

2017 IL App (1st) 152387-U

No. 1-15-2387

Order filed May 10, 2017

Third Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 4173
)	
JAVIER BOUVIER,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge, presiding.

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

ORDER

- ¶ 1 *Held:* Defendant's convictions for robbery on 2 counts are affirmed as the evidence viewed in light most favorable to the State supports the reliability of the victim's identification of defendant. Defendant's sentence is affirmed as the sentence is not excessive.
- ¶ 2 Following a bench trial, defendant Javier Bouvier was convicted of two counts of robbery (720 ILCS 5/18-1(a) (West 2012)) and two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2012)) and sentenced to concurrent terms of nine years' imprisonment.

Defendant appeals his convictions, arguing that the identification by a single witness was not sufficiently reliable to prove him guilty beyond a reasonable doubt. Defendant also contends that his extended term sentences of nine years' imprisonment for robbery were excessive. For the reasons set forth herein, we affirm the judgment of the trial court.

¶ 3 Defendant and two co-defendants, Tatiana Webbs and Tatyanna Edwards, were charged in a four count indictment with two counts of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)), and two counts of aggravated unlawful restraint while “using a dangerous weapon, to wit: a firearm” (720 ILCS 5/10-3.1 (West 2012) for their involvement in the robbery of Clinecea Philips and Lakeiya Darby. Counts 1 and 3 of the indictment charged defendant with the armed robbery and aggravated unlawful restraint of Lakeiya Darby. Counts 2 and 4 of the indictment charged defendant with the armed robbery and aggravated unlawful restraint of Clinecea Phillips. Defendant filed a motion for severance, which the trial court granted. Defendant and co-defendants waived their rights to a jury trial, and the cases proceeded to severed, but simultaneous, bench trials.

¶ 4 Clinecea Phillips testified that, on the night of January 12, 2013, she and her friend Lakeiya Darby were walking on Lake Street toward a train station. At 9:30 p.m., a train went by on the elevated train tracks above them. As the train passed overhead, Phillips turned around to become familiar to the area around her. When she turned back around, a man was standing in front of her with a gun in his hand. He was wearing a black hooded sweatshirt with the hood secured tightly over his head so that “you couldn't really see his face,” and a mask that covered his nose and mouth. (ROP Q20). Phillips, however, was able to see his eyes. Phillip's identified defendant in court as the man with the gun.

¶ 5 She testified that defendant stood two to three feet from Phillips and Darby, pointed the gun at them, and told them to “give [him] everything.” At this time, two women, whom Phillips identified in court as codefendants Webbs and Edwards, approached and stood next to defendant. (ROP Q21). Webbs was wearing a mask over her nose and mouth.

¶ 6 Phillips and Darby proceeded to hand over their purses, phones, and money to their assailants. Phillips asked codefendant Edwards if she could keep her phone and her coat, and Edwards responded that she could keep her coat, but not her phone. Darby asked codefendant Webbs if she could keep her medical card, and Webbs said that she could. Defendant, Webbs, and Edwards then ran away. Phillips and Darby told a nearby security guard what had happened, walked back to Phillips’s house, and called the police.

¶ 7 On January 30, 2013, Phillips went to the police station and met with Detective Bor. She signed a line-up advisory form and viewed a physical line-up, from which she identified codefendant Webbs as the short woman wearing a mask who robbed her on the night of January 12, 2013. On February 5th, 2013, Phillips returned to the police station, signed a line-up advisory form, and viewed a physical line-up, from which she identified defendant as the man who had robbed her on the night of January 12, 2013.

¶ 8 On cross examination, Phillips stated that she was scared when she was approached by defendant, and that the robbery lasted approximately 30 seconds. She testified that the man holding the gun had a hood pulled tightly over his head and a mask covered the lower part of his face. She had never seen this individual before that night and could only see the individual’s eyes and part of his hair. Phillips explained that she could see half of his face, excepting his nose and mouth, and could see his hair was “like an Afro.” She stated that she knew about guns from

television, that she was not struck with the gun the individual was holding, and that she did not know what material the gun was made of.

¶ 9 Lakeiya Darby testified that, on the night of January 12, 2013, she and Clinecea Phillips were walking to the Pulaski Green Line CTA station near the 3900 block of West Lake Street. When a train went by on the elevated tracks above them, a man ran past them. Darby and Phillips turned around to see what the man was running from, but did not see any other people. When they turned back around, the man was standing in front of them. The man pointed a gun at Darby and Phillips, and told the two to give him their belongings. Two women approached from behind the man and repeated his demand. Darby recognized one of the women as someone she had seen a few times on the bus, and identified her in court as codefendant Edwards, the woman who stood in front of Phillips. She made an in court identification of codefendant Webbs, stating that Webbs was the woman who stood front of her during the robbery.

¶ 10 Darby gave her purse to Webbs, but asked if she could keep her child's social security card. Webbs removed the card from Darby's purse and threw the card at her. Darby noticed that Phillips was giving her belongings to Edwards. The man with the gun then told Darby and Phillips to give him their coats, but Edwards told him that Phillips and Darby could keep their coats. (ROP Q 61). The man then told Darby and Phillips to turn around. When they turned around, the man, Edwards, and Webbs ran away. After talking to a security guard in a nearby parking lot, Darby and Phillips walked back to Phillips's house and called the police. (ROP Q 63)

¶ 11 On January 23, 2013, Detective Bor came to Darby's house and had her view a photo array. After signing a photo line-up advisory form, Darby identified the photograph of

codefendant Edwards as one of the women who robbed her on January 13, 2013. On January 30, 2013, Darby went to the police station to view a physical line-up. After signing an advisory form, Darby picked Edwards out of the line-up. On February 5, 2013, Darby returned to the police station, signed an advisory form, and picked codefendant Webbs out of a physical line-up.

¶ 12 On cross examination, Darby agreed that, other than street lighting, it was dark out at the time of the robbery. She acknowledged that the man with the gun had a hood drawn tightly around his head and a mask that covered the lower part of his face. She was unable to describe the man's hair color or style because his hood was pulled over his head.

¶ 13 Detective Kevin Bor testified that, on January 13, 2013, he was assigned to investigate the armed robbery of Lakeiya Darby and Clinecea Phillips. On February 5, 2013, Bor met with Phillips at the police station to conduct a physical line-up. After signing a line-up advisory form, Phillips positively identified defendant as the man who robbed her at gun point.

¶ 14 The remainder of the State's evidence was admissible against only co-defendants Webbs and Edwards. Defendant made a motion for a directed finding, which the trial court denied. Defendant did not present any evidence. After argument, the trial court found defendant guilty on all counts, finding Phillips and Darby credible.

¶ 15 Defendant then filed a motion to reconsider, arguing that Phillips's testimony was not sufficiently reliable to identify him and that the victims' testimony regarding the gun was not sufficient to support a finding that defendant possessed a firearm. The trial court agreed that the evidence was insufficient to prove beyond a reasonable doubt that defendant possessed a firearm and granted the motion in part, reducing defendant's convictions from armed robbery with a firearm to Class 2 robbery (720 ILCS 5/18-1 (West 2012)).

¶ 16 The trial court held a sentencing hearing on January 21, 2015. After hearing arguments in aggravation and mitigation, the court initially noted:

“I’ve considered the factors in aggravation, which basically consist of the facts of this case, and each defendant’s criminal history, as set forth in the presentence investigation. As indicated before, I do think that [defendant] is the prime mover in this incident. He was the one that came up with the bright idea to do this. He was the one that was armed with whatever confrontation [*sic*]. So, I do find that he is more culpable in the sentencing.”

¶ 17 After discussing the culpability of defendants Webbs and Edwards, and noting that they both expressed remorse, the court focused on defendant, and stated that “[c]onsidering the factors in aggravation and mitigation, I believe that [defendant] should be sentenced to 9 years in the Illinois department of corrections.”

¶ 18 The trial court sentenced defendant to two concurrent, extended term sentences of nine years’ imprisonment for the robbery convictions. 730 ILCS 5/5-8-2 (West 2012); 730 ILCS 5/5-5-3.2(b)(1) (West 2012). Both unlawful restraint counts merged with the robbery counts. Defendant did not file a motion to reconsider his sentence. On September 9, 2015, we granted defendant leave to file a late notice of appeal.

¶ 19 On appeal, defendant argues that Clinecea Phillips’s identification was not sufficiently reliable to prove him guilty beyond a reasonable doubt. Alternatively, defendant contends that the trial court erred by imposing an excessive sentence.

¶ 20 The due process clause of the fourteenth amendment safeguards defendants from conviction in state court except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime charged. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16. When considering a challenge to the sufficiency of the evidence in a criminal case, a reviewing court's function is not to retry the defendant. *People v. Lloyd*, 2013 IL 113510, ¶ 42. Rather, a reviewing court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.*

¶ 21 This means that we must draw all reasonable inferences from the record in favor of the prosecution, and that “ ‘[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.’ ” *Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). In reviewing a trial court's decision, we must give proper deference to the trier of fact who observed the witnesses testify, because it was in the “superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom.” *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 22 An identification of the accused by one credible witness is sufficient to sustain a conviction. *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 88 (citing *People v. Slim*, 127 Ill. 2d 302, 307 (1989)). The reliability of a witness's identification is a question for the trier of fact. *Simmons*, 2016 IL App (1st) 131300, ¶ 88. In assessing the reliability of identification testimony, Illinois courts use the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Simmons*, 2016 IL App (1st) 131300, ¶ 89. There, the Court held that circumstances to be considered in evaluating the reliability of an identification include: (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. *Slim*, 127 Ill. 2d at 307; *Biggers*, 409 U.S. at 199-200.

¶ 23 Defendant cites a plethora of scientific studies and law review articles which suggest that eyewitness identifications are not reliable. Defendant cites the case of *People v. McKown*, 226 Ill. 2d 245, 272 (2007), for the proposition that the Illinois Supreme Court has “broadly held that reviewing courts may consider sources outside of the record,” including scientific articles. This, however, is a gross mischaracterization of our supreme's court's statement in that case. *McKown* noted that a reviewing court could “consider sources outside the record, including legal and scientific articles” when reviewing a trial court's *Frye* analysis. This is not, as defendant characterizes it, a broad holding that reviewing courts may consider evidence not in the record in every case. In this case, defendant did not call an expert witness and the trial court did not conduct a *Frye* hearing.

¶ 24 Similarly, defendant cites our supreme courts statement in *People v. Lerma*, 2016 IL 118496, ¶ 24, that “we not only have seen that eyewitness identifications are not always as reliable as they appear, but we also have learned, from a scientific standpoint, why this is often the case” for the proposition that we are able to consider scientific articles that are not in the record. However, *Lerma* dealt with a trial court's denial of a defendant's request to have an expert witness testify regarding eyewitness identifications. As noted above, defendant did not attempt to call an expert witness at trial. Therefore, the reasoning of *McKown and Lerma* is inapplicable to this case.

¶ 25 We wish to underscore that, while this sort of information could have appropriately been raised through the testimony of expert witness, defendant did not attempt to call an expert witness at trial. See *Lerma*, 2016 IL 118496, ¶32 (Finding an abuse of discretion where the trial court denied defendant's request to allow expert testimony regarding the reliability of eyewitness testimony). Instead, because these materials are raised for the first time on appeal, and are not a part of the trial record, we will not consider them in our analysis of defendant's sufficiency of the evidence claim. See *People v. McGee*, 374 Ill. App. 3d 1024, 1030 (2007) (striking portions of appellant's brief that included psychological studies not presented at trial.) Accordingly, we defer to the trial court's determinations regarding the weight and credibility of Clinecea Phillips's testimony.

¶ 26 In regard to the first *Biggers* factor, the opportunity the victim had to view the offender at the time of the crime, Phillips testified that defendant was wearing a hooded sweatshirt with the hood secured tightly over his head so that "you couldn't really see his face," and a mask that covered his nose and mouth. Nevertheless, she said she was able to see "half of his face, excepting his nose and mouth," specifically his eyes and "part of his hair." Defendant stood two to three feet from Phillips. The encounter lasted around 30 seconds and was illuminated by artificial street lighting.

¶ 27 This court has upheld identifications where the victims were only able to see a portion of the defendant's face. See *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006) (where the defendant was wearing a bandana that covered the lower part of his face); *People v. Zarate*, 264 Ill. App. 3d 667, 674 (1994) (where the defendant was wearing a bag with thee-and-a-half inch eye holes over his head). Similarly, we have held that the brevity of an encounter alone does not

render identification unreliable. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 32 (upholding an identification where victims had less than a minute to observe offender); *People v. Parks*, 50 Ill. App. 3d 929, 932-33 (1977) (upholding an identification where victims had five to ten seconds to observe offender). As defendant stood two to three feet away from Phillips, and artificial light allowed Phillips to see defendant's eyes and part of his hair for 30 seconds, the first *Biggers* factor weighs in favor of the reliability of her identification of defendant.

¶ 28 In regard to the second *Biggers* factor, the witness' degree of attention, Phillips testified that she was confronted by three offenders, one of whom was pointing a gun at her, and that this confrontation frightened her. Defendant claims that Phillips's attention was compromised by the existence of the weapon and the fact that there was more than one offender. Defendant cites no Illinois case law to support this contention. Regardless, Phillips was not too distracted by the gun to identify codefendant Webbs, who was also wearing a mask, or to recount details about personal items that codefendant Webbs told Lakeiya Darby that she could keep. Phillip's attention to detail, in spite of the fact that she had a gun pointed toward her, weighs in favor of the reliability of her identification of defendant.

¶ 29 The parties agree that the next two *Biggers* factors, the accuracy of a witness's prior identification of the offender and the witness's certainty in identifying the defender, are neutral in this case as very little evidence was presented about them. We agree with the parties. Thus, we move to the final *Biggers* factor.

¶ 30 The final *Biggers* factor, the length of time between the crime and the identification confrontation, weighs in favor of the reliability of the identification. Only 24 days elapsed between the robbery on January 12, 2013, and Phillips's identification of defendant in a physical

line-up on February 5, 2013. Illinois courts have held that significantly longer lengths of time have not rendered identifications unreliable. See *People v. Malone*, 2012 IL App (1st) 110517, 36 (one year and four month delay between crime and positive identification); *People v. Bennett*, 9 Ill App. 3d 1021, 1025-6 (1973) (one month delay between crime and positive identification); *People v. Rodgers*, 53 Ill. 2d 207, 213-14 (1972) (two year delay between crime and positive identification).

¶ 31 Defendant also argues that the line up procedures used in this case were significantly flawed and made Phillips's identification of defendant unreliable. Specifically, defendant argues that Detective Bor's administration of the line-up, as opposed to the use of an independent administrator who was unaware of which person in the line up was the suspected perpetrator, rendered the identification unreliable. He also attacks the reliability of simultaneous, and non-sequential, lineup procedures.

¶ 32 Defendant's main support for these contentions comes from studies and law review articles that are outside the trial record. As noted above, we will not consider these materials, as they were not raised in the trial court. However, defendant also points to recent Illinois legislation which favors the use of independent administrators in conducting physical lineups "unless it is not practical." 725 ILCS 5/107A-2(a)(1) (West 2014). Defendant correctly concedes that this statute was not in effect at the time of defendant's line-up on February 5, 2013, but argues that it demonstrates that the legislature has recognized that lineups that are not conducted by an independent administrator are less reliable than those that are. However, while the legislature may have expressed favor toward the use of independent administrators, the statute still allows for lineups to be conducted without an independent administrator when the use of an

independent administrator is not practical. This indicates that the legislature believes that lineups conducted without an independent administrator are sufficiently reliable to support convictions. Otherwise, the legislature would categorically bar such lineups.

¶ 33 Weighing the *Biggers* factors and viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that Clinecea Phillips's identification was reliable. As the identification by one credible witness is sufficient to sustain a conviction (*Simmons*, 2016 IL App (1st) 131300, ¶ 88), none of the State's evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. As such, we will not disturb the trial court's determination that Phillips's identification was reliable and that defendant was guilty beyond a reasonable doubt.

¶ 34 Defendant next contends that the trial court abused its discretion in imposing two concurrent nine-year extended term prison sentences for his robbery convictions. Defendant concedes that he did not preserve this issue by filing a motion to reconsider sentence in the trial court. However, defendant challenges his sentence as a plain error and alternatively argues that his counsel was ineffective for failing to file a motion to reconsider his sentence.

¶ 35 Generally, a sentencing issue is forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18. However, forfeited claims related to sentencing may be reviewed for plain error. *Id.* (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). The plain error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) that error is so serious that it affected the fairness of

the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Nowells*, 2013 IL App (1st) 113209, ¶ 18. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id.* at ¶ 19. A reviewing court conducting plain error analysis must first determine whether an error occurred, as “[w]ithout reversible error, there can be no plain error.” *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). For the following reasons, we find no error here.

¶ 36 A trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference on review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). This is because a trial court has a superior opportunity “to weigh such factors as the defendant’s credibility, demeanor, general moral character, mentality, social environment, habits, and age.” *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). As such, reviewing courts will not alter a defendant’s sentence absent an abuse of discretion. *Alexander*, 239 Ill. 2d at 212. Our supreme court has noted that a “ ‘reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.’ ” *Id.* at 213 (quoting *Stacey*, 193 Ill. 2d at 290).

¶ 37 A sentence should reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The trial court is presumed to have considered all relevant factors and any mitigation evidence (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but has no obligation to recite each factor and the weight it is given at a sentencing hearing. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11. “ ‘A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly

disproportionate to the nature of the offense.’ ” *People v. Brown*, 2015 IL App (1st) 130048, ¶ 42 (quoting *People v. Fern*, 189 Ill. 2d 48, 54 (1999)).

¶ 38 Here, defendant was convicted of two counts of robbery, a Class 2 felony punishable by 3 to 7 years’ imprisonment. 720 ILCS 5/18-1(c) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). Defendant does not contest that his criminal background made him eligible for extended sentences of 7 to 14 years’ imprisonment. 730 ILCS 5/5-8-2 (West 2012); 730 ILCS 5/5-5-3.2(b)(1) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). The trial court sentenced defendant to two concurrent extended terms of nine years’ imprisonment. Defendant argues that his nine year sentences were excessive in light of his youth, rehabilitative potential, and non-violent criminal record.

¶ 39 We do not believe that defendant’s concurrent nine year sentences were an abuse of discretion. Defendant was eligible for extended term sentences of 7 to 14 years’ imprisonment based on his 2008 conviction for possession of a controlled substance, and 2010 conviction for delivery of a controlled substance. Our supreme court has stated that the extended term sentencing provision “is designed to increase the length of imprisonment, where the defendant has a criminal record of prior felonies, in order to punish and deter recidivist behavior.” *People v. Hicks*, 164 Ill. 2d 218, 224 (1995) (upholding a six-year extended term sentence for a retail theft of less than \$150 worth of merchandise). With this purpose in mind, we cannot say that defendant’s sentence is greatly at variance with the spirit and purpose of the law or that it is disproportionate to the crime of robbery.

¶ 40 Defendant also contends that the trial court abused its discretion by not discussing mitigating evidence and the financial impact of incarcerating defendant during the sentencing

hearing. As noted above, a trial court is presumed to have considered all relevant factors and any mitigation evidence that has been presented, and is not required to recite each factor and the weight it is given at a sentencing hearing. *Wilson*, 2016 IL App (1st) 141063, ¶ 11. Accordingly, we presume that the court considered defendant’s age, work history, efforts to obtain a GED – all of which were reflected in his presentence investigation report and argued by counsel in mitigation to demonstrate his rehabilitative potential. We similarly presume that the court considered the financial impact of defendant’s incarceration. *People v Sauseda*, 2016 IL App (1st) 140134, ¶ 22

¶ 41 As we find that the trial court did not abuse its discretion in sentencing defendant to concurrent extended terms of nine years’ imprisonment, we find no plain error here. *McGee*, 398 Ill. App. 3d at 794 (“Without reversible error, there can be no plain error.”)

¶ 42 Defendant next asserts that we can consider his excessive sentence claim because his attorney was ineffective for failing to file a motion to reconsider sentence in the trial court.

¶ 43 “ ‘To show ineffective assistance of counsel, a defendant must demonstrate that ‘his attorney’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.’ ” *People v. Simpson*, 2015 IL 116512, ¶ 35 (quoting *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)). A reasonable probability is defined as “ ‘a probability sufficient to undermine confidence in the outcome.’ ” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). A defendant must satisfy both prongs of this test, and a failure to satisfy either prong precludes a finding of ineffectiveness. *Id.*

¶ 44 Defendant's ineffective assistance claim fails as he has failed to satisfy the prejudice prong of the *Strickland* test. As we have determined that no error occurred, defendant cannot establish that he was prejudiced by his counsel's failure to raise this claim in a motion to reconsider sentence. *See People v. Bailey*, 364 Ill. App. 3d 404, 408-409 (citing *Strickland v. Washington*, 466 U.S. 668, 700 (1984)) (a defendant establishes ineffective assistance of counsel by showing counsel's representation fell below an objective standard of reasonableness and that the result of the proceeding would have been different but for the complained of error.) An attorney will not be deemed ineffective for a failure to file a futile motion. *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006).

¶ 45 While we affirm defendant's robbery convictions and sentences, we remand the case to the trial court to clarify the offenses of which it found defendant guilty, and to issue a corrected mittimus.

¶ 46 Defendant was charged with two counts of armed robbery and two counts of aggravated unlawful restraint "while using a deadly weapon, to wit: a firearm." The trial court initially found defendant guilty of all four counts. However, the court later reduced defendant's armed robbery convictions to simple robbery, finding that "there was not proof beyond a reasonable doubt, that a firearm was used." The mittimus reflects that the court merged the aggravated unlawful restraint counts into defendant's robbery convictions. It remains unclear, however, how the court's finding affected defendant's convictions for aggravated unlawful restraint which were also predicated on the use of a firearm.

¶ 47 In addition, the mittimus reflects that Counts 3 and 4 merged into Count 2. Counts 2 and 4 of the indictment charged defendant with the robbery and aggravated unlawful restraint of

Clinecea Phillips, while Count 3 of the indictment charged defendant with the aggravated unlawful restraint of Lakeiya Darby. As Count 2 and Count 3 specify different victims, Count 3 cannot merge into Count 2. See *People v. Pryor*, 372 Ill. App. 3d 422, 434 (2007) (“ ‘In Illinois it is well settled that separate victims require separate convictions and sentences’ ” (quoting *People v. Shum*, 117 Ill.2d 317, 363 (1987))).

¶ 48 Because there is a lack of clarity in the counts upon which judgment was entered, we are unable to exercise our authority pursuant to Illinois Supreme Court Rule 615(b)(1) to correct the mittimus without remanding to the trial court. Thus, we remand to the trial court to clarify its findings regarding the existence of a firearm and defendant’s convictions for aggravated unlawful restraint and to correct the mittimus in regard to the merger of Count 3. We ask the trial court to make certain that the mittimus accurately reflects its findings so that such a remand can be avoided in the future.

¶ 49 Affirmed in part and remanded with directions.