

No. 1-14-1467

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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. 13 CR 13500
)	
TOMMIE THOMPSON, JR.,)	Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's trial counsel was not ineffective for failure to file a pretrial motion to suppress identification; the evidence established that defendant was in possession of a firearm during the commission of the armed robbery; defendant was entitled to one additional day of presentence credit.
- ¶ 2 Following a jury trial, defendant Tommie Thompson, Jr., was convicted of armed robbery while armed with a firearm and was sentenced to 23 years in prison. On appeal, defendant contends his trial counsel provided ineffective assistance by failing to move before trial to suppress photo array and lineup identifications. Defendant also contends his armed robbery

conviction should be reduced to robbery or aggravated robbery because the State failed to prove that he was in possession of a firearm when he robbed the victims. He also claims he is entitled to one additional day of presentence custody credit. We affirm defendant's armed robbery conviction and amend the mittimus.

¶ 3 Defendant was charged by indictment with the armed robbery with a firearm of Ashraf Abdallah and his wife, Dalal Thalji.¹ The evidence adduced at defendant's jury trial included the following testimony.

¶ 4 Ashraf Abdallah testified that in May 2013, he owned a cell phone company. Ashraf would use craigslist, an advertisement website, for buying and selling electronics and cell phones. On May 10, he placed an advertisement on craigslist that listed his name, phone number, and the fact he was seeking to buy brand-new phones. On May 13, a man calling himself Jay phoned Ashraf in response to the advertisement. Jay and Ashraf agreed that Jay would sell Ashraf 30 cell phones for \$22,000 in cash. Ashraf and Jay agreed to meet that evening at an Ultra Foods store at 131st and Cicero in Crestwood. The sale did not take place at Ashraf's cell phone store because Jay said he was in a rush and did not have time and because Ashraf's store was closed at that time.

¶ 5 At about 9:05 that evening, Ashraf and his wife, Dalal Thalji, drove their silver Hyundai to the Ultra Foods store. Jay phoned and said he was a couple of minutes away and driving a "maroonish" Nissan Altima with Missouri license plates. Ashraf drove into the Ultra Foods lot, observed the red Nissan, and pulled next to it. A man exited from the back seat of the Nissan,

¹ The trial court granted the State's pretrial motion for an order of *nolle prosequi* on additional indictment counts.

went to the Nissan's trunk, and took out a box. Ashraf exited his own vehicle and opened its trunk so he could put the box of phones he was buying into the trunk. The \$22,000 was in his trunk, secured with rubber bands and wrapped up in paper in a red Puma bag. The man with the box came toward him and Ashraf thought that "something was fishy" because the box looked too light to contain 30 phones. Ashraf took the money from the trunk, threw it through the trunk opening to his wife Dalal inside the car, and closed the trunk. Dalal placed the money in the console in the middle of the front seat. The Nissan's driver exited that vehicle and entered the back seat of Ashraf's car. Ashraf was a couple of feet from the Nissan. At trial, Ashraf identified defendant as the man who drove the Nissan and entered the back seat of Ashraf's car.

¶ 6 The second man dropped the box to the ground and got behind Ashraf, who then quickly returned to the driver's seat of his car. His wife, Dalal, was sitting in the front passenger seat next to him. The second man, who had been in the back seat of the Nissan initially and who had dropped the box, held Ashraf's car door open and yelled that defendant had a gun. Defendant was sitting behind Dalal and pointed the gun to the back of her head, saying, "Give me the money or I will shoot." Ashraf recognized defendant's voice as that of Jay whom he had talked to earlier on the phone. Ashraf was looking at both defendant and the gun. Dalal was looking at Ashraf as defendant held the gun to her head. Ashraf testified that he had seen guns before, owns several guns, and has a FOID (Firearm Owners Identification) card to own them. He recognized the gun that he saw defendant holding; it was a Glock. Defendant was only inches away from Ashraf, who testified he "had a very good look" at defendant. The lights in the car and the lights in the parking lot were lit. Defendant demanded their cell phones. Ashraf took the money from the console and gave it to defendant. He also gave defendant his cell phone, and Dalal gave him her

cell phone and iPod. The second man grabbed Ashraf's car keys, and both he and defendant entered the Nissan and drove to the parking lot exit. The incident lasted about two or three minutes.

¶ 7 Ashraf stepped out of his car, took a good look at the Nissan license plate and committed it to memory. Then he ran into the Ultra Foods store, grabbed a store receipt, and wrote down the license plate number, make, model and color of defendant's car. The receipt was introduced in evidence at trial and is in the record on appeal. It contained the number "FG9 U9L" written twice and the handwritten notation "Nissan altima Red." The plate number was written in two different ways, first as F69 U9L and then as FG9 U9L. Ashraf testified: "It looked like a 6, that's why I wrote it again. Just to double check 'G.' So I make sure." He did not write down that the license was a Missouri plate because that was easy to remember. Using a phone inside the store, Ashraf telephoned the police. When the police arrived, he gave them the receipt containing the description of defendant's vehicle. Ashraf's cell phone, an iPhone 5 which defendant had taken during the robbery, was equipped with a tracking device. The police took Ashraf to the Crestwood police station where he was able to track the location of his cell phone. The police went to that location, found the phone, and returned it to Ashraf. Because Jay had phoned Ashraf, he was able to show the police the phone number Jay had called from. The police took custody of the box the second man had dropped. Ashraf did not remember telling the police that he felt the box, noticed it weighed less than a case of phones should, believed something was not right, and tossed the money to his wife. Ashraf testified there were two things that he would always remember: defendant's face and the license plate number, make and model of defendant's car. "That is what I really will never forget."

¶ 8 Two days later, on May 15, 2013, Ashraf and Dalal went to the police station to view photographs. Detective Alexander showed Ashraf a form advising him that the man the police were looking for might be in the photo array or might not. Ashraf understood and signed the form. At trial, he identified the form and his signature on it. The detective did not tell him that he had to identify anyone in the array. He told Ashraf, "See if you recognize any of these guys. It might not be on there." Ashraf viewed an array of six photographs and "instantly" recognized defendant, the fourth man in the array, as the man who had pointed the gun at his wife. At trial Ashraf drew a circle around defendant's photograph on the six-man photo array. After Ashraf viewed the array, the detective gave him another form asking him to circle the number of the person in the array whom he had identified, and he circled number four. Both Ashraf and Detective Alexander signed the form. Ashraf believed his wife also viewed photos that day, but he was "not a hundred percent sure." He was not with her at any point when she viewed photos, as she was in the room by herself.

¶ 9 On May 24, Ashraf and his wife returned to the police station to view a lineup. Detective Alexander showed them a form similar to the one Ashraf previously had signed on May 15 before he viewed the photo array. Ashraf explained the form to Dalal in Arabic because she did not speak English. Ashraf signed the form and observed his wife sign an identical form. Then Ashraf was placed in a room by himself, and Dalal viewed the lineup. Later Ashraf also viewed the lineup of five individuals, each of them holding up a number. Ashraf knew that he could identify the gunman if he was in the lineup because Ashraf knew the face. He identified defendant, the fourth man in the lineup, as the man who had held the gun to his wife's head on May 13. Detective Alexander did not tell Ashraf whom to pick out of the lineup nor tell him that

he had to make an identification. Ashraf stepped into the lineup room and identified defendant immediately. He testified that he "looked right away. I knew who it was. I walked right up. Number four. That's the defendant. I can't forget him." At trial, Ashraf identified a color photograph that accurately depicted the lineup as he had viewed it. After identifying defendant, Ashraf was given another form on which he circled the number four, indicating the individual he had identified in the lineup. Ashraf identified the post-lineup form he had circled and signed. He also identified at trial a color photograph of a dark red Nissan Altima with license plate number FG9 U9L as the car defendant had driven at the time of the armed robbery. Ashraf was positive that he and his wife did not view the lineup together.

¶ 10 Ashraf testified that before trial he had an opportunity to view a video from a surveillance camera in the Ultra Foods parking lot and that it accurately depicted what occurred in the parking lot on the evening of May 13, 2013.² The somewhat blurry video was played in the jury's presence and showed from a distance Ashraf's silver Hyundai pull up to defendant's red Nissan in the parking lot. Ashraf identified himself in the video as exiting his Hyundai and opening its trunk. Two men can be seen exiting the red Nissan and walking toward the vehicles' trunks. Ashraf can be seen returning to the Hyundai's driver's seat and one of the men from the Nissan entered the Hyundai as the other man walked to the Hyundai's driver's side. The two men return to the Nissan and drive away. Finally, Ashraf can be seen running from his Hyundai toward the store.

² The parties stipulated to the video's accuracy. The DVD disk containing the video is included in the record on appeal and we have viewed it.

¶ 11 Dalal Thalji testified through an interpreter that she was Ashraf Abdallah's wife. On May 13, 2013, she and Ashraf drove to the Ultra Foods parking lot in their silver Hyundai to meet with a customer to buy telephones. They parked next to a red Nissan and Ashraf got out of their Hyundai to open their trunk. Two men got out of the red Nissan, the driver and a second person in the back seat. Ashraf became suspicious and threw the money to her through the trunk, and she put it in the middle compartment. The driver of the red Nissan climbed into the back seat of the Hyundai. Dalal turned around and looked at him. He was about two feet from her. The light was on in the car. At trial, she identified defendant as the Nissan driver who climbed into the back seat of the Hyundai. Defendant had a gun in his hand and he placed it at the back of her head. She was looking toward the side and could see the gun as he placed it to her head. The second man from the Nissan was outside the Hyundai, holding the door. That was the man who took the keys to the Hyundai and said that the person in back was holding a gun. Defendant demanded the money and said that if she did not give it to him, he was going to shoot her. When the defendant said that, Ashraf gave him the money. Defendant also demanded their phones. Dalal gave him her phone and iPod, and Ashraf also gave defendant his phone. Then defendant left the car and entered the driver's side of the red Nissan. He had been in the Hyundai maybe ten minutes, but she was not counting. The second man also entered the Nissan, and they drove away. Her husband left their vehicle to get a piece of paper to write down the license plate number.

¶ 12 Two days later, on May 15, she and her husband went to the Crestwood police station. She did not remember viewing photos. She and her husband were at the police station together the entire time that day. On May 24, they went back to the police station and met with Detective

Alexander. Before she viewed any lineup, she was shown a form, which was written in English. She could read and understand English a little bit. She remembered signing the form. Her husband explained to her that she was going to enter a room, view a lineup of individuals, and was asked if she recognized defendant, identify him with a number, and choose that same number on the document. That was before her husband had viewed the lineup. After she viewed the lineup, she was presented with a form again and circled the number four on the form, then signed the form. Dalal was shown the photo of the lineup and identified it as an accurate depiction of the lineup she viewed. She recognized the man holding the number four as the man who held the gun to her head on May 13.

¶ 13 Detective Michael Alexander testified that he was assigned to investigate the armed robbery of Ashraf and Dalal. When Ashraf was able to locate his stolen cell phone through a GPS system, Alexander went to the indicated location, the 14900 block of Cicero Avenue, found the phone on a curb, photographed it and took possession of it. Alexander learned that the vehicle with the license plate number Ashraf gave the police was owned by Enterprise Leasing. Alexander contacted Enterprise to determine who had leased the vehicle and then began looking for defendant.

¶ 14 On May 15, 2013, Alexander prepared an array of six photos that included defendant's photo and photos of five men with similar physical features. Alexander entered defendant's physical information, including height, weight and hair color, into a computer to search for individuals with similar characteristics and included their photos in the array. Ashraf and Dalal came to the police station to view the photo array on May 15, although Alexander did not require Dalal to view the array because of language difficulties. Alexander read to Ashraf a two-page

advisory-and-identification form when they were alone in a room. Alexander read the advisory form to Ashraf, which informed him that (1) a suspect's photo may or may not be in the array, (2) Ashraf was not required to make an identification, and (3) Ashraf must not assume the person administering the photo spread knew which person depicted in the array was suspected. After signing the advisory form, Ashraf viewed the photo array. At trial, Alexander identified an exhibit as an accurate black-and-white copy of the photo spread showing defendant's photo circled. After Ashraf identified defendant's photo, Alexander read the identification form to him and Ashraf drew a circle around photo number four, defendant's photo on the array. Dalal was not present when Ashraf viewed the array and identified defendant's photo.

¶ 15 Alexander prepared a case report containing information about defendant. Because defendant's driver's license contained a Matteson address, Alexander gave his report to a detective of the Matteson Police Department. Alexander testified about his attempt to locate the leased Nissan and his unsuccessful attempts to conduct a surveillance of it. On May 23, a Matteson police detective informed Alexander that defendant had been arrested and was at the Matteson police station, and Alexander brought him to a police station in Chicago.

¶ 16 On May 24, Ashraf and Dalal came to the police station in Chicago to view a lineup. Alexander produced the advisory/identification form, read it to Ashraf, and asked him to explain it to Dalal because of the language difficulty. After Ashraf did so, Alexander placed Ashraf and Dalal in separate rooms so they could not communicate or view the lineup together. He brought Dalal in to view the lineup consisting of five individuals and asked her if she recognized any of the five participants. Dalal signaled that she recognized the fourth man in the lineup: defendant. Dalal was returned to her separate room and Alexander asked defendant if he wanted to change

his position in the lineup. Defendant elected to remain in the fourth position. Alexander then brought Ashraf to view the lineup outside Dalal's presence. Ashraf also identified defendant. Alexander went to Dalal, who circled number four on her identification form. Then he went to Ashraf in another room, and Ashraf also circled defendant's number, four, on his form. A photograph of the lineup showing defendant in the fourth position, and the forms signed by Ashraf and Dalal, were introduced in evidence at the trial. Alexander testified that he did not tell Ashraf or Dalal whom to identify in the lineup each of them viewed. He also testified that no gun was recovered in the case and, other than Ashraf's cell phone, no robbery proceeds were recovered.

¶ 17 A crime scene investigator testified that on May 13, 2013, he and his partner went to the Ultra Foods parking lot, processed Ashraf's Hyundai for fingerprints, DNA, and clothing fibers. The collected evidence and a box found at the scene were sent to the state crime lab. A state forensic scientist testified she received the evidence from the crime scene. She determined that two latent fingerprints in a sealed envelope were unsuitable for comparison. She also tested an iPhone and a piece of clear tape with writing on it but determined that neither contained latent prints suitable for comparison. She was able to obtain a latent fingerprint from the box, but she determined the print was not made by defendant.

¶ 18 After the State rested, defendant's motion for a directed verdict in his favor was denied, and the defense also rested. During its deliberations, the jury sent a note to the trial judge requesting Alexander's testimony about the viewing of the May 15 photo array, and another note requesting the "testimony of [Dalal] Thalji, a photo lineup on May 15." In each case the court sent a written response to the jurors that no transcripts were available at that time, that they had

all of the evidence, and that they were to continue to deliberate. The jury found defendant guilty on count one, the armed robbery of Ashraf Abdallah and found it proven beyond a reasonable doubt that defendant committed the robbery while armed with a firearm. The jurors were unable to agree on a verdict as to count two, the armed robbery of Dalal Thalji. Consequently, the trial court declared a mistrial on count 2. Subsequently, the trial court sentenced defendant to 23 years in prison for the one count of armed robbery while armed with a firearm.

¶ 19 On appeal, defendant first contends his trial counsel provided ineffective assistance by failing to move prior to trial to suppress the photo array and lineup identifications. He asserts that both the photo array and the lineup were unduly suggestive, that a motion to suppress the identifications would have had merit, and that suppression of the identifications would have undermined the in-court identifications of defendant by Ashraf and Dalal. After examining the copy of the photo array and the photograph of the lineup, which are contained in the record on appeal, and after reviewing the trial testimony, we reject defendant's contention that the identification procedures conducted by Detective Alexander were unduly suggestive, and we conclude that defendant's trial counsel was not ineffective for not seeking to suppress them.

¶ 20 Where identification is the main issue, the State must prove beyond a reasonable doubt the identity of the individual who committed the crime charged. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). The testimony of a single credible witness identifying a defendant as the perpetrator of the crime is sufficient to satisfy the requisite burden of proof. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). To prevail on a claim that his trial counsel was ineffective for failing to file a motion to suppress a pretrial lineup identification, a defendant bears the burden of showing that the motion to suppress would have been granted and that the trial outcome would have been

different if the evidence had been suppressed. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). A witness's pretrial identification of an accused will not be suppressed unless the identification procedure employed was unnecessarily suggestive and there was a substantial likelihood of irreparable misidentification such that he was denied due process. *People v. Enis*, 163 Ill. 2d 367, 398 (1994).

¶ 21 Defendant argues that the photo array was unduly suggestive because his photo was "uniquely cropped" in that it was "zoomed in," showing defendant closer to the camera than the individuals in the other five photos. We have examined the replica of the photo array and conclude that all six photographs depict individuals with very similar complexions and facial features and same approximate age, and that the cropping of the photos did not unduly highlight defendant so as to create a suggestive identification procedure. Defendant also complains that the lineup was unduly suggestive because only one other man in the lineup was as short as defendant and that man had a lighter complexion. Our examination of the lineup reveals that its composition was of five individuals with very similar physical characteristics. We do not believe the fact that one of the five participants bore skin coloring lighter than defendant rendered the lineup unnecessarily suggestive. Lineup participants are not required to be identical or near identical. *People v. Faber*, 2012 IL App. (1st) 093273, ¶ 57.

¶ 22 Both parties refer us to the identification factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972) against which any suggestiveness must be weighed: the eyewitnesses' opportunity to view the suspect during the offense, their degree of attention, the accuracy of any prior descriptions, their level of certainty at the time of their identification, the length of time between the offense and the identification, and any prior acquaintance with the subject. Because we have determined

that the photo array and lineup procedures were not unduly suggestive, we find it unnecessary to apply the *Biggers* factors to determine whether the victims' in-court identifications were sufficiently reliable. *People v. Johnson*, 222 Ill. App. 3d 1, 8-9 (1991). We conclude that trial counsel was not ineffective, as there was no reasonable basis for counsel to have sought to suppress the photo and lineup identifications prior to trial.

¶ 23 Next, defendant asserts that his conviction should be reduced to robbery or aggravated robbery because the testimony was not sufficient to establish that the object the victims described as a gun was actually a firearm as defined in section 1.1 of the Firearm Owners Identification Act (FOID Act) (430 ILCS 65/1.1 (West 2012)), and not one of the devices excluded from the firearm definition, such as an air gun, spring gun, BB gun, starter pistol, or antique gun. We disagree.

¶ 24 Due process dictates that a defendant may not be convicted of a crime unless each element constituting that crime is proven beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). Defendant was charged under section 18-2(a)(2) of the Criminal Code of 2012 (Code) with armed robbery in that he committed robbery and carried on or about his person, or was otherwise armed with, a firearm. 720 ILCS 5/18-2(a)(2) (West 2012). Section 2-7.5 of the Code (720 ILCS 5/2-7.5 (West 2012)) provides that the term "firearm" has the meaning ascribed to it in section 1.1 of the FOID Act, namely, "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," but specifically excluding any pneumatic gun, spring gun, paint ball or BB gun, any device used exclusively for signaling or safety, or for the firing of industrial ammunition, and an antique firearm that is primarily a collector's item.

¶ 25 Defendant does not dispute that the State proved he robbed the victims, but he contends the State failed to prove he possessed a firearm while doing so. He notes that the alleged firearm was never recovered. Defendant argues that objective evidence, rather than a victim's subjective belief, is required to establish the armed element in the armed robbery. In support of his assertion, defendant refers us to *People v. Skelton*, 83 Ill. 2d 58 (1980) and *People v. Crowder*, 323 Ill. App. 3d 710 (2001). In *Skelton*, the issue presented was whether a toy gun, which was recovered shortly after the robbery, constituted dangerous weapons under the armed robbery statute. The issue in *Crowder* was whether the trial court properly dismissed an indictment charging the defendant with unlawful possession of weapons by a felon and unlawful use of weapons by a felon as a sanction for the State's destruction of the gun recovered from the defendant. Neither *Skelton* nor *Crowder* addressed the issue of what constitutes sufficient proof of a firearm for purposes of the armed robbery statute. Here, Ashraf testified that he had seen guns before. He owned several guns, possessed a FOID card, and recognized the make of the gun defendant was pointing at Dalal's head; it was a Glock. Also, defendant said that if Ashraf did not give him the money, he was going to shoot Ashraf's wife.

¶ 26 Courts have consistently held that eyewitness testimony that the offender possessed a firearm, combined with circumstances under which the witness was able to view the weapon, is sufficient to allow a reasonable inference that the weapon was actually a firearm. *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 15; *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36, vacated on other grounds, 2016 IL 117475. See also *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 4, 52 (finding evidence sufficient where video surveillance showed the defendant had a gun in his hand, corroborating witness testimony that the defendant wielded a "black or

black and silver" firearm). Defendant contends that both *Malone* and *Fields* were incorrectly decided. However, we decline to depart from those well-reasoned decisions of this court holding that testimony of an eyewitness who was able to view the weapon in question is sufficient to raise the inference that the weapon in question was actually a firearm. Consequently, the State is not required to present a firearm in order for the trier of fact to find that the defendant possessed one. See *People v. Washington*, 2012 IL 107993, ¶ 36; *People v. Clark*, 2015 IL App (3d) 140036, ¶ 24.

¶ 27 In the instant case, nothing in the record suggests the object defendant had in his possession was anything other than a firearm as defined in the FOID Act. While the surveillance video of the crime showed the armed robbery from a distance and the activity inside the Hyundai was not visible in the video, both victims had ample opportunity to view the weapon at very close distance and under good lighting conditions. Ashraf's belief that the object in defendant's hand was a real gun, a Glock, was based on Ashraf's familiarity with and ownership of guns. No evidence was presented that could lead the trier of fact to any conclusion other than that the weapon defendant used in the robbery was a firearm. Given Ashraf's unequivocal and uncontroverted testimony and his personal experience with guns, viewed in the light most favorable to the prosecution, we find that a rational trier of fact reasonably could have inferred that defendant possessed a real firearm during the commission of the crime to sustain his conviction for armed robbery.

¶ 28 Finally, defendant contends, and the State agrees, that the trial court awarded him with 225 days of time served prior to sentencing, but the mittimus should be corrected to reflect that he is entitled to one additional day of credit. A defendant is entitled to have the mittimus

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accurately reflect credit for the number of days served prior to the date of sentencing. 730 ILCS 5/5-4.5-100(b) (West 2013). Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Feb. 6, 2013), this court directs the circuit court clerk to amend the mittimus to reflect that the number of days of presentence credit that should have been awarded to defendant was 226 days.

¶ 29 Under our authority pursuant to Illinois Supreme Court Rule 615(b), we direct the circuit court clerk to correct the mittimus to reflect that the presentence credit to which defendant was entitled was 226 days. We affirm the judgment of the circuit court in all other respects.

¶ 30 Affirmed; mittimus corrected.