed throughout history" and concluded that "a severe sentence did not become cruel and unusual simply because it was mandatory in nature." *Id.* at 248.

¶ 44 Defendant, however, emphasizes that he is not raising a facial challenge to the Habitual Criminal Act; rather, he is arguing the Act is unconstitutional "as applied" to him. In particular, he argues that his third armed robbery was essentially a nonviolent offense because he caused no physical harm to Cannon or the other employees during the Speedway robbery. He argues that the imposition of a mandatory life sentence following an offense that caused no physical harm "contravenes our evolving standards of decency," "offends the moral sense of the community," and constitutes cruel and unusual punishment. We disagree. Even if we were to be persuaded by defendant's efforts to categorize his latest armed robbery conviction as a "nonviolent" offense, this court has upheld the application of the Act's mandatory life sentence requirement to individuals convicted of three qualifying nonviolent drug offenses. See, e.g., *People v. Collins*, 2015 IL App (1st) 131145, ¶¶ 32-35; *People v. Fernandez*, 2014 IL App (1st) 120508, ¶¶ 37-66. We see no reason to depart from precedent.

¶ 45 We note that prior to this case, defendant had been convicted of two other armed robbery offenses. He has thus demonstrated that he poses a significant risk to the community. Moreover, given that defendant committed a third armed robbery after he served significant terms of imprisonment for those two prior offenses diminishes the likelihood that he is capable of rehabilitation. In light of these facts, we are unable to agree that defendant's mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment or that it violates the Illinois proportionate penalties clause. We therefore affirm defendant's sentence.

¶ 46

CONCLUSION

¶ 47

Affirmed.