2017 IL App (1st) 143968-U
No. 1-14-3968

THIRD DIVISION
June 28, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13CR2585
	)	
DALE SEALEY,	)	
	)	The Honorable
Defendant-Appellant.	)	Erica L. Reddick,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held:* defendant's convictions for aggravated vehicular hijacking and armed robbery affirmed where he received effective assistance of trial counsel and where the circuit court did not err in admitting evidence.

¶ 2 Following a jury trial, defendant Dale Sealey was convicted of aggravated vehicular hijacking and armed robbery and sentenced to 29 years' and 28 years' imprisonment, respectively, the sentences to be served concurrently. Defendant appeals his convictions and the sentences imposed thereon, arguing that he was denied his constitutional right to effective

assistance of trial counsel and that the circuit court erred in admitting certain evidence. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On October 12, 2012, coworkers Casey Diers and Steven Ferrier were approached by an armed man and two unarmed assailants as they left work for the day. The three offenders robbed both men and then fled the scene in Diers's vehicle. Defendant and codefendant Eariss Brent were both subsequently charged with multiple crimes in connection with those events.[1] Defendant, who was identified as the gunman, was charged with armed robbery with a firearm, attempted aggravated vehicular hijacking and aggravated unlawful restraint.

¶ 5 Pretrial Proceedings

¶ 6 Prior to trial, defendant filed a motion to suppress the victims' identification. In his motion, defendant argued that the lineup that Diers and Ferrier viewed was unduly suggestive because defendant was the only participant in the lineup who was bald. In addition, he was the only participant who was wearing a bright yellow coat and white shoes. The other members of the lineup were wearing black coats. Given "the suggestiveness of the lineup," defendant argued that the "in-court identification of [him] as the offender by Diers and Ferrier w[ould] be the product of the out-of-court suggestion by the police, rather that Diers' and Ferrier's own independent observations," and would necessarily violate his "constitutional rights to due process and fundamental fairness." Accordingly, defendant sought the suppression of the victims' pretrial identifications as well as their in-court identifications of him as the gunman.

¶ 7 Following a hearing, the circuit court granted defendant's motion to suppress Diers and Ferrier's pretrial lineup identifications, concluding that the lineup was "unnecessarily

[1] The third perpetrator was never identified.

suggestive" because defendant "st[ood] out like a proverbial sore thumb." Thereafter, the circuit court stated it would conduct a separate hearing to determine if there existed an independent basis for the witnesses in-court identifications of defendant.

¶ 8 At the subsequent hearing, Diers and Ferrier both testified that the crime occurred at approximately 5:50 p.m. on October 12, 2012, while there was still daylight. Both men categorized the crime as being brief in duration. Diers, in pertinent part, estimated that it was over within 3 minutes, while Ferrier estimated that the crime was over within a minute or a minute and a half. Despite the brevity of the crime, both Diers and Ferrier testified that they had been afforded sufficient opportunity to view the gunman, whose face was unobstructed and visible to them during the offense. In addition, both men positively identified defendant as the gunman. At the conclusion of the hearing, the circuit court determined that there was a sufficient independent basis for the victims' identifications of defendant and that Diers and Ferrier would be permitted to identify defendant in court at the upcoming trial. After litigating pretrial motions, the cause proceeded to a joint, but severed, jury trial.

¶ 9 Trial

¶ 10 At trial, Casey Diers testified that in October 2012, he was employed at Design Lab, located near the intersection of Albany and Carroll in Chicago. At approximately 5:50 p.m. on October 12, 2012, Diers left work with Steven Ferrier, one of his coworkers, and both men walked to their respective vehicles. After exiting the building, Diers turned left because he had parked his vehicle, a 2006 Ford Mercury Milan, on Carroll. Ferrier, in turn, had parked his vehicle on Albany directly across from Design Lab and crossed the street to get to his own vehicle. After reaching his car, Diers unlocked the doors and entered the driver's seat. Before he could close the door, however, defendant, who was wearing jeans and a jacket, ran up to him

and inserted himself between the driver's side door and the vehicle's interior. Defendant was holding a small metallic handgun, which he pointed at Diers's torso, and demanded Diers's wallet. Diers testified that defendant's face was a couple of feet away from him and that he was able to see his face clearly. Diers complied with defendant's demand and showed defendant his wallet, which did not contain any U.S. currency. Instead, his wallet contained credit cards and 50 European dollars. After being shown the contents of Diers's wallet, defendant paused for a "long" period and asked Diers about his friend. When Diers responded that he did not know who defendant was referring to, defendant ordered Diers to get out of his vehicle and to walk toward Ferrier, who had pulled up behind Diers and had exited his own vehicle. When Diers walked up to Ferrier, he told him that they were "getting robbed."

¶ 11 At that point, Diers noticed, for the first time, that defendant was accompanied by two other men, codefendant Brent and a third African American man. The three men then proceeded to search Ferrier's pockets and his vehicle. After the three men completed their search of Ferrier's vehicle, defendant instructed codefendant Brent to keep an eye on Diers and Ferrier while he and the third man searched Diers's vehicle. Diers testified that Brent then searched his pockets and that he was able to clearly view Brent's face as he did so. Diers estimated that he was standing approximately 10 feet away from defendant and the third man as they searched his vehicle and emphasized that defendant "was never more than ten feet away from [him]" throughout the entire incident. He was able to observe the two men as they conducted their search. Diers described the third offender, who was also wearing black clothing, as being both younger and shorter than defendant. Once the two men finished their search of Diers vehicle, defendant entered the driver's side of the vehicle. Brent and the third offender then joined

defendant in Diers's car and the three men fled westbound on Carroll. Diers confirmed that he had never seen any of the three men prior to that day.

¶ 12 After the men drove off in his vehicle, Diers returned to Design Labs to call 911. Officers responded to the scene approximately 15 minutes later and Diers relayed what had occurred and provided general descriptions of the three offenders. Specifically, he described all of the offenders as African American males and estimated that one of the offenders as being "a little bit older [than] the other two." In addition, one of the offenders had a bigger build and the gunman had facial hair. He did not recall providing the officers with any information about the offenders' hair colors because the three men were all wearing hats during the crime. Diers also did not recall providing the officers with specific height or weight estimates of the men. Following this initial conversation, Diers was subsequently contacted by police in the early morning hours of October 13, 2012, and informed that his car had been recovered. Diers was then able to retrieve his vehicle from the police station.

¶ 13 Following the crime, Diers testified that he noticed that the building located across the street from his workplace was equipped with external security cameras. He subsequently contacted Chris Loutris, the manager of the building, and was able "to gain access to those videos" recorded by security cameras and download the video footage to a flash drive. Diers then provided the flash drive to Detective Smith, who was investigating the crime. On November 28, 2012, during the course of the police investigation, Diers was called upon to view a photo array. Codefendant Brent's picture was included in that array and Diers positively identified him as one of the offenders.

¶ 14 Ferrier corroborated Diers's account of the crime. He testified that they both left work around 5:50 p.m. on October 12, 2012, and walked to their respective vehicles. Ferrier started

his truck and pulled it forward to the stop sign located at the intersection of Carroll and Albany. Before proceeding through the stop sign, Ferrier looked right and then left. When he looked to his left, Ferrier saw a "large black man standing in the doorway of [Diers's] car." Ferrier thought the man might be a "panhandler who was bothering him," so Ferrier "pulled up behind [Diers] and stopped," intending to "chase [the man] off." As Ferrier exited his vehicle, Diers walked up to him and stated, "we're being robbed." When Ferrier looked behind Diers, he saw defendant, the "man who had been standing in Diers's doorway," holding "a gun in his [right] hand." Defendant, who was wearing a blue jacket and a "blue pull down hat," pointed his gun at Ferrier and ordered Ferrier to "empty [his] pockets." Ferrier complied and as he did so, he made a point to look at defendant's face, explaining that he "remember[ed] hearing at one point that people who are being robbed tend to focus on the weapon and not on the face of the person who is robbing them, so [he] made a decision to look up and stare at the face of the man who was robbing [him]." Ferrier testified that defendant was standing "about two feet in front of [him]" and confirmed that he was able to clearly see defendant's face. After emptying his pockets, Ferrier gave defendant his cell phone, knife and "$70 to $80 worth of cash." Defendant then ordered Ferrier to turn over the keys to his truck. At that point, one of defendant's "associates" walked over to search him. Ferrier explained that defendant was accompanied by two other African American men but that he had not noticed defendant's "associates" until that time. The second man who searched Ferrier's pockets was wearing a black hooded sweatshirt; however, Ferrier testified that he did not focus on the man's face. Instead, he remained focused on defendant because he was the assailant who was armed with a gun. The men then searched Ferrier and Diers's vehicles before leaving the scene in Diers's car.

¶ 15 Ferrier confirmed that sometime after the assailants had left the scene, he and Diers noticed the security cameras affixed to the exterior of the building located across the street from their office and that they were subsequently able to review and copy relevant surveillance footage of the crime to a flash drive. That flash drive was subsequently provided to the detectives investigating the case.

¶ 16 On cross-examination, Ferrier acknowledged that the robbery was unexpected and that he was concerned about getting shot. He also admitted that he was not skilled in providing height and weight estimates or physical descriptions of other people and that when he conversed with officers after the crime, he did not describe defendant's eyes, eyebrows, nose or mouth shape. He simply described defendant as "a larger man with jowls" with a dark complexion. Ferrier emphasized, however, that he took the time to memorize defendant's face so that "if [he] had the occasion to point him out [in a lineup], [he] would be able to do so." He had no doubt that defendant was the gunman.

¶ 17 Pawel Jasiak testified that he was the owner of PJ Satellite, a company that installs satellite TVs, home theater, audio video and camera systems. He has worked in the industry for over 23 years and estimated that he has installed at least 200 camera surveillance systems. Jasiak testified that he was contacted by Christopher Loutris, sometime in June 2012, and hired to install a security camera system at a building located at the intersection of Albany and Carroll. Jasiak replaced the building's existing security system on June 6, 2012, with six new cameras and a digital recorder. Jasiak testified that the majority of the cameras were installed on the exterior of the building and faced various street angles in order to record "the various happenings on the outside on the streets." The data images captured by the cameras were then transmitted to the digital recorder that he installed inside of the building.

¶ 18 Chris Loutris, the property manager of the building located at 319 North Albany, confirmed that he hired Jasiak to install a camera system at the building. Loutris further confirmed that in October 2012, he was contacted by several "guys [who worked] across the street" who asked permission to view his building's surveillance footage. Loutris provided the men with access to the digital recorder and the men then downloaded video footage to a flash drive.

¶ 19 The jury subsequently viewed surveillance footage and still images of the three men involved in the armed robbery of Diers and Ferrier.

¶ 20 Chicago Police Officer Angelo Travlos testified that following the armed robbery of Diers and Ferrier, he viewed video surveillance of the crime. On January 3, 2013, upon viewing the footage and observing the three men depicted therein, Officer Travlos arrested defendant and transported him to the police station for processing.[2] At the time of his arrest, defendant was 39 years old. The processing paperwork identified defendant's as 5'11'' and his weight as 215 pounds. His skin color was described as having a "medium brown complexion."

¶ 21 Chicago Police Officer Abuzatat testified that at approximately 11 p.m. on October 12, 2012, he and his partner, Officer Angelo Tagler, were patrolling the area of 5600 West Madison in a marked squad car. As they were traveling westbound on Madison, he noticed a double parked vehicle obstructing the intersection. The vehicle was a tan Ford Mercury and did not have any license plates. Officer Abuzatat "pulled up right next to" the double-parked vehicle and saw that it contained four male passengers, one of whom was codefendant Brent. He then activated his vehicle's lights, intending to effectuate a traffic stop; however, the Mercury "sped through the intersection, disobeying a red light in a westbound direction." Officer Abuzatat, in

[2] Pursuant to the circuit court's earlier ruling on a motion *in limine*, Officer Travlos was specifically precluded from testifying that he recognized defendant from the tape based on his "prior dealings" with defendant as a police officer.

turn, activated his squad car's siren and pursued the fleeing vehicle while his partner transmitted a description of the Mercury and its location to the dispatcher. As the pursuit continued, they lost sight of the fleeing vehicle near the intersection of Cicero and Washington. Approximately two minutes later, however, Officer Abuzatat received a radio transmission directing him to relocate to the area of 4441 West Congress Parkway, where the subject vehicle was stopped. The vehicle was "up on a curb" and all four of its doors were open. None of the vehicle's four occupants were present at the scene. Officer Abuzatat and his partner subsequently responded to anther radio transmission and drove approximately "half a block" to the intersection of Kostner and Congress, where codefendant Brent had been detained and was seated in the rear of another squad car. Upon relocating to the police station to complete his investigation, Abuzatat learned that the Mercury vehicle had been reported stolen earlier that day by its owner, Casey Diers.

¶ 22 On cross-examination, Officer Abuzatat acknowledged that no firearm was recovered from the vehicle and that the vehicle was not dusted for fingerprints.

¶ 23 Following Officer Abuzatat's testimony, the State entered several exhibits into evidence. One of those exhibits was co-defendant's Brent's photo array, which was admitted over defendant's objection. Thereafter, the State rested its case-in-chief.

¶ 24 Defendant responded with a motion for a directed verdict, which the circuit court denied. Chicago Police Officer Jesus Rivota was then called upon to testify for the defense. He testified that at approximately 6 p.m. on October 12, 2012, he was dispatched to the area of 3125 West Carol in response to a "possible carjacking or some sort of robbery." When he arrived at the scene, Officer Rivota spoke to Diers and Ferrier, the victims of the crime. After the men relayed what had transpired, Officer Rivota asked the men to provide physical descriptions of the three offenders. Diers and Ferrier described the three offenders as being between 19 and 22 years of

age with dark complexions. One of the offers was described as being 6'0'' and weighing 260 pounds. He was wearing a blue jacket and dark blue jeans. The second offender was described as being 5'2'' and 140 pounds and wearing a green sweat shirt and dark blue jeans. Finally, Diers and Ferrier estimated that the third offender was approximately 5'11'' and 160 pounds. He was said to be wearing a dark blue shirt and dark blue jeans. Officer Rivota testified that neither Diers nor Ferrier relayed that one of the offenders had large jowls. Moreover, neither man provided any specific descriptions regarding any of the offenders' unique facial features or characteristics.

¶ 25 Following Officer Rivota's testimony, defendant exercised his constitutional right not to testify, and instead proceeded by way of stipulation. Pursuant to the stipulation, the jury was informed that defendant was arrested in connection with the crime on January 3, 2013, and that at the time of his arrest, he was fingerprinted and palm printed in accordance with the standard booking procedures of the Chicago Police Department.

¶ 26 The parties then delivered closing statements. Upon the conclusion of those statements, the jury received a series of relevant instructions and commenced deliberations. Following deliberations, the jury returned with a verdict finding defendant guilty of aggravated vehicular hijacking and armed robbery. At the sentencing hearing that followed, the circuit court, after considering the aggravating and mitigating evidence presented by the parties, sentenced defendant to 29 years' imprisonment for the offense of aggravated vehicular hijacking and 28 years' imprisonment for the armed robbery offense. The court ordered the sentences to be served concurrently. Defendant's posttrial motions were denied. This appeal followed.

¶ 27 ANALYSIS

¶ 28 Ineffective Assistance of Counsel

¶ 29 On appeal, defendant first argues that he was denied his constitutional right to effective assistance of trial counsel. He argues that counsel was ineffective for failing to present an expert witness to provide testimony about the fallibility of eyewitness identifications because that the case against him "hinged" on the identification testimony provided by Diers and Ferrier. Additionally, defendant contends that counsel was also ineffective for failing to call Detective Smith as a witness to further impeach the identification testimony provided by Diers and Ferrier. We will address each of his arguments in turn.

¶ 30 It is well-established that every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). " 'In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL

App (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002)); see also *People v. Mitchell*, 105 Ill. 2d 1, 15 (1984) ("The issue of incompetency of counsel is always to be determined by the totality of counsel's conduct.") To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). Keeping these relevant standards in mind, we turn now to defendant's claim that his trial attorney was ineffective for failing to call an expert witness to testify about the fallibility of eyewitness identifications.

¶ 31 As a threshold matter, we note that "[d]ecisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf" are "matters of trial strategy" that are "generally immune from claims of ineffective assistance of counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997); see also *People v. Patterson*, 217 Ill. 2d 407, 442 (2005). More specifically, "counsel's failure to call an expert witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion." *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2010). As a result, these strategic decisions will not support an ineffective assistance of counsel claim unless the "strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Reid*, 179 Ill. 2d at 310.

¶ 32 Defendant correctly observes that defense counsel "pursued a misidentification theory" at trial. He acknowledges that defense counsel, in support of the chosen defense theory, made repeated efforts to cast doubt on the validity of Diers and Ferrier's in-court identifications of

defendant throughout the trial and "argued vigorously that [defendant] had been misidentified." Indeed, the record reflects that defense counsel repeatedly highlighted the purported weaknesses of the State's case, including Diers and Ferrier's identification testimony, throughout the trial. Defense counsel argued in her opening and closing statements that defendant was the victim of misidentification and emphasized that there was no physical evidence connecting defendant to the crime. In addition, defense counsel highlighted the short duration and "terrible" and "terrifying" nature of the crime and argued that those factors contributed to the victims' misidentifications of defendant as one of the perpetrators of the offense. Defense counsel also vigorously and thoroughly cross-examined both Diers and Ferrier about the the limited opportunity both men had to view the offenders as well as discrepancies between their prior descriptions of the gunman and defendant's actual physical characteristics. Although defendant acknowledges these efforts, he submits that counsel's failure to call an expert to testify about the potential problems inherent in eyewitness identifications, particularly cross-racial identifications, was unreasonable and prejudiced him because such evidence was "needed" in order for his misidentification theory to be "persuasive."

¶ 33 On review, however, we cannot agree that defense counsel's representation in this vein amounted to ineffective assistance of counsel. We acknowledge that there has been a recent trend among Illinois courts to recognize the mounting literature regarding the difficulties and potential pitfalls associated with eyewitness identification testimony. See, e.g., *People v. Lerma*, 2016 IL 118496, ¶ 24 (recognizing that there has been a "dramatic shift in the legal landscape" and that research concerning the reliability of eyewitness testimony "has moved from novel and uncertain to settled and widely accepted"); *People v. Starks*, 2014 IL App (1st) 121169, ¶ 71 (recognizing that "numerous studies in the area of eyewitness psychology indicate there is

significant potential for eyewitness error and jurors have misconceptions about the abilities of eyewitnesses and the reliability of their testimony"). As such, Illinois courts have acknowledged that expert testimony can, in certain circumstances, be relevant and properly admissible to assist the trier of fact in evaluating eyewitness identification testimony at trial. See, e.g., *Lerma*, 2016 IL 118496, ¶ 24 (recognizing that eyewitness identification "research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony"); *Starks*, 2014 IL App (1st) 121169, ¶ 71 (citing *State v. Guilbert*, 306 Conn. 218, 49 A. 3d 705, 721-22 (2012) (recognizing that that "expert testimony on such subjects as (i) the weak correlation between a witness's confidence in his or her identification and its accuracy, (ii) how the presence of a weapon can diminish the reliability of an identification, and (iii) how stress at the time of observation can render a witness less able to retain an accurate perception and memory of the event, can assist the jury in evaluating such evidence without usurping the jury's factfinding function" in certain appropriate circumstances). Although our supreme court has held that the circuit court may abuse its discretion in excluding proffered eyewitness expert testimony where the only evidence against the defendant consists of eyewitness identifications (*Lerma*, 2016 IL 118496, ¶ 32), the court has not gone so far as to hold, or even suggest, that an attorney's failure to offer such expert testimony amounts to ineffective assistance of counsel. We see no reason to do so either.

¶ 34 We reiterate that the decision to call an expert witness remains a matter of trial strategy (*Reid*, 179 Ill. 2d at 310; *Patterson*, 217 Ill. 2d at 442) and that an attorney's representation will be viewed in its "totality" when evaluating an ineffective assistance of counsel claim (*Mitchell*, 105 Ill. 2d at 15). Given our review of the record, we are unable to conclude that trial counsel's performance and strategy were so unsound and amounted to a complete failure to conduct any

meaningful adversarial testing. Although an eyewitness identification expert could have perhaps strengthened defendant's misidentification defense, "counsel's failure to call an expert witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger." *Hamilton*, 361 Ill. App. 3d at 847. Given trial counsel's thorough cross-examinations of Diers and Ferrier and her overall representation of defendant, we cannot say that counsel's chosen strategy was objectively unreasonable. As such, defendant's ineffective assistance of counsel claim necessarily fails. Even if we could agree that trial counsel's failure to call an eyewitness expert was objectively unreasonable, defendant cannot meet the prejudice prong of the *Strickland* test. Importantly, the State's identification evidence was not limited to the testimony of Diers and Ferrier; rather, it also included surveillance footage and still images of the three perpetrators. Although defendant characterizes the images as "grainy," the members of the jury were afforded the opportunity to view those images and use those images to evaluate the credibility of Diers and Ferrier's in-court identifications of defendant as the gunman. Where, as here, the evidence against defendant was not limited solely to eyewitness identification testimony, we cannot say that there is a reasonable probability that the trial result would have been different had an eyewitness identification expert been called. As such, defendant's ineffective assistance of counsel claim has no merit.

¶ 35 We are similarly unpersuaded by defendant's argument that trial counsel also rendered ineffective assistance when she failed to call Detective Smith, who had testified at the earlier hearing on defendant's motion to suppress, to impeach Diers and Ferrier's testimony concerning the descriptions of the offenders that they provided to investigating officers after the crime. At the suppression hearing, Detective Smith testified that he interviewed Diers and Ferrier on November 14, 2012, and that they supplied descriptions of the offenders. Their descriptions

were "similar if not exactly what was [in Detective Rivota's] case report." Specifically, Diers and Ferrier described the offenders as three African American males in their 20's. Diers and Ferrier estimated that tallest offender was approximately 6'0" and weighed approximately 260 pounds and described the other offenders as shorter and skinnier. All three offenders were described as having dark hair and dark complexions.

¶ 36 Defendant argues that Detective Smith's testimony was required to "fully impeach" Diers and Ferrier at trial, both of whom denied that they had provided investigating officers with detailed descriptions of the gunman, and contends that defense counsel rendered ineffective assistance when she failed to call him as a trial witness. We disagree. We again reiterate that decision whether or not to call a particular witness is a matter of trial strategy. *Reid*, 179 Ill. 2d at 310; *Patterson*, 217 Ill. 2d at 442. More importantly, we note that defense counsel called Detective Rivota at trial to provide the same substantive impeachment testimony. At trial, Detective Rivota testified that Diers and Ferrier, contrary to their trial testimony, did attempt to give detailed descriptions of the offenders and described the gunman as being 6 feet tall and weighing approximately 260 pounds. They estimated that the gunman was between 19 and 22 years old and described his complexion as being dark. In addition, Officer Rivota denied that Diers or Ferrier ever described the gunman as having big jowls. Because Officer Smith's testimony would have simply mirrored that provided by Officer Rivota, defense counsel's failure to call upon Officer Smith to provide cumulative evidence cannot be deemed ineffective assistance of counsel. See *People v. Henderson*, 171 Ill. 2d 124, 155 (1996) (recognizing that "[t]rial counsel's performance cannot be considered deficient because of a failure to present cumulative evidence"); see also *People v. Enis*, 194 Ill. 2d 361, 411-13 (2000) (rejecting the defendant's claim that his attorney was ineffective for failing to provide certain evidence where

that evidence was cumulative of information that had already been presented to the court); *People v. Smith*, 195 Ill. 2d 179, 190-91 (2000) (finding the defendant's claim that his attorney rendered ineffective assistance when he failed to call a witness to provide cumulative testimony was without merit because the defendant could not satisfy the prejudice prong of the *Strickland* test). We therefore reject defendant's ineffective assistance of counsel claim.

¶ 37 Admission of Evidence

¶ 38 Defendant next argues that the circuit court erred when it admitted into evidence the photo array from which his codefendant, Eariss Brent, was identified. He asserts that Brent's photo array was "irrelevant" to his case and improperly "served to bolster the State's questionable identification evidence" against him.

¶ 39 As a general rule, evidence is considered relevant and admissible if it as any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 53 (citing Ill. R. Evid 401 (eff. Jan. 1, 2011)). As a general rule, photographs are generally considered relevant and admissible when a perpetrator's identity is a material issue. See generally *People v. Nelson*, 193 Ill. 2d 216, 224 (2000). Ultimately, however, determinations concerning the relevance and admissibility of evidence are left to the discretion of the circuit court and will not be reversed absent an abuse of discretion. *Reid*, 179 Ill. 2d at 313; *People v. Swanson*, 335 Ill. App. 3d 117, 125 (2002). An abuse of discretion pertaining to an evidentiary ruling " ' 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. Thompson*, 2013 IL App (1st) 113105, ¶ 100 (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)).

¶ 40 At trial, Diers was asked about the police investigation into the crime. He testified, in pertinent part, that police contacted him the day after the crime to report that they had recovered his vehicle. The following month, Diers testified that an officer stopped by his place of employ and showed him a photo array. Codefendant Brent's picture was included in that array and Diers was able to positively identify Brent as one of the three perpetrators of the crime.[3] That photo array was subsequently entered into evidence. On review, we find no prejudicial error. Initially, we note that defendant fails to provide this court with any specific controlling legal authority addressing this specific issue. Moreover, we note that defendant does not argue that Diers's *testimony* concerning police investigative efforts and his identification of Brent from a photo array is irrelevant; his argument solely pertains to the admission of the actual photographs. He contends that the admission of the photographs of the exhibits improperly served to "bolster" Diers's abilities as someone skilled in making identifications. However, given that defendant does not dispute that Diers was properly permitted to testify that he identified Brent from a photo array, we find that any purported error in the admission of the actual photographs to be harmless as they were essentially cumulative and duplicative of Diers's oral testimony. See generally *People v. Smith*, 256 Ill. App. 3d 610 (1994) (recognizing that improperly admitted identification evidence is harmless when it is merely cumulative of other evidence); see also *People v. Becker*, 239 Ill. 2d 215 (2010) (recognizing that improperly admitted evidence is harmless when it is merely duplicative of other properly admitted evidence).

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court is affirmed.

¶ 43 Affirmed.

[3] In accordance with the court's ruling on defendant's pretrial motion to suppress, Diers was unable to testify that he identified defendant from a physical lineup.