

No. 1-14-3869

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	11 CR 18168
)	
JACKIE FISHER,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty beyond a reasonable doubt. The trial court did not err in denying defendant's motion to suppress. Defendant did not receive ineffective assistance of counsel. The prosecutor's comments during closing argument did not deny defendant a fair trial.

¶ 2 Following a jury trial, defendant Jackie Fisher was convicted of aggravated vehicular hijacking with a firearm (720 ILCS 5/18-4(A)(4) (West 2012)) and armed robbery with a firearm (720 ILCS 5/18-2(A)(2) (West 2012)) and was sentenced to two concurrent terms of 25 years' imprisonment. On appeal defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt where its case depended on a single unreliable eyewitness identification and where the State failed to establish that the weapon used was a firearm; (2) the trial court erred by failing to suppress the identifications of defendant where they were the result of a highly

suggestive show-up; (3) he received ineffective assistance of counsel when counsel failed to present expert testimony to support his misidentification defense; and (4) he was denied a fair trial based on improper comments by the prosecutor during closing argument. For the following reasons, we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 Defendant was indicted for aggravated vehicular hijacking, armed robbery with a firearm, unlawful vehicular invasion and aggravated unlawful restraint following his involvement in the robbery and carjacking of Freeman Bacon.

¶ 5 Prior to trial, defendant filed a motion to suppress identification testimony and a motion to quash arrest and suppress evidence. At the hearing on the motion, Officer Salcedo testified that on October 3, 2012, he was on patrol, driving with a partner in a marked squad car, when he received a flash message regarding a vehicular hijacking that occurred at 604 South Kilpatrick at approximately 9:50 p.m. The message he received indicated that the vehicle was a black Dodge Charger with tinted windows, a light blue spoiler and custom rims. He also learned that he should be on the lookout for a slim black male, with short hair, 6 feet tall, with a grey hoody and dark jeans, and a black male, 5 feet 10 inches tall with a black hoody, dark jeans, dread locks and a gun.

¶ 6 About 20 minutes after he received the message, Officer Salcedo saw a Charger parked, but still running, on a residential street at 3838 West 18th Street. The Charger matched the description of the vehicle taken in the hijacking. Officer Salcedo verified the license plate number with dispatch. No one was in the vehicle at the time. Officer Salcedo waited five to ten minutes and then saw a person he later identified in open court as defendant, open the gate at an apartment complex at 3838 West 18th Street and walk right toward the passenger side of the

vehicle. Defendant, who had gotten within two or three feet of the vehicle on the grassy parkway, stopped and looked back at the officers. He then walked away.

¶ 7 Defendant matched the description of one of the offenders given over the broadcast. Defendant was a black male, wearing a gray hoody, dark jeans and appeared to Officer Salcedo to be 6 feet tall. Officer Salcedo pulled up and asked defendant to approach the squad car and defendant complied. Defendant was placed in handcuffs and put into the police car. Officer Salcedo then informed the other units that they had a possible suspect in custody.

¶ 8 About five minutes later, Bacon arrived in a squad car. The officers shined a spotlight on defendant who had been brought out of the back of Officer Salcedo's squad car in handcuffs. Bacon remained in the squad car and, from approximately 15 feet away, identified defendant as one of the offenders immediately. Defendant was arrested, about 53 minutes after the offense.

¶ 9 The court denied defendant's motions noting that before defendant was detained, the police were sure that they had found the stolen vehicle and observed defendant "clearly moving" toward that vehicle. The court further held that the defendant matched the "pretty specific" description given to the police. The court also stated that the show-up was not suggestive and caused minimal intrusion and that it would have been a "larger intrusion if the defendant had been taken to a police station" while a lineup was assembled and conducted.

¶ 10 Prior to trial, the State indicated that it would be proceeding on the aggravated vehicular hijacking with a firearm and armed robbery with a firearm counts.

¶ 11 Bacon testified at trial that at 9:50 p.m. on October 3, 2011, he was sitting in the driver's seat of his Dodge Charger alone near 604 South Kilpatrick, smoking a cigarette. Two men approached the car. One man had a gun and tapped the black barrel on the driver's side window and told Bacon to unlock the door. The man without the gun, who Bacon identified as

defendant, opened it and asked Bacon what items he had on him and where his phone was. Street lights across from where Bacon was sitting and the interior dome light of the vehicle, that turned on when defendant opened the door, allowed Bacon sufficient light to see defendant's face. Defendant was inches from him. While the other man stood outside the driver's side door pointing his gun at Bacon, defendant "pretty much climbed over" Bacon, going through his pants pockets and the car for money and valuables. Defendant spent about 30 seconds going through Bacon's pockets and during that time Bacon was able to see defendant's face. Defendant did not touch the steering wheel or console. Defendant took about \$80 cash from Bacon's pockets. He also took other valuables.

¶ 12 The men told Bacon to run, telling him to decide between his car and his life. Bacon ran south but saw defendant enter the passenger's side of the car and the man with the gun enter the driver's side. They drove off. Bacon eventually entered a building and called police. The police responded about 10 minutes later. Bacon gave police a description of his car and the license plate number. He described defendant to police as a black male with short hair, slim, wearing a grey hoody, dark jeans and about 6 feet tall. Bacon testified that during trial, defendant did not look like he did the night he was in police custody.

¶ 13 Officer Salcedo's trial testimony was relatively consistent with his testimony at the hearing on the motions to quash and suppress. He saw defendant walking in the direction of Bacon's stolen car. Defendant matched the description of one of the offenders given in the broadcast. The officers approached, detained defendant and radioed that they had a possible suspect.

¶ 14 Chicago police officer Gozdal testified that he was on routine patrol on October 3, 2011, with his partner Officer Chaiket and responded to a call for a vehicular hijacking. They arrived

at 604 South Kilpatrick and spoke with the victim, Freeman Bacon. After speaking with Bacon, Officer Gozdal sent a flash message over the radio with a description of two offenders in a vehicle and provided the vehicle's make, model and license plate number.

¶ 15 Within 20 to 25 minutes, he received a response from officers that they had a possible suspect in custody. Officer Gozdal brought Bacon to 3838 West 18th Street, where Officer Salcedo had found Bacon's car and had detained defendant. This was approximately five to ten minutes away from the location of the carjacking. After Officer Gozdal had a brief conversation with Officer Salcedo, Officer Salcedo took defendant out of the back of the squad car and shined a light on his face. Bacon, who remained in the back of Officer Gozdal's squad car about 15 to 20 feet from defendant, identified defendant as the man who robbed him right away. Bacon noted that defendant was wearing a different sweatshirt.

¶ 16 Chicago police officer John Buczkiewicz, an evidence technician with the forensic services section, testified that on October 3, 2011, at about 11 p.m., he arrived at the scene. Bacon's car was locked. The exterior surface of Bacon's car was wet and therefore he was unable to obtain fingerprints. He did not follow up to try to obtain fingerprints from the inside of the car.

¶ 17 After hearing all of the evidence and closing arguments, the jury found defendant guilty of both counts. Defendant's motion for a new trial was denied. The court sentenced defendant to 25 years' imprisonment on each count, the sentences to run concurrently. Defendant filed a timely appeal.

¶ 18 ANALYSIS

¶ 19 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant argues that Bacon's identification is unreliable and insufficient to

support his convictions. Furthermore, defendant argues that the State failed to prove the use of a firearm beyond a reasonable doubt.

¶ 20 On appeal, when the defendant challenges the sufficiency of the evidence, the reviewing court must determine, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). “[A] reviewing court must allow all reasonable inferences from the record in favor of the [State].” *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed “unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant’s guilt.” *People v. Graham*, 392 Ill. App. 3d 1001, 1009 (2009).

¶ 21 It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* It is not the duty of the trier of fact to accept any possible explanation that favors the defendant’s innocence and “elevate[s] it to the status of reasonable doubt.” *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 22 Defendant alleges that the identification testimony of Freeman Bacon was insufficient to support his conviction. When assessing identification testimony, we must apply the following factors: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s 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. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). “A single witness’ identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification.” *Slim*, 127 Ill. 2d at 307.

¶ 23 With respect to the first and second factors, the witness’s opportunity to observe the offender during the incident and the degree of attention, defendant argues that Bacon’s ability to see was compromised given that the offense occurred at 9:50 p.m. on October 3, 2011, and that he was distracted by the second man who allegedly was holding a firearm. The evidence does not support this claim. Bacon testified that as he was sitting in the driver’s seat of his car, two men approached. The one with the gun knocked on the window and told him to open the door. After Bacon unlocked the door, the other man, whom Bacon identified in open court as defendant, opened the door. When defendant opened the door, Bacon’s dome light illuminated the interior of the car. Defendant asked Bacon, “What you got? Where is your phone?” Defendant then leaned over Bacon and went through his pockets. Bacon was able to see defendant’s face during the approximately 30 seconds that defendant spent going through Bacon’s pockets. There was no testimony that Bacon was focused on anyone other than defendant who was leaning across his lap while going through his pockets. We find that Bacon had ample opportunity to view defendant, and testified to a degree of detail that would allow the jury to make a determination as to the appropriate weight to be given his identification testimony.

¶ 24 Third, we consider the accuracy of the witness’s description of defendant. Bacon described both offenders to the officers. He relayed that defendant was a slim black male about 6 feet tall, with short hair, wearing a grey hoody, dark jeans and a dark baseball cap. Defendant

argues that Bacon's description of him to police was inaccurate because he is 5 feet, six inches, not 6 feet and at the time he was arrested had a shaved head and a goatee. Defendant also points out that at trial, Bacon, who is 6 feet, four inches, testified that defendant was "just a little bit shorter than" him. While there may have been discrepancies in Bacon's testimony, "[t]he presence of discrepancies or omissions in a witness' description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *People v. Magee*, 374 Ill. App. 3d 1024, 1032 (2007) (citing *Slim*, 127 Ill. 2d at 309). Bacon's general description of defendant as one of the offenders was accurate, and any discrepancy was presented to the jury and it was for the jury to assess what weight to give to Bacon's identification.

¶ 25 We consider the fourth and fifth factors together, the level of certainty the witness demonstrates in identifying defendant as the offender and the amount of time between the commission of the crime and the identification. Bacon identified defendant "immediately" after seeing him less than an hour after the incident and again in open court. At no point did Bacon waiver in his identification of defendant. After considering all five *Biggers* factors, we find Bacon's identification testimony to be reliable. The jury found him to be credible in his identification, and we will not substitute our judgment for the trier of fact. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 26 We reject defendant's argument that Bacon's description of him was so vague that it did not differentiate him from any other black male. We note that our supreme court has rejected this very argument in *Slim*. Our supreme court stated in *Slim* that "a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification." Instead, a witness' positive identification can be sufficient even though the witness gives only a

general description based on the total impression the accused's appearance made.” *Id.* at 308-09. Here, Bacon testified that he recognized defendant’s face and identified defendant immediately as one of the offenders.

¶ 27 Defendant also argues that the State failed to prove that the weapon used met the statutory definition of a firearm and therefore failed to prove the use of a firearm beyond a reasonable doubt.

¶ 28 Defendant was charged with armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) and aggravated vehicular hijacking (720 ILCS 5/18-4(a)(4) (West 2012)), which require the State to prove beyond a reasonable doubt that defendant or a person who was accountable committed those offenses while armed with a firearm. “Firearm” is defined in section 1.1 of the Firearm Owners Identification Card Act as follows:

“ ‘Firearm’ means 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; excluding, however:

(1) any pneumatic gun, spring gun, paint ball gun or BB gun which either expels a single globular projectile not exceeding .18 inch in diameter and which has a maximum muzzle velocity of less than 700 feet per second or breakable paint balls containing washable marking colors;

(2) any device used exclusively for signaling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;

(3) any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition; and

(4) an antique firearm (other than a machine-gun) which, although designed as a weapon, the Department of State Police finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.” 430 ILCS 65/1.1 (West 2012).

¶ 29 Whether a defendant possessed a firearm during the commission of an offense is a question of fact for the jury. *People v. Clark*, 2015 IL App (3d) 140036, ¶ 24. “The State does not have to prove the gun is a firearm [within the meaning of the statutory definition] by direct or physical evidence; unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant was armed during a robbery.” *People v. Wright*, 2015 IL App (1st) 123496, ¶ 74.

¶ 30 In this case, Bacon testified that on the evening in question two men approached his vehicle. One of the men tapped on his window with a gun. He was able to see the black barrel of the gun. He opened the car door at the men’s request. Defendant went through Bacon’s pockets as the other man remained outside the driver’s side, pointing his gun at Bacon’s head. We find that the evidence was sufficient to establish that a firearm was used in the commission of this offense.

¶ 31 Defendant next argues that the trial court erred by failing to suppress Bacon’s identifications of defendant where they were the product of a highly suggestive show-up. Defendant claims that identification was the sole issue in the State’s case against defendant and it was a violation of due process to allow evidence of a show-up identification that was unnecessarily suggestive and entirely unreliable.

¶ 32 After being robbed and having his car stolen, Bacon gave a description of the offenders to the police. Approximately 40 minutes later, Officer Salcedo located Bacon’s stolen car and saw

a man matching one of those descriptions walking towards the car. Officer Salcedo then arrested defendant and placed him in the back of his squad car. He radioed that he had a possible offender in custody. Shortly thereafter, Bacon arrived escorted by police. Officer Salcedo removed defendant from the back seat of the squad car and shined a light on his face. Bacon immediately identified defendant as one of the offenders and he was placed under arrest within approximately 53 minutes after the hijacking.

¶ 33 Courts use a two-step analysis when reviewing whether a show-up identification should have been suppressed. First, defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994). If the defendant meets this burden, the State must then establish that, under the totality of the circumstances, the identification is independently reliable. *Id.* The standard of review of a trial court's denial of a motion to suppress a show-up identification is whether the trial court's decision was “manifestly erroneous.” *Id.* at 796.

¶ 34 We must first consider whether defendant has met his burden of showing that the show-up was unnecessarily suggestive and conducive to irreparable misidentification. See *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 236. Illinois courts have long held that an immediate show-up identification near the scene of the crime is proper police procedure. *People v. Thorne*, 352 Ill. App. 3d 1062, 1076 (2004); *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). In *People v. Hicks*, 134 Ill. App. 3d 1031, 1036 (1985), this court stated:

“Although one man show-ups are generally condemned, they have been consistently upheld when they are justified by the circumstances. One of the circumstances in which a show-up has been justified by the court is when it is necessary

to facilitate a police search for the real offender, and the Supreme Court has consistently upheld prompt identification of a suspect by a witness or victim near the scene of the crime where [it fosters] the desirable objectives of a fresh, accurate, identification, which may lead to the immediate release of an innocent subject and at the same time enable the police to resume the search for the fleeing offender while the trail is still fresh.” *Id.*

¶ 35 A show-up conducted with a suspect in handcuffs does not automatically weaken the veracity of the identification either. See *People v. Howard*, 376 Ill. App.3d 322, 331-32 (2007) (show-up with suspect in handcuffs and flanked by police appropriate where all three witnesses had ample opportunity to observe the suspect closely and the identification took place shortly after the crime); *People v. Frisby*, 160 Ill. App. 3d 19, 32-34 (1987) (one-person show-up of suspect in handcuffs appropriate where alley light illuminating darkened room was sufficient to support identification). Moreover, shining a light on a defendant so there is adequate illumination is not problematic. See *Ramos*, 339 Ill. App. 3d at 898.

¶ 36 Here, the police officers were justified in conducting a one man show-up, in the manner in which it was conducted, because a prompt identification was necessary to inform police officers whether they needed to continue their search to find armed and dangerous offenders. We therefore find the evidence presented at the suppression hearing in this case demonstrates that the show-up was not unnecessarily suggestive and the trial court properly denied defendant’s motion to quash and suppress.

¶ 37 Even if the show-up could be construed as suggestive, as we have already discussed, Bacon’s identification of defendant was independently reliable under the *Slim* factors. Bacon identified defendant immediately when defendant was removed from the squad car. In addition, the time lapse between the crime and the identification was approximately one hour. Bacon had

the opportunity to observe the offender during the commission of the offense as defendant was leaning over his lap, removing items from Bacon's person and his car. He was able to see defendant's face and describe his clothing because the streetlight and the interior dome light of the car illuminated the area. The spotlight illuminating defendant served to allow that the lighting was adequate for Bacon to see defendant from a distance given that it was about 11:30 p.m., and for defendant not to see Bacon. Defendant failed to establish that the show-up was impermissibly suggestive, and even if he had not, the totality of the circumstances establishes that Bacon's identification of defendant was reliable.

¶ 38 Defendant argues that counsel was ineffective for failing to retain an expert witness in eyewitness identification. Defendant claims that the State's entire case against him rested on Bacon's identification, which stemmed from a highly suggestive show-up. Defendant claims that although defense counsel focused on the suggestive nature of the show-up, the circumstances surrounding the encounter, the brevity of the encounter, the presence of a weapon and Bacon's initial description of defendant differing from defendant's actual appearance, defense counsel did not present evidence to support his argument that Bacon's trial testimony about the events was unreliable. Defendant argues that in this particular case, an expert on eyewitness identification testimony would have aided the jury in understanding the science behind misidentification.

¶ 39 A defendant has a constitutional right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Ill. Const. of 1970, Art. I, § 8. Counsel renders ineffective assistance when: (1) counsel's representation falls below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors the results in the trial court would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Albanese*, 104 Ill. 2d

504, 525-26 (1984).

¶ 40 We acknowledge that eyewitness identification is an appropriate subject for expert testimony in an appropriate case. See *People v. Lerma*, 2016 IL 118496, ¶ 28. Although we have no way of knowing what an expert identification witness would say if called to testify in this case, based upon what we do know we can confidently find that trial counsel's performance was not unreasonable where he did not call an expert witness regarding the reliability of eyewitness identification testimony because Bacon's identification has not been shown to be unreliable. Bacon's identification of defendant was neither vague nor doubtful. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997); *People v. Faulkner*, 292 Ill. App. 3d 291, 394 (1997) (to overcome the presumption that counsel's trial strategy is sound, the strategy must appear irrational and unreasonable in light of the circumstances defendant is facing and that no reasonable criminal defense attorney facing such circumstances would pursue such strategies). Both Bacon and Officer Salcedo testified that Bacon identified defendant immediately upon seeing his face in the show-up shortly after the offense.

¶ 41 Additionally, we cannot say that there is a reasonable probability the results in the trial court would have been different if counsel had presented such expert testimony. Even if defense counsel had called an expert identification witness, the State could have called its own witness to offer a contrasting opinion. *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005).

¶ 42 In the case at bar, defense counsel conducted a very thorough cross-examination of Officer Salcedo regarding the initial description of the offenders that went out in the flash message and whether defendant matched that description. Defense counsel impeached Officer Salcedo's trial testimony with his testimony from the motion to suppress. Defense counsel argued to the jury that the police identification methods were suggestive, Bacon's opportunity to

observe was brief, the presence of a weapon would affect the ability to identify the perpetrator and the discrepancies in the description of the offender. The jury was not persuaded. We cannot say that counsel's performance and trial strategy were so unsound as to deny defendant a fair trial.

¶ 43 Defendant also argues that he was denied a fair trial when the prosecutor misled the jury by improperly injecting a material fact relating to Bacon's identification of the offender. Defendant asserts that he was denied a fair trial by a single leading question on redirect examination that included a fact not previously in evidence.

¶ 44 On direct examination, Officer Salcedo testified that he saw a black male, who he identified as defendant in open court, wearing a dark hoody and dark jeans, walk out of the apartment complex towards Bacon's stolen car. Officer Salcedo was asked if he was able to see the approximate height of that individual. Salcedo replied, "yes." The prosecutor then asked "approximately how tall was that person?" Salcedo responded, "approximately 5,6, 5,8." Salcedo then responded "yes" when asked if the man matched the description of the offenders he received over the flash message. Defendant did not object.

¶ 45 On cross-examination, Officer Salcedo agreed that when defendant was placed in custody, he was five feet, six inches tall with brown eyes, black hair that was shaved and facial hair and matched the description of one of the possible offenders. Officer Salcedo also agreed that on the evening in question, he was looking for two specific individuals who were involved in the car jacking - a five feet six inch tall man with dreadlocks and a six feet tall light skinned black man with short hair. On redirect examination, the prosecutor asked Officer Salcedo if "one of the offenders' description that came out over the air was a male black, 5,6 to 6 feet." Officer Salcedo responded, "yes." Officer Salcedo then agreed that that same person had a shaved

hairstyle and medium brown complexion. Defense counsel objected as a misstatement of the evidence and the trial court overruled the objection. Officer Salcedo responded, “yes.” The prosecutor then asked “and that person that was approximately 5,6 to 6 feet with a shaved hairstyle, medium complexion that person was stated to have a gray hoodie on and blue pants on?” Officer Salcedo responded, “yes.” The prosecutor then asked Officer Salcedo, “the other description that was provided to you for the second offender is that person was also a male black” and was “about 5,9 to 5,10,” “with a hairstyle with dreads” and a “black hoody and dark colored pants.” Officer Salcedo answered “yes.” Officer Salcedo then agreed with the prosecutor that defendant did not have dreadlocks when he saw him that evening. Then during recross, defense counsel asked Officer Salcedo “[t]here wasn’t a description that went out that night of 5’6” to 6 feet with a shaved head, was there?” Officer Salcedo responded, “During the course of flash messages and trying to get a better description of possible offenders there is a range sometimes given. I believe that is in one of the reports.” Defense counsel then attempted to impeach Officer Salcedo with his testimony from the suppression hearing where he testified that the description given over the radio included that the suspect without a gun was six feet tall.

¶ 46 Defendant argues that prior to the prosecutor’s leading question on redirect examination Officer Salcedo had not previously testified that the initial description of the offender included a height description ranging from five feet, six inches to six feet. Defendant makes much of the issue of the inconsistency in Officer Salcedo’s testimony regarding the initial description that went out over the flash message. The initial description of the offenders that Officer Salcedo received as a flash message was the subject of thorough questioning by the parties during direct, cross-examination, redirect examination and recross examination given that this case involved a single witness identification.

¶ 47 We are cognizant that discrepancies existed in Officer Salcedo's testimony in this regard and that some of those discrepancies existed as a result of the prosecutor's leading question. We note that those discrepancies were brought to the jury's attention by defense counsel's impeachment of Officer Salcedo with Officer Salcedo's testimony from the suppression hearing. In addition, leading question or not, the fact of the matter is that any discrepancies or omissions in the description of defendant merely go to the weight of the identification testimony to be decided by the trier of fact. *Slim*, 127 Ill. 2d at 308-09. The discrepancies in Officer Salcedo's testimony regarding the description of the offenders he was looking for on the night in question were fully explored at trial, and these discrepancies did not render Bacon's identification of defendant unreliable. *Id.* at 307. We therefore reject defendant's argument that the prosecutor misled the jury.

¶ 48 Defendant argues that during closing argument the prosecutor improperly misstated several facts, repeatedly mischaracterized the evidence and misled the jury with unfair analogies and injected himself into the case.

¶ 49 Defendant complains of several specific instances of error that he did not object to during closing argument. To preserve an issue for appeal, a defendant "must both contemporaneously object at trial and include the specific alleged error in a written post-trial motion. Failure to raise an issue in a written post-trial motion constitutes a waiver of the issue and it cannot be considered on appeal." *People v. Ramos*, 318 Ill. App. 3d 181 (2000). "By operation of Ill. Sup. Ct. R. 615, an appellate court may review any question not otherwise properly preserved if it believes that plain error affecting a substantial right may have occurred." *Id.* at 326.

¶ 50 Plain error can occur in two situations. First, "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence."

People v. Herron, 215 Ill. 2d 167, 169 (2005). Second, “where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process.” *Id.* However, before we embark on determining whether plain error occurred, we must first determine if there was error at all. *People v. Piatkowski*, 225 Ill. 2d 551, 554 (2007).

¶ 51 Courts allow prosecutors great latitude in making closing arguments. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987). A prosecutor may comment on the evidence and all reasonable inferences from the evidence. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Even if the statement is found to be improper, it will be considered prejudicial only where defendant can show that the jury would have reached a contrary verdict had the improper statements not been made. *People v. Jackson*, 2012 IL App (1st) 092833, ¶38.

¶ 52 There is a conflict regarding the correct standard for reviewing a prosecutor’s remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Sims*, 192 Ill. 2d 592, 615 (2000), our supreme court suggested that we should review this issue *de novo*. In *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), however, the court suggested that we should review this issue for an abuse of discretion. We need not take a position in this case, as defendant’s claim fails under either standard.

¶ 53 We note that prior to closing arguments, the trial court instructed the jury that “what the lawyers say [in closing argument] is not evidence and it should not be considered by you as evidence. The lawyers will simply be discussing what they believe the evidence has shown.” It must be presumed the jurors followed the court’s instructions. *People v. Jackson*, 145 Ill. App. 3d

626, 642 (1986). Instructions of this sort by the trial court decrease the likelihood that improper remarks in the prosecutor's closing argument rose to the level of plain error. *Id.*

¶ 54 Defendant argues that the prosecutor told the jury that Bacon initially described the offender as being between 5 feet 6 inches and six feet tall. Again, the issue of identification and the discrepancies between the descriptions of the offenders given on the night in question have been fully explored in this case. The prosecutor was merely commenting on the evidence and testimony, making all reasonable inferences therefrom. This was not error.

¶ 55 Second, defendant argues he was denied a fair trial when the prosecutor bolstered Bacon's description of the events by claiming that Bacon described the gun used during the offense as a "dark steel gun" when Bacon simply described the gun as being "black." We agree with defendant that Bacon did not describe the gun as being "steel." However, we do not believe that the prosecutor's injection of the adjective "steel" in his description of the firearm used in this case amounts to error. As previously stated, the prosecutor is given a great deal of latitude and is entitled to argue all reasonable inferences, including that the gun was made of steel. We find no error with respect to this characterization of the gun.

¶ 56 Defendant also claims the prosecutor denied him a fair trial when he argued that Bacon saw defendant for 30 to 40 seconds and 30 to 45 seconds when Bacon testified that defendant spent about 30 seconds going through his pockets. We reject this argument and find that the prosecutor's argument that Bacon was able to see defendant's face for 30 to 40 or 30 to 45 seconds is a reasonable inference from the evidence. Bacon testified that defendant spent about 30 seconds going through his pockets and that he was able to see his face during that time. However, the additional 10 to 15 seconds, as argued by the State, could include the time period when defendant approached the car and opened the door after Bacon unlocked it, and after

defendant went through Bacon's pockets, when defendant and the second offender threatened Bacon before getting into his car and driving away. We find no error here.

¶ 57 Next, defendant complains that the State's argument misrepresented to the jury how it should evaluate the evidence. Defendant states that during closing argument while arguing that Bacon had adequate opportunity to view the offender, the prosecutor stated, "I want to do a little exercise with you, please. I want you to look at me and I'm going to time you for ten seconds, okay." The court sustained defendant's objection. Defendant asserts that despite the court's ruling on this objection, the prosecutor persisted in this argument and in its rebuttal argument stated:

"You can't recognize that person 45 minutes later? You didn't see me for days. I think you'd recognize me on the street. We're talking about a person coming this close to you face for over 30 seconds, 45 seconds. You can't recognize that person? Is that the argument? This is 4 seconds. Imagine 30 to 45 just looking at me. You would remember."

¶ 58 Contrary to defendant's argument, the record reveals that the prosecutor did not persist in his exercise following the court's ruling on defendant's objection. His comments in rebuttal argument were not a continuation of the exercise he proposed in his closing argument. Rather, in rebuttal he was properly commenting on Bacon's ability to identify defendant approximately one hour after seeing defendant for only approximately 45 seconds. This was a proper area of discussion for closing argument and well-within the latitude afforded given the evidence in this case and did not amount to error.

¶ 59 Defendant also claims that the prosecutor "played up the fear Bacon conveyed in court to bolster the appearance of the reliability of the identification." The prosecutor stated: "Remember

how he reacted. He looked, he looked over. Remember his demeanor that moment when he saw this guy sitting there. Remember his demeanor. Remember his face. Fear three years later.” Defendant’s objection was overruled. The prosecutor continued, “Fear three years later. For three years he hasn’t seen him and when he sees him he trembled. You think that’s a misidentification. No.” These comments came after defense counsel argued that there was a suggestive identification and that Bacon was “understandably traumatized and perhaps stress has led to a conclusion” that Bacon wanted someone caught so that “it was easy for Mr. Bacon to make a mistake.”

¶ 60 The prosecutor may comment on the inference related to credibility which might logically be drawn from the demeanor of the witness. *People v. Cole*, 80 Ill. App. 3d 1105, 1108 (1980). It is fair to argue, as the prosecutor did in this case, that a witness is believable based on his demeanor while testifying. *People v. Nitz*, 143 Ill. 2d 82, 120 (1991). And, importantly, it was for the jury to view Bacon’s demeanor while testifying and to factor his demeanor into its credibility determination. We therefore find no error occurred.

¶ 61 Next, defendant argues that the State further prejudiced defendant by “contrasting its bolstering of Bacon with disparaging comments towards Fisher” during closing argument. Defendant complains that the State noted that defendant walked with a cane at the time of trial and highlighted that change along with other alleged differences between defendant’s appearance between the time of his arrest and trial.

¶ 62 During defendant’s closing argument, defense counsel argued, “when [defendant] was placed under arrest 50 minutes after the car-jacking he looked exactly then as he does now.” The State responds that its rebuttal argument was in response to defense counsel’s argument. We agree with the State.

¶ 63 When reviewing allegations of prosecutorial misconduct, the complained-of statements must be considered in the context of the entire closing argument of both the State and the defendant. *People v. Smith*, 199 Ill. App. 3d 839, 854 (1990) Statements will not be held improper if they were provoked or invited by the defense counsel’s argument. *People v. Kirchner*, 194 Ill. 2d 502, 553 (2000). No error occurred as a result of the prosecutor’s comments regarding the difference in defendant’s appearance between the night of the offense and the time of trial where those comments were invited by defense counsel in an apparent attempt to portray someone who walks with a cane as being incapable of approaching someone in a car and committing an armed robbery and vehicular hijacking.

¶ 64 Defendant argues that the prosecutor’s argument regarding defendant’s “flight” was improper. We disagree. The prosecutor properly argued in closing that defendant’s action of approaching Bacon’s stolen car, by turning away from it after he saw the officers was “circumstantial evidence” supporting “reasonable inferences” of defendant’s “consciousness of guilt.” A reasonable inference can be drawn that defendant was attempting to avoid police detection by changing directions when he spotted the officers sitting in their squad car several feet away as defendant approached Bacon’s car that had recently been reported as taken at gunpoint. The prosecutor’s argument in this regard was not improper or prejudicial.

¶ 65 Alternatively, defendant argues that defense counsel was ineffective for failing to object to all of the State’s comments.

¶ 66 Under *Strickland*, a defendant claiming ineffective assistance of counsel must demonstrate that counsel's performance fell below an objective standard of reasonableness and the performance prejudiced the defense of the case. *Strickland*, 466 U.S. at 687. Prejudice exists where there is a reasonable probability that but for counsel's deficient performance, the result of

the proceeding would have been different. *Id.* at 694. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.*

¶ 67 We have already determined that no error resulted from the prosecutor’s comments in closing argument. An attorney’s performance is ineffective only if it falls below an objective standard of reasonableness and counsel cannot be deficient if he fails to object to remarks that are not improper. *People v. Johnson*, 2118 Ill. 2d 125, 139 (2005). Here, counsel was not ineffective for failing to object to remarks that were within the bounds of proper argument by a prosecutor.

¶ 68 We similarly reject defendant’s argument that the cumulative impact of the issues he has raised regarding closing argument has denied him a fair trial. As we have discussed, defendant has failed to show that any of the issues he has raised are tantamount to reversible error.

Consequently, where there is no error, there can be no cumulative error. *People v. Evans*, 186 Ill. 2d 83, 103 (1999).

¶ 69 As we have found that no error has occurred with respect to the prosecutor’s comments during closing argument, plain error analysis is unnecessary.

¶ 70 CONCLUSION

¶ 71 For the following reasons, the judgment of the trial court is affirmed.

¶ 72 Affirmed.