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FIRST DIVISION
December 12, 2016

No. 1-15-0237
2016 IL App (1st) 150237-U

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.	)	12 CR 2306802
	)	
EDGAR DIAZ,	)	
	)	Honorable William O'Brien,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in denying defendant's motion *in limine* regarding alleged statements of a witness; the evidence was sufficient to support defendant's convictions under an accountability theory; the prosecution did not make improper remarks in opening or closing arguments; defendant was identified beyond a reasonable doubt; and the State did not commit a discovery violation for failing to offer Detective Leal as an expert witness.

¶ 2 Following a jury trial, defendant Edgar Diaz was found guilty of attempted first degree murder, aggravated battery causing great bodily harm, and aggravated battery causing permanent disfigurement. Defendant was sentenced to 25 years in prison for attempted first degree murder,

and the other counts merged. Defendant contends on appeal that: the trial court erred in denying his motion *in limine* regarding alleged statements of a witness, the evidence was insufficient to support defendant's conviction of attempted murder and aggravated battery under an accountability theory, the prosecution made improper remarks, defendant was not identified as the offender beyond a reasonable doubt, and the State committed a discovery violation when it failed to disclose an expert witness. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 As defendant notes, the facts of the underlying incident are undisputed, although he takes issue with his identification. On September 13, 2012, at about 7 p.m., the victim, an attorney employed by the Cook County State's Attorney's Office, arrived by bicycle at Diversey Harbor, where he was meeting a friend to go fishing. While locking up his bike, the victim looked up and saw a group of four people (two men and two women) walking about 40 to 50 feet away. The victim testified at trial that the two men in the group made him feel uncomfortable. The victim testified that one of the men, later identified as defendant, was wearing long, baggy shorts, a light-colored hoodie, and a teal baseball hat, and the other man, later identified as Luis Cotto, was wearing baggy jeans and a black hoodie.

¶ 5 The victim noticed two other men walking along the harbor. The victim testified that he thought the two men were gay. He then heard angry yelling and scuffling. The victim ran parallel to where the commotion was and saw defendant chasing after one of the gay men and Cotto beating the other man. The victim ran towards them and yelled, "Leave him alone." Defendant then turned on the victim and punched him in the face. The victim testified that he

grabbed defendant by the shoulder and pulled defendant towards him and they both fell down, with defendant landing on top of the victim.

¶ 6 The victim testified that he could hear the two women yelling, "Edgar, Edgar, leave him alone. We got booze. Let's get the hell out of here. Leave him alone." The victim then saw Cotto standing over him with an alcohol bottle in his hand raised above his head. The victim threw defendant off of him and rolled over into a ball. Defendant started hitting the victim on his left side, and he could see that Cotto's bottle was now broken. The victim testified that he rolled onto his back and tried to tell the perpetrators to leave him alone, but that both continued to yell at him. The victim then grabbed defendant by the neck and pulled him back down on top of him to shield himself from the broken bottle. He felt his fingers scratch defendant across the neck.

¶ 7 The victim testified that defendant continued to punch him and kick him in the face while the victim was in the fetal position. While defendant was kicking and punching him, the victim felt Cotto hitting him on his body. He finally managed to get up and he ran towards the parking lot.

¶ 8 The victim testified that he could not see out of his left eye, and that blood was pouring and squirting out of his side. He immediately went to the hospital. The victim testified that a police officer was at the hospital and he was able to tell him what he could before the doctors sent the officer out of the room. The victim spoke to Detective Leal at around 10 p.m. and briefly told him what happened.

¶ 9 The victim testified that as a result of the incident, he had a swollen eye, a gash on the left side of his head, a stab wound on his left arm, a large stab wound in the right side of his abdomen, and a small stab wound on his right thigh. He received a total of 40-60 stitches. The victim showed his injuries to the jury and testified that he still had pain in those areas.

¶ 10 On cross-examination, the victim testified that he had been assigned to the Juvenile Delinquency Division and had been working there for about a year at the time of the stabbing. While employed at the Cook County State's Attorney's Office, he attended training courses related to criminal prosecution, including identification testimony, and DNA evidence. He testified that he did not know the two men that he thought were gay, and just thought they were a couple based on how they interacted with each other. The victim testified that he was worried about them getting hurt.

¶ 11 Brian Poe testified that he was fishing at Diversey Harbor at around 7 p.m. on the night in question when he noticed a group of four Hispanics walking by – two males and two females. Poe identified the shorter male as defendant, and testified that he was wearing a teal baseball hat and had a pony tail. Poe identified the taller male as Cotto. Poe testified that on the night in question, he heard a commotion and saw the victim run up under the tree line yelling "knock it off." The commotion then got louder. Poe walked towards the noise and saw the victim getting beaten up. He saw defendant punch the victim in the side and back of the head. He saw Cotto break a bottle over the victim's back and stab him repeatedly with it. Poe testified that he was between 50 and 100 feet away and could see the perpetrators clearly.

¶ 12 Poe called 9-1-1 from his cell phone and then packed up his stuff and ran to his car. He could see the victim bleeding badly. He left the area when he saw a police car pull up. A little over a week later, Poe saw an article online about the lakefront attack that included a picture of defendant. Poe testified that he recognized defendant. Detective Leal called Poe and Poe eventually viewed a photo array and a lineup. He identified defendant in both.

¶ 13 On cross-examination, Poe testified that he did not recall seeing any tattoos on defendant's face when he first passed him in Diversey Harbor, but that he noticed tattoos on one

of the offender's faces during the attack. Poe could not recall if he had told Detective Leal about the tattoos.

¶ 14 Dr. Lawrence Lim, the doctor that treated the victim after the incident, testified that when the victim came in, he had an 18-centimeter laceration to his right lower chest and abdomen. He also noticed bruising around the victim's eye, a laceration to his forehead, and multiple lacerations to his left arm.

¶ 15 Officer Brad Jedlink spoke to the victim in the hospital. The victim described the offenders. He described defendant as a male Hispanic wearing a turquoise baseball hat, zip-up hoodie, white t-shirt, and a longer hairstyle. The victim described the second offender as a male Hispanic wearing a black hoodie and baggy jeans.

¶ 16 Officer Michael McKenna went to Diversey Harbor at around 8 p.m. on the night in question and found a bag, a bottle, and broken glass with blood on it. He called an evidence technician who photographed the crime scene and collected evidence.

¶ 17 Detective Emiliano Leal, a detective and registered nurse, testified that while he was working as a detective on the day in question, he was assigned to the victim's case. He went to the hospital and spoke to the victim. The victim told him what happened and said that during the attack one of the females shouted "Edgar," and told him to stop attacking the victim. He got an approximate age and physical description of the offender. Detective Leal then went to the police station and searched through police records to construct a photo array of white male Hispanics between the ages of 19 and 25 with the first name Edgar, and long hair. Detective Leal returned to the hospital with the photo array, one of which depicted defendant with facial tattoos. The victim viewed the pictures and identified defendant as the offender that punched and kicked him.

¶ 18 Police officers eventually found defendant at a friend's house, hiding in a bedroom closet. He asked the officers how they had found him and asked if it was "C-Murder" that told them. He also stated that if "this is about the stabbing of the ASA by the lake, I had nothing to do with it."

¶ 19 Bobby Melendez testified that defendant is his friend, but that he is not friends with Cotto, who is also known as C-Murder. Melendez testified that he arrived back home on September 14, 2012, after spending two days in the hospital after being shot, and defendant was in his apartment. Defendant told Melendez that he was laying low because he beat up two "faggots", stabbed a prosecutor, and the police were looking for him.

¶ 20 On cross-examination, Melendez stated that everyone called defendant "Roscoe," and that he did not know anyone that called him Edgar. He said he had been in custody for three weeks for failing to come to court pursuant to a subpoena because he did not want to testify against his friend.

¶ 21 Detective Leal conducted a lineup on September 21, 2012, and used tape to cover defendant's facial tattoos during the lineup. He then put tape on all the other participants' faces in the same places as the tape on defendant's face. The victim viewed the lineup and instantly identified defendant before all participants had entered the room. The victim told Detective Leal that defendant would have scratch marks on his neck, so Detective Leal looked after the lineup and saw bruises and a laceration. Detective Leal testified that he believed the bruises were caused by fingers and that the color of bruises indicated that the injury was about 7 to 10 days old. Detective Leal testified that as a police officer and a nurse, he had seen scratch marks and bruises numerous times. On cross-examination, Detective Leal admitted that he speculated as to what caused the marks on defendant's neck.

¶ 22 Detective Leal testified that he met with Poe on October 19, 2012, and showed him photo arrays that contained pictures of defendant and Cotto. Poe identified Cotto as the person who stabbed the victim with a broken bottle, and identified defendant as the second offender.

¶ 23 At the close of evidence, the jury found defendant guilty of attempted first degree murder, aggravated battery causing great bodily harm, and aggravated battery causing permanent disfigurement. Defendant was sentenced to 25 years in prison. He now appeals.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant contends that: the trial court erred in denying his motion *in limine* regarding alleged statements of a witness, the evidence was insufficient to support defendant's conviction of attempted murder and aggravated battery under an accountability theory, the prosecution made improper remarks, defendant was not identified as the offender beyond a reasonable doubt, and the State committed a discovery violation when it failed to disclose an expert witness. We will address each argument in turn.

¶ 26 Motion *in Limine*

¶ 27 Defendant's first argument on appeal is that the trial court erred in denying his motion *in limine* to preclude the introduction of evidence related to the statement by one of defendant's friends using defendant's name. Specifically, defendant sought to bar the victim's testimony that one of the females defendant was with yelled, "Edgar, Edgar, leave him alone * * *." Defendant maintains that the statement was hearsay and does not fall into any exceptions of the hearsay rule. The State responds that the trial court properly denied the motion *in limine* because the statement was admissible as substantive evidence pursuant to the excited utterance exception to the hearsay rule.

¶ 28 "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). Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Reid*, 179 Ill. 2d 297, 313 (1997). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 29 Defendant contends that the trial court erroneously found that the statement was a present sense impression, an exception that has not yet been adopted in Illinois. In denying the motion, the trial court stated:

> "It is admissible. It is part of the observations of the victim at the time of the event. It's what he's taking in by not only what he senses, sees, but hears as well during his attack * * *. As part of his present sense impression, what he heard. Did he – was he the excited utterance, no. He heard it though. It's part of what he took in. It's part of what he can report on how this crime went down. And apparently from listening to the examination, it is part of the information that he gave the police that began this investigation and the compilation of photo arrays."

¶ 30 While we agree with defendant that Illinois does not recognize the present sense exception to the hearsay rule (*People v. Abram*, 2016 IL App (1st) 132785, ¶¶ 69-70), we may affirm on any basis supported by the record. *Reyes v. Walker*, 358 Ill. App. 3d 1122, 1124 (2005). Accordingly, we find that the statement in question was an excited utterance, and further

agree with the trial court's statement that the statement at issue was "part of the information that [the victim] gave the police that began this investigation and the compilation of photo arrays."

¶ 31 Initially, we note that defendant contends that the trial court found that this statement was not an excited utterance. There was no such finding. Rather, as quoted above, the trial court stated, "[W]as [the victim] the excited utterance, no. He heard it though." The trial court was merely stating that the victim was not the declarant, but rather the victim was the one who heard the declarant (a female) yell for "Edgar" to leave the victim alone. We now turn to whether this statement qualifies as an excited utterance.

¶ 32 A statement is admissible as an excited utterance where it "relat[es] to a startling event or condition" and is "made while the declarant was under the stress of excitement caused by the event or condition." Ill. R. Evid. 803(2) (eff. Jan. 1, 2011). The theory underlying the exception is that the event is so startling that "it temporarily stills the capacity for reflection, thus producing statements free of conscious fabrication." *People v. Harris*, 134 Ill. App. 3d 705, 711 (1985). In determining whether a statement qualifies as an excited utterance, "courts consider the totality of the circumstances, including: the time elapsed between the event and the utterance, the nature of the event, the declarant's mental and physical condition, and the presence of self-interest." *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 44.

¶ 33 Here, the victim testified that during his attack, he heard a female yelling, "Edgar, Edgar, leave him alone. We got booze. Let's get the hell out of here. Leave him alone." During this time, the victim was on the ground with defendant on top of him. Because the statement was made during the midst of an attack, we find that it qualifies as an excited utterance. It certainly relates to a startling event (the attack), and was made while the female was under the stress or excitement caused by the attack. According to the victim, the female sounded frantic. There

was no evidence presented that the female would have had any self-interest in making this statement during the attack, and no evidence that she was not of sound mind or body.

¶ 34 Moreover, the "explanation exception" to the hearsay rule allows the admission of statements that explain the progress of a police investigation under the rationale that such evidence is not offered for its truth. *People v. Sample*, 326 Ill. App. 3d 914, 920 (2001). Such statements can be "offered for the limited purpose of showing the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact." *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004). Such testimony is not hearsay because it is within the witness's personal knowledge. *Sample*, 326 Ill. App. 2d at 920. In the case at bar, the statement explained why the police officers searched their database for perpetrators by the name of "Edgar," in order to compose a photo array for identification purposes. Accordingly, we find that it was not an abuse of discretion for the trial court to deny defendant's motion *in limine* regarding this statement.

¶ 35 Finally, contrary to defendant's contention, admissible nonhearsay does not implicate the confrontation clause. *Crawford v. Washington*, 541 U.S. 36, 60 n. 9 (2004) (the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

¶ 36 Sufficiency of the Evidence

¶ 37 Defendant's next contention on appeal is that the evidence was insufficient to support his conviction of attempted first degree murder under an accountability theory. The State maintains that the jury properly determined that the evidence proved defendant's guilt beyond a reasonable doubt.

¶ 38 “When a defendant challenges the sufficiency of the evidence, the relevant inquiry 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.” *People v. Woods*, 214 Ill. 2d 455, 470 (2005). This standard applies to all criminal cases, “regardless of the nature of the evidence.” *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). If “the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant’s guilt,” the conviction must be reversed. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). We will not substitute our judgment for that of the trier of fact or reverse a conviction if “any rational trier of fact could have reached the same conclusion based on the evidence viewed in the light most favorable to the prosecution.” *People v. Adair*, 406 Ill. App. 3d 133, 137 (2010).

¶ 39 A defendant is accountable for the conduct of another when “[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.” 720 ILCS 5/5-2(c) (2012). To prove that the defendant possessed the intent to promote or facilitate the crime, the State must present evidence that establishes beyond a reasonable doubt that either: "(1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design." *People v. Perez*, 189 Ill. 2d 254, 266 (2000).

¶ 40 In this case, the State established that there was a common criminal design. Under the common-design rule, if "two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts." *In re W.C.*, 167 Ill. 2d 307, 337 (1995). "Evidence that a

defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another." *Id.* at 338. Proof of the common purpose or design need not be supported by words of agreement, but may be drawn from the circumstances surrounding the commission of the unlawful conduct. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). "A conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group." *People v. Cooper*, 194 Ill. 2d 419, 435 (2000).

¶ 41 In the case at bar, defendant and Cotto were together following the two men at the harbor. When the victim intervened, both defendant and Cotto delivered blows to the victim. While Cotto stabbed the victim with a broken bottle, defendant continued to participate in the crime by hitting and kicking the victim, thereby keeping him on the ground, susceptible to continued attacks from both offenders. Accordingly, viewing the evidence in a light most favorable to the prosecution, we find that the State proved a common design beyond a reasonable doubt.

¶ 42 Prosecutorial Misconduct

¶ 43 Defendant's next argument on appeal is that the prosecution erred by making improper remarks during both opening statement and closing argument. The State responds that defendant has forfeited this issue on appeal because while he objected to some of the complained-of remarks, he failed to designate any of the specific prosecutorial remarks challenged in his motion for a new trial. Defendant does not reply to this argument.

¶ 44 If a complained-of error is not both objected to at trial and raised in a post-trial motion, the issue is forfeited on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). While defendant did object to some of the complained-of remarks, he failed to identify any remarks in his motion

for a new trial. While forfeited issues can be reviewed under the plain error doctrine if (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence, defendant did not make an argument under either prong of the plain error doctrine. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Accordingly, this issue has been forfeited.

¶ 45 Forfeiture aside, we would nevertheless find that the prosecutorial remarks complained of were not improper. Defendant contends that the State referred to defendant as a "street thug," improperly referred to the victim as an Assistant State's Attorney, and improperly referenced the two men being followed as a "gay couple." The State responds that its opening and closing remarks were proper.

¶ 46 The purpose of a prosecutor's opening statement is to inform the jury about what the prosecution intends in good faith to prove through the evidence to be presented. *People v. Flax*, 255 Ill. App. 3d 103, 108 (1993). It is improper to mention matters that the prosecution knows will not be proved during the trial. *Id.* However, improper remarks during opening statement will not be grounds for reversal unless they resulted in substantial prejudice to the defendant, such that it is impossible to say whether or not a verdict of guilt resulted from them. *Id.*; *People v. Alvarez*, 186 Ill. App. 3d 541, 552-53 (1989). Stated differently, if the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendants' conviction, a new trial should be granted. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 47 For closing remarks, prosecutors are afforded wide latitude. *Id.* In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt

resulted from them. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000). Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.*

¶ 48 Questions as to the prejudicial effect of remarks made during opening statement and closing argument are within the discretion of the trial court, and determinations as to such questions will not be overturned absent a clear abuse of discretion. *Simmons v. Garces*, 198 Ill. 2d 541, 568 (2002). In determining whether there has been an abuse of discretion, we may not substitute our judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely. *Id.* We do not find an abuse of discretion here, as all the complained-of remarks in this case were part of either opening statement or closing argument, and as such were subject to a jury instruction that opening statements and closing arguments are not evidence and that the jury should disregard the improper remark. *Id.*; *People v. Favors*, 254 Ill. App. 3d 876, 886 (1993).

¶ 49 Jury instructions aside, we do not find that the comments made were prejudicial. Defendant first contends that the prosecutor, in his opening statement, referred to defendant as part of the "tag team of death" and a "street thug." This argument is not accompanied by citations to the record. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), requires that the appellant's arguments contain his contentions and the reasons therefor, with citations to authorities and to the pages of the record relied upon in support of the appellant's contentions. The failure to provide proper citations to the record is a violation of Rule 341(h)(7), the

consequence of which is the forfeiture of the argument. *People v. Sprind*, 403 Ill. App. 3d 772, 778-79 (2010). Accordingly, this argument is forfeited.

¶ 50 Defendant's second contention is that the prosecution improperly bolstered the victims' testimony by referencing the fact that the victim was a State's attorney. However, the only complained-of statements that are supported by a record cite, and therefore not forfeited, are the prosecutor's statements that the victim "practiced what he preached. He was in court on behalf of victims. He was outside at night on behalf of victims." See *Sprind*, 403 Ill. App. 3d at 778-79.

¶ 51 Defendant relies on *People v. Lee*, 229 Ill. App. 3d 254, 260 (1992), in support of his contention that the complained-of statements were improper. In *Lee*, this court found that it was prejudicial error for the prosecutor to express personal beliefs by stating a witness was "extremely honest in my humble opinion." This court found that those statements were distinguishable from the prosecutor's statements made in *People v. Pryor*, 170 Ill. App. 3d 262, 273 (1988), that a police officer witness was believable and correct. In *Pryor*, the court found that while it was improper for the State to place the integrity of the State's Attorney's office behind the credibility of a witness, the State may discuss the witnesses and their credibility and is entitled to assume the truth of the State's evidence. *Lee*, 229 Ill. App. 3d at 260.

¶ 52 In the case at bar, the prosecutor merely stated that the victim "practiced what he preached," and that he was in court on behalf of victims, as well as outside at night on behalf of victims. This statement did not go to the credibility of the victim, but rather was a statement regarding who the victim was as a person. It did not express the prosecutor's personal beliefs in any way. Accordingly, we find *Lee* to be inapposite, and we find that the comments were not prejudicial.

¶ 53 Finally, defendant contends that the prosecutor made improper references to the "gay couple" during opening remarks to inflame the passions of the jury. However, as stated above, the purpose of a prosecutor's opening argument is to inform the jury about what the prosecution intends in good faith to prove through the evidence to be presented. *Flax*, 255 Ill. App. 3d at 108. At trial, the victim testified that he saw two men walking along the path at Diversey Harbor, and that their body language and they way they interacted led him to believe that they were a gay couple. On cross-examination, the victim admitted that he did not know the two men personally and did not know for a fact whether they were gay. We are unwilling to find that the prosecutor's remark in opening statements was improper. Even if we were to find it improper, we could not find that the statement was so prejudicial as to require reversal. *Wheeler*, 226 Ill. 2d at 123 (misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction).

¶ 54 Identification of Defendant

¶ 55 Defendant's next contention on appeal is that he was not identified as the offender beyond a reasonable doubt. Defendant argues that he had three large tattoos on his face at the time of the incident, and that neither the victim, nor Brian Poe, mentioned the tattoos to police officers.

¶ 56 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). In assessing identification testimony, our courts have generally relied upon certain factors set out by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), which include: (1) the opportunity the witness 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 witness at the identification confrontation; and (5) the length of time

between the crime and the identification confrontation. See *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). Additionally, "discrepancies and omissions as to facial and other physical characteristics are not fatal, but merely affect the weight to be given the identification testimony." *Lewis*, 165 Ill. 2d at 357. "Such discrepancies and omissions do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *Id.*

¶ 57 In this case, two witnesses positively identified defendant as one of the offenders. The victim identified defendant in a photo array, in a physical lineup, and in open court. His identifications in both the photo array and in the physical lineup were immediate. Poe also immediately identified defendant in a photo array, and identified him again in open court. Evidence presented showed that both the victim and Poe had adequate time to view defendant, that they were in close proximity to him at the time of the incident, and that the area was well-lit.

¶ 58 Furthermore, both the victim and Poe testified that defendant's face was shadowed because he was wearing a hat, making it hard to see facial tattoos. The victim further stated that there was "zero doubt' that defendant was one of his attackers. Additionally, Poe testified that he saw defendant's facial tattoos while defendant was attacking the victim, but that the police did not ask him for a physical description of the attackers when he called 9-1-1. The failure of the victim and Poe to mention the facial tattoos to police officers does not mean their identifications of defendant were unreliable. See *People v. Williams*, 118 Ill. 2d 407, 413-14 (1987) (witness' failure to mention defendant's mustache and facial hair did not render her otherwise positive identification unreliable). Under the circumstances in this case, we believe that the victim's and Poe's identifications of defendant were reliable.

¶ 59 Discovery Violation

¶ 60 Defendant's final contention on appeal is that the State committed a discovery violation in failing to disclosure Detective Leal as an expert witness. Specifically, defendant takes issue with Detective Leal's testimony regarding the marks on defendant's neck. Detective Leal opined that because of degrading hemoglobin scratch marks change color, and that defendant's yellow marks on his neck indicated he received scratches 7 to 10 days prior to the lineup. Defendant contends that if he were made aware of Leal's conclusions prior to trial, he could have called an expert to refute this contention.

¶ 61 We first note that this issue of an alleged discovery violation has been forfeited on review by defendant's failure to both raise it at trial and allege it in a post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeiture aside, this argument is without merit.

¶ 62 Defendant relies on Illinois Supreme Court Rule 412(a)(iv) in support of his proposition that the State was obligated to disclose Detective Leal as an expert witness. Ill. S. Ct. R. 412(a)(iv) (eff. Mar. 1, 2001). However, Detective Leal was not an expert witness. There is no indication that he was offered as an expert witness at any point.

¶ 63 Rather, Detective Leal testified as a lay witness as to his own observations. He stated that he personally observed grab marks on defendant's neck following the lineup. He testified there were also healing lacerations, and that the color of such marks indicated to him that the injury was approximately seven to ten days old. Detective Leal testified that his testimony was based on his experience of observing scratch marks and bruises numerous times as both a police officer and a nurse. On cross-examination, Detective Leal admitted that he speculated as to the cause and origin of the marks in question. Defendant does not make any argument regarding improper lay witness testimony. Accordingly, we find that Detective Leal's testimony was proper.

¶ 64 III. CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 66 Affirmed.