2019 IL App (1st) 163248-U

No. 1-16-3248

March 29, 2019

First Division

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. 15 CR 13230
	)	
DARNELL HALMON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Where the show-up identification of defendant near the shooting scene was not unduly suggestive, trial counsel was not deficient in failing to seek suppression of that identification. One of defendant's two convictions is vacated under the one-act, one-crime rule, and he is given an additional day of credit for time in custody prior to sentencing.

¶ 2 Following a bench trial, defendant Darnell Halmon was convicted of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)). The trial court sentenced defendant to 12 years in prison

for each offense, with those terms to be served concurrently. On appeal, defendant contends that: (1) his trial counsel was ineffective for failing to file a motion to suppress an identification of him by a witness to the shooting because the show-up procedure was unduly suggestive; (2) his conviction for aggravated discharge of a firearm should be vacated under the one-act, one-crime rule because it was based on the same physical act as his aggravated battery conviction; and (3) the mittimus should be corrected to award him an additional day of credit for time spent in custody prior to sentencing. We affirm in part, vacate in part, and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on July 17, 2015, in connection with a shooting that occurred on the same date in the 1600 block of South Ridgeway Avenue in Chicago. He was charged by indictment with aggravated battery with a firearm, aggravated discharge of a firearm, and four counts of attempt first degree murder. The aggravated battery with a firearm count alleged that defendant knowingly discharged a firearm and caused injury to another person, to wit: shot Carlrevious Smith (Smith) about the body. The aggravated discharge of a firearm count alleged that defendant knowingly discharged a firearm in the direction of Smith.

¶ 5 At trial, Raquel Adams (Adams) and Smith testified regarding the incident which took place outside their house on South Ridgeway. Adams, who is Smith's sister, resided with Smith. A second brother, Katory Smith (Katory), and Adams's mother, also resided in the house.

¶ 6 Adams testified that at about 11 a.m. on July 17, 2015, she was sitting in the front room of the house. Smith, Katory, and other family members were on the front porch. The windows were open, and Adams heard arguing on the porch. Adams, who was holding her child, went to

the porch and saw Smith, Katory, and their friends, shouting at two teenage boys and a teenage girl who stood across the street.

¶ 7 As the teenagers approached the house, Adams also saw an "older man" standing nearby. Adams testified the man wore blue jeans, a white T-shirt, and a hat. When asked later in her testimony if she noticed anything else about the man's appearance, Adams stated he had a "big star tattooed on his face." Adams was on the porch and the man was standing at the foot of the stairs leading up to the porch. The man was holding a gun and said that if anyone moved, he would shoot them.

¶ 8 Adams ran inside, put her child down and returned to the porch where the man was pointing the gun. Katory and the teenagers were in the yard, where the teenagers started to hit Katory in the face. As Smith ran to help Katory, the man shot Smith, and everyone started running. Smith ran away from the shooter. Adams ran inside the house to get her phone, returned to the porch, and called 911. Adams heard people shouting, "[h]e shot him." The gunman ran along the side of the house away from Ridgeway Avenue toward a vacant lot.

¶ 9 Adams testified that police arrived at the house 10 or 15 minutes after she called. She said she was standing in front of the house and an officer walked Adams into the street. She stated that "the car pulled up" and "[t]hey asked could I identify him." Adams said yes. The officer asked a man to step out of the car, and the officer asked Adams, "Was it him?" She responded yes. Adams identified defendant in court as the man who fired the shots.

¶ 10 On cross-examination, Adams stated, contrary to her direct testimony, that she was inside when the shooting began. She got her phone while inside and was looking through the window. Defendant had a gun and started shooting while standing in front of the house. Adams said

defendant "was the only one outside shooting." When Adams went back outside, defendant was "still shooting" and was chasing Smith and Katory.

¶ 11 Adams called 911 "in the midst of it." She did not see Smith get shot but saw blood dripping down his leg as she made the call. Adams said the shots and shell casings were "spread out" because Smith was running around while defendant was shooting.

¶ 12 On redirect examination, Adams said she was in the house for "seconds" when she put down her child and got her phone. Adams did not see anyone else with a gun or see anyone else shoot or chase Smith.

¶ 13 Smith testified that at about 11 a.m. on July 17, 2015, he was sitting on the front porch with Adams and Katory. A group of five or more boys walked near the house, and Smith went inside.

¶ 14 Smith looked outside and saw the boys punching Katory. He ran back out to the porch and heard shots fired. He did not see the shooter but saw "flames" of the gun and ran away from the house until the shooting stopped. When Smith ran back to the house, the boys were "running up the street" but he did not see the gunman. Smith realized he had been shot in the right calf. Police arrived, and Smith was taken to a hospital for treatment. Smith could not recall if Adams was on the porch when the group of teenagers approached.

¶ 15 Chicago police officer John Sandoval testified that about 11:15 a.m. on July 17, 2015, he was driving an unmarked squad car with his partner, Officer Fietko.[1] At 11:19 a.m., the officers received a radio call of shots fired in the 1500 block of South Ridgeway. The report was updated

[1] No first name was given for Officer Fietko.

"right away" to indicate "multiple people fighting in the street" and then updated again to state a person had been shot. The officers were four or five blocks from the area.

¶ 16 While en route, the officers received a description of two black males running away from the scene. Both men were wearing white T-shirts, and one wore beige pants and the other wore blue jeans. Sandoval turned south on Ridgeway and saw two men who matched that description running towards him through a double lot.

¶ 17 Sandoval stopped the police car, got out and announced his office. The men slowed down to a walk. At 11:21 a.m., Sandoval detained a man wearing a white T-shirt, blue jeans, and a white hat worn backwards. Sandoval identified that man in court as defendant. Fietko detained a man later determined to be defendant's son. Sandoval testified the son was shorter than defendant and wore a white T-shirt and beige cargo pants. That detention took place about a block away from the scene of the shooting.

¶ 18 At 11:23 a.m., Sandoval received a radio report describing a suspect as wearing a white hat and a white T-shirt. At 11:24 a.m., another message indicated the suspect wore a white hat and white pants and had a "tattoo on the face." Sandoval stated on cross-examination that the initial description was of a white hat with "rainbow colors." When detained, defendant was wearing a white baseball cap with an orange and blue New York Mets logo on the front and a blue National League symbol on the side of the hat. Sandoval testified that defendant, as observed in court, had a star tattoo on his cheek. Sandoval reported via radio that he had detained two men who matched the dispatched description. Defendant and his son were placed in separate cars.

¶ 19 Sandoval drove defendant to the residence on South Ridgeway. Sandoval spoke to Adams, describing their conversation as follows:

> "I asked [Adams] if she had seen who shot [Smith]. She informed me she could identify somebody. At which point I informed her that I was going to show her an individual, she could point him out, she could tell me yes or no, at which point [defendant] was pulled out [] the vehicle and she positively identified him as the one that held the firearm and shot [Smith]."

¶ 20 On cross-examination, Sandoval testified he detained defendant and his son based on the radio description and because they were "sweating profusely" and running. He did not see anyone running with them. Defendant did not have a weapon. When Sandoval arrived near the residence, "mostly squad cars" and an ambulance were there.

¶ 21 The parties stipulated that police recovered two fired shell casings at the scene and those two casings were fired from the same 9 mm weapon. The parties further stipulated that defendant's hands tested positive for gunshot residue, which indicated defendant had discharged a firearm, had been in contact with an item that had gunshot residue, or that he was "in the environment of a discharged firearm." The defense did not present any witnesses.

¶ 22 In finding defendant guilty of aggravated battery with a firearm and aggravated discharge of a firearm, the court found the State witnesses to be credible. The court noted Adams's account was "corroborated by other independent evidence of the case, including very strong circumstantial evidence," such as the gunshot residue on defendant's hands and defendant's proximity to the scene when detained by police. In addition, the court stated: "[U]ltimately, the

star tattoo is a fairly significant identification aspect of the case that's difficult to explain away. It's as specific an identification as you can get."

¶ 23 Defendant filed a motion for a new trial, which was denied. The trial court sentenced defendant to 12 years in prison for each offense, with those terms to be served concurrently. Defendant was given credit for 493 days in custody prior to sentencing. Defendant's motion to reconsider sentence was denied.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant first contends that he was denied the effective assistance of trial counsel based on counsel's failure to file a motion to suppress the show-up identification made by Adams.

¶ 26 A claim of ineffective assistance of counsel is evaluated under the two-part test set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Henderson*, 2013 IL 114040, ¶ 11. Under that test, the defendant must first show that counsel's performance, objectively measured against prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *Strickland*, 466 U.S. at 687; *People v. Jackson*, 205 Ill. 2d 247, 259 (2001). In so doing, the defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Second, the defendant must show he was prejudiced by counsel's deficient performance, which means there must be a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 47. Failure to establish either prong precludes a finding of ineffective assistance of counsel.

People v. Henderson, 2013 IL 114040, ¶ 11. A reviewing court need not examine counsel's performance where it may dispose of defendant's claim based on lack of prejudice. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 55.

¶ 27 Defendant's contention revolves around the prejudice to his case from the absence of a motion to suppress his identification. In *Henderson*, our supreme court described a variation of the prejudice standard to be applied when a claim of counsel's ineffectiveness stems from the failure to file a motion to suppress evidence. *Id*. ¶ 15. To show prejudice in that situation, the defendant must "demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Id*.

¶ 28 Defendant recognizes the standard in *Henderson* but maintains it does not apply in this case because *Henderson* addressed the failure to bring a suppression motion based on a fourth amendment claim, whereas here, the unfiled motion would have alleged defendant was convicted following a suggestive identification. However, in noting previous applications of the rule, *Henderson* cited, *inter alia*, a case involving counsel's failure to file a motion to suppress the defendant's identification in a lineup. See *People v. Harris*, 182 Ill. 2d 114, 146 (1998). Moreover, the court did not limit its rule to certain types of suppression motions. See *Henderson*, 2013 IL 114040, ¶ 15. Therefore, to show his counsel was ineffective for not seeking suppression of the show-up identification, defendant must show the motion would have been meritorious and also show a reasonable probability exists that the outcome of his trial would have been different had the evidence been suppressed. *Id*.; *Harris*, 182 Ill. 2d at 146; see also *People v. Kornegay*,

2014 IL App (1st) 122573, ¶¶ 18-19. An attorney is not ineffective for failing to file a futile motion. *People v. Lundy*, 334 Ill. App. 3d 819, 830 (2002).

¶ 29 Defendant asserts that Adams's identification of him resulted from a suggestive show-up procedure, and thus, a motion to suppress the identification, if filed, would have been meritorious. He maintains that, if Adams's identification of him had been suppressed, there is a reasonable probability that the outcome of his trial would have been different. The State responds that had such a motion been filed, it would not have been meritorious because the show-up identification was not unduly suggestive and, furthermore, Adams's identification of defendant as the gunman was independently reliable.

¶ 30 When ruling on a motion to suppress a show-up identification, a trial court conducts a two-part inquiry. *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008). "First, 'the 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. Jones*, 2017 IL App (1st) 143766, ¶ 28 (quoting *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994)). "Second, if the defendant establishes that the confrontation was unduly suggestive, the burden shifts to the State to demonstrate that, 'under the totality of the circumstances, the identification * * * is nonetheless reliable.' " *Jones*, 2017 IL App (1st) 143766, ¶ 28 (quoting *Moore*, 266 Ill. App. 3d at 797).

¶ 31 Here, defendant cannot show that he was prejudiced by counsel's failure to file a motion to suppress the identification made by Adams. Even if counsel had filed a motion to suppress the show-up identification, the motion would not have been granted because the show-up confrontation was not unnecessarily suggestive and conducive to irreparable misidentification.

¶ 32 A criminal defendant has a due process right to be free from identification procedures that are suggestive and could lead to a mistaken identification. *People v. Jones*, 2017 IL App (1st) 143766, ¶ 27. However, our supreme court has approved of an immediate show-up identification near the scene of the crime as acceptable police procedure under certain circumstances. *People v. Lippert*, 89 Ill. 2d 171, 188 (1982); *People v. Thorne*, 352 Ill. App. 3d 1062, 1076 (2004). Although show-up identifications are disfavored, they can be justified where the police need to determine: (1) whether a suspect is innocent and should be released immediately; and (2) whether police should continue searching for a fleeing culprit while the trail is still fresh. *People v. Rodriguez*, 387 Ill. App. 3d 812, 830 (2008). Here, Sandoval testified that at 11:15 a.m., he and his partner received a radio call of shots fired. At 11:21 a.m., the officers stopped two males who substantially matched the description in the radio report within four or five blocks of the shooting. At 11:24 a.m., the officers received a report stating that one of the suspects had a facial tattoo. Defendant had a star tattoo on his cheek, as observed in court. Accordingly, the circumstances justified the officers' use of a show-up identification to see if defendant was the gunman.

¶ 33 An encounter that results in a show-up identification threatens the defendant's due process rights only when it is so unnecessarily or impermissibly suggestive that there exists a substantial likelihood of irreparable misidentification. *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972); *Jones*, 2017 IL App (1st) 143766, ¶ 27. The encounter involves an analysis of "both the suggestiveness of the identification and the necessity of the suggestive identification." *Jones*, 2017 IL App (1st) 143776, ¶ 28 (quoting *People v. Follins*, 196 Ill. App. 3d 680, 688 (1990)). If the defendant establishes the identification was unduly suggestive, the State has the burden of

establishing, under the totality of the circumstances and by clear and convincing evidence, that the identification is nonetheless reliable under the factors set out in *Biggers* and is based on the independent recollection of the witness. *Jones*, 2017 IL App (1st) 143776, ¶ 28; *People v. Williams*, 2015 IL App (1st) 131103, ¶ 77.

¶ 34 In attempting to meet his initial burden of establishing the show-up procedure in this case was unduly suggestive, defendant first points to the circumstances of the identification itself. He recounts Adams's testimony that she was asked by an officer if she could identify the gunman, her response that she could, and her identification of defendant after he was taken from a police car in her presence. Show-up identifications are typically conducted in police stations or in public after police have detained a suspect. *Jones*, 2017 IL App (1st) 143776, ¶ 30. Therefore, the procedure used in this case was not impermissibly suggestive on that basis.

¶ 35 Defendant next argues the show-up was impermissibly suggestive because Adams was never "face-to-face" with the shooter and she lacked "an unobstructed view" of him. A review of Adams's testimony leads us to reject those assertions. Adams testified that she saw the person she later identified as the shooter when she was on the porch and the man was standing at the base of the porch. Thus, Adams had a clear opportunity to see the gunman. Although defendant argues Adams was not part of the fight between her brothers and the teenagers and she acknowledged on cross-examination she was inside when the shooting began, she nevertheless had the ability to see the man who had been standing near the porch holding a gun. Adams's description of that man's clothing matched what defendant was wearing when he was detained by police.

¶ 36 Defendant further argues the show-up was improperly suggestive because even though the police saw two males walking in the area, he was the only suspect shown to Adams. That is explained by the fact that Sandoval received a report that the suspected shooter wore a white hat and had a tattoo on his face, which more accurately matched defendant than his companion. Although a one-person show-up is not favored as a means of identification, that procedure is justified where the witness had an excellent opportunity to view the offender or where prompt identification is needed for the police to determine whether or not to continue their search. *People v. Hughes*, 259 Ill. App. 3d 172, 176 (1994). For these reasons, defendant has not met his initial burden of showing the identification was unduly suggestive.

¶ 37 Even assuming *arguendo* that defendant met his burden, the State may then show by clear and convincing evidence that the identification is reliable under the *Biggers* factors. See *id*. ¶ 28. Those factors are: the witness's opportunity to view the offender at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199; *People v. McTush*, 81 Ill. 2d 513, 518 (1980). No single factor is dispositive; the reliability of the identification is based on the totality of the circumstances. *Biggers*, 409 U.S. at 199.

¶ 38 Based on those factors, Adams's identification of defendant was independently reliable. Adams had an ample opportunity to view defendant as he stood in the front yard in daylight. The description of the offender was detailed and accurate, including a facial tattoo and a white hat with multiple colors. According to Sandoval's testimony, Adams identified defendant immediately after seeing him. Moreover, approximately 30 to 45 minutes elapsed between the

shooting and the identification. See, *e.g.*, *People v. Robinson*, 299 Ill. App. 3d 426, 435 (1998) (identification within a half-hour of crime supported its reliability). Therefore, had defense counsel filed a motion to suppress Adams's identification of defendant, we cannot conclude that motion would have been meritorious, as her identification was independently reliable.

¶ 39 Moreover, defendant is also required to show a reasonable probability exists that the outcome of his trial would have been different had the evidence of the show-up identification not been admitted. See *Henderson*, 2013 IL 114040, ¶ 15. Even without Adams's identification of defendant as the shooter, the remaining evidence is sufficient for a rational trier of fact to conclude that defendant committed the offense. Officer Sandoval testified he and his partner received a radio call of shots fired and saw two black males running within a few blocks of the reported location of the shooting. The clothing worn by defendant and his son, and his facial tattoo, matched the description of the suspects. The parties stipulated that defendant's hands tested positive for gunshot residue. In conclusion, defense counsel was not ineffective for failing to seek suppression of the show-up identification because the motion would not have been meritorious and defendant was not prejudiced by counsel's failure to file the motion.

¶ 40 The remaining two issues raised by defendant on appeal are conceded by the State. We accept the State's concessions as to both issues.

¶ 41 First, defendant argues his conviction for aggravated discharge of a firearm must be vacated pursuant to the one-act, one-crime rule because that conviction was based on the same physical act as his conviction for aggravated battery with a firearm. Although defendant did not raise this argument in the trial court, this court can address his claim under the plain-error doctrine, which allows consideration of unpreserved errors in the case of a clear or obvious error

where: (1) the evidence is closely balanced; or (2) the error affected the fairness of the defendant's trial or challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). A forfeited one-act, one-crime argument has been deemed appropriate for review under the second prong of plain error, *i.e.*, as an obvious error implicating the integrity of the judicial system. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 42 The one-act, one-crime doctrine provides that a defendant may not be convicted of multiple offenses based on a single physical act. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Where a defendant is convicted of two offenses based on the same act, the conviction for the less serious offense is vacated. *Id.*

¶ 43 Defendant contends even though evidence was presented that more than one shell casing was recovered from the scene, and thus, more than one shot was fired, the indictment did not treat the shots as separate acts. Furthermore, he asserts that both counts on which he was convicted were based on the single act of firing a gun at the only victim, Smith. We agree. The State charged defendant with the Class X felony of aggravated battery with a firearm in that he knowingly discharged a firearm causing injury to Smith, *i.e.*, "shot [him] about the body." See 720 ILCS 5/12-3.05(e)(1), (h) (West 2014). Defendant was also charged with the Class 1 felony of aggravated discharge of a firearm based on knowingly discharging a firearm in the direction of Smith. See 720 ILCS 5/24-1.2(a)(2), (b) (West 2014). Accordingly, defendant's conviction for aggravated discharge of a firearm, as the less serious of those two offenses, is vacated.

¶ 44 Lastly, defendant asserts he should receive one additional day of credit toward his prison sentence for the time he spent in custody prior to sentencing. The State concedes, and we agree, that defendant was in custody for 494 days during that period. Pursuant to our authority under

Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the mittimus corrected to reflect that number of days in custody.

¶ 45 CONCLUSION

¶ 46 Counsel's failure to file a motion to suppress did not amount to ineffective assistance. Therefore, defendant's conviction for aggravated battery with a firearm is affirmed. Furthermore, defendant's conviction for aggravated discharge of a firearm is vacated because it was based on the same physical act as his conviction for aggravated battery with a firearm. The mittimus is corrected as set forth above.

¶ 47 Affirmed in part; vacated in part; mittimus corrected.