2020 IL App (1st) 170384-U

No. 1-17-0384

Order filed September 29, 2020.

Modified upon denial of rehearing December 29, 2020.

Second 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. 10 CR 19744
	)	
WILLIAM PASCHAL,	)	The Honorable
	)	Michele Pitman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to suppress out-of-court identifications from a show-up procedure. The trial court did not abuse its discretion in denying defendant's motion for a mistrial on the basis of a violation of the defense's motion *in limine* or the confrontation clause, and defense counsel was similarly not constitutionally ineffective. Defendant was not precluded from presenting his defense such that he suffered any prejudice. This court affirmed the judgment of the trial court.

¶ 2 Following a jury trial, defendant William Paschal was found guilty of home invasion and armed robbery, both with a firearm, then sentenced to 30 years' imprisonment. On appeal, defendant argues the trial court erred in denying his motion to suppress the show-up identifications as unduly suggestive and not based solely on the witnesses' memories. Defendant also argues that one of the State's main trial witnesses violated a court order by referencing the identification of defendant by non-testifying witnesses, and the court then abused its discretion in denying defendant's motion for a mistrial on that same basis. He further argues defense counsel was constitutionally ineffective for failing to strike that testimony. Last, defendant argues his right to present a complete defense was violated when the court limited his testimony. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant and his cohort were arrested and then charged with the above-stated offenses after Darece Lake, her daughter Antoinet Lake, her niece Chakira Pasco, and Chakira's 13-year-old daughter Chamara Brown identified them at a show-up as the men who invaded Darece's home (12638 S. Paulina Street in Calumet Park) and then robbed the women by force of valuables.

¶ 5 Defendant filed a motion to suppress the show-up identifications as improperly suggestive, unreliable, and lacking an independent basis, and a hearing was held. The four victims testified, and the parties stipulated to the testimony of Sergeant Ronald Smith from an earlier pretrial hearing. For the sake of readability, we have woven in the testimony of two officers, Carmichael Lewis and Mario Smith, who testified at trial.

¶ 6 Evidence at the suppression hearing showed that around 8 p.m. on October 8, 2010, Antoinet was standing by the bedroom and collided with a man sporting shoulder-length

dreads/braids and slight facial hair, later identified as defendant, as he entered the home. In that moment, he was "in [her] face with the gun," pointing it at her from a foot away. Defendant then ordered Antoinet and Chamara, who were both in the bedroom, to the ground and demanded money. He pointed the gun at Antoinet's head and began searching the closet as he asked repeatedly where the money was while also stating, "Do you want to die for this shit[?]" Antoinet looked up at defendant from the floor, they conversed back and forth, and she responded that she did not have any money. The hallway lights were on, so Antoinet could see defendant "quite well."

¶ 7 Meanwhile, the other two men had walked passed them into the kitchen where Darece and Chakira were located. There, from about 15 feet away, Darece could see defendant's face. Darece saw him point the gun at Antoinet and Chamara before the other offenders also ordered her, with a gun to the head, to the ground. One was large-built and had a fade haircut; the other was light skinned and slender. At one point, Antoinet (from her place in the bedroom) saw the larger one sitting on top of her cousin and heard her mother crying. The more slender one went back and forth between another room and the kitchen. Darece (from her place in the kitchen) was able to focus on defendant again when he began arguing with Antoinet about the money.

¶ 8 Defendant found Antoinet's purse and dumped its contents, and his phone rang, at which point he signaled that it was time to go. The armed robbery lasted some 5 to 10 minutes. At one point, one of the victims managed to call 911.

¶ 9 Police showed within minutes just after 8 p.m., and were notified that three black male offenders with guns had fled in a white van. In particular, Darece's boyfriend (who apparently was not inside when the crime occurred) reported to Sergeant Smith that he saw three men leave the rear of the residence and get into a white van. Sergeant Smith then observed that same van

traveling northbound through the alley, meaning towards 126th Street, and relayed the message to his fellow officers Carmichael Lewis and Mario Smith who were en route to the scene. Officer Carmichael Lewis, who was located at 125th Street and Paulina Avenue, observed a white van exiting the alley with its lights out. At that point, the van was about a block from Darece's home, and he attempted to curb the van, but it fled east and northbound onto the expressway. Several officers then chased the vehicle, with Officer Lewis observing a suspect jump out. At some point, another suspect also jumped from the van, and several guns were tossed as it fled. Officers eventually stopped the van at 94th Street and Harvard Avenue and discovered three black males inside; defendant and codefendant Sean Peoples were in the back seat and codefendant Sean Paul Williams was in the driver's seat. Officer Smith described Williams as a light-skinned, slim black male and Peoples as heavy set with dark skin.

¶ 10 Within about 20-30 minutes after the incident, the victims appeared where the van was stopped for a show-up identification. While Sergeant Smith testified that he drove the victims in his squad car to the show-up location, the victims testified that Darece's boyfriend drove them there, and they followed a police vehicle.

¶ 11 A police officer instructed the victims to make an identification of the offenders who had been inside the house. The police lined up defendant and his two codefendants, all handcuffed, and shined a bright light on them while they stood nearby at a vehicle. Darece, Antoinet, Chakira, and Chamara remained together inside their own car. There was conflicting evidence as to whether the police presented the offenders one by one or all at once; however, Darece, Antoinet, and Sergeant Smith testified that it was one by one. Darece, Antoinet and Chamara all identified the three offenders as the armed men inside Darece's home. Although equivocal in her identification testimony, Chakira ultimately stated that she only identified the two offenders in

the kitchen but could not identify defendant, while Sergeant Smith testified that all the women had identified defendant. Antoinet noted that she and the other victims discussed which of the defendants was in the bedroom or kitchen as they were making the identifications.

¶ 12 At the suppression hearing, Antoinet stated she was 100 percent positive that defendant was in the bedroom with her and Chamara, as she "wouldn't forget his face," and her identification was immediate. Antoinet did not identify him because of what the other victims in the car said. She stated in court that he was the same individual she identified at the show-up. Darece likewise made an in-court identification of defendant. Darece stated that at the show-up she "instantly" recognized defendant by his face when police shined the light on him as the man who pointed the gun at Antoinet and, "I could see visualizing him being in my home and just going through the whole ordeal." The officer did not specifically tell her who to identify and did not declare beforehand that the individuals the police had apprehended were in fact the offenders who had invaded her home. Nonetheless, police did state that they had "caught" or "apprehended" the offenders prior to the show-up. Antoinet and Darece also viewed a line-up after the show-up but didn't identify anyone. Darece explained the line-up suspects were not the three men in her home. Police eventually recovered the proceeds from the armed robbery inside the white van.

¶ 13 The trial court denied defendant's suppression motion. The court found defendant failed to meet his burden of demonstrating that the identification procedure was so unduly suggestive as to cause a misidentification of defendant. The court found that "not one witness indicated that they identified Defendant because of anything they were told."

¶ 14 The cause then proceeded to trial with only Darece and Antoinet testifying. The court granted defendant's motion *in limine* barring reference to identifications made by Chakira and Chamara since they did not testify at trial.

¶ 15 Testimony for the State at the three-day trial was more in-depth but reflected many of the facts already presented at the suppression hearing. Darece added that for much of the time, one of the offenders held a gun to her head and she was so terrified that she "peed [her] pants" just as one criminal pistol-whipped Chakira. In addition, Darece and Antoinet made in-court identifications of defendant at trial. They also identified his codefendants from photos. They were shown photos of the two individuals who jumped from the van while it fled but testified those men were never in Darece's home.[1] Both those suspects were black males who were ultimately arrested but did not participate in the show-up. As stated, Officers Lewis and Smith also testified about their pursuit of the fleeing van.

¶ 16 Defendant testified on his own behalf that around February or March 2010, he became an informant purchasing guns from gang members for the Federal Bureau of Investigation (FBI) and Chicago police. He signed a cooperation agreement to that effect with a cover-name of Merlot and was in contact with Chicago police typically three or four times a week and daily with the FBI. He would usually be instructed to see the guns before "the operation was set into place." While defendant admitted to being present in the fleeing van, he denied that he participated in the preceding home invasion and armed robbery. Thus, his theory of defense was that he wasn't present during the crime.

[1]The record on appeal includes some of the photographs that were shown at trial, but the exhibit numbers on appeal do not correspond with the exhibit numbers presented at trial. It is therefore difficult to discern which photographs of which individuals were shown to the victims. From our reading of the briefs and our review of the record, however, the parties do not seem to dispute that Antoinet and Darece identified the various photographs of the five suspects/offenders at trial.

¶ 17 In support, defendant testified that on October 8, 2010, his assignment was to purchase guns from an individual by the name of Anthony Griffin, aka "Pistol Pete," on behalf of FBI agents Stephanie Lambert and Brian Hill.

¶ 18 That day, defendant met with Pistol Pete around 4 p.m. to look at guns, but while they drove to several locations, they did not purchase any. Defendant texted Agent Lambert to let her know he was with Pistol Pete. At the last stop, J & J Fish at 127th Street and Ashland Avenue[2], a white van pulled into the parking lot with three black males inside whom defendant did not know. Defendant was unsure of the time but guessed it was around 8 p.m. While Pistol Pete spoke with the men, defendant went inside to purchase food since he was not authorized to "deal with" those men. Several minutes later, defendant found that he'd been left by both vehicles. Eventually defendant got ahold of Pistol Pete, although the trial court barred defendant from testifying as to their specific conversation, as hearsay.

¶ 19 Defendant proceeded to explain that the white van pulled into the lot seven to nine minutes after his first sighting it, the man in the backseat waved defendant inside, and defendant complied. When asked why, defendant testified he was going home but had plans to meet with Pistol Pete later as to the guns. Inside the van were defendant's codefendants and the other two men who jumped out of the van but were later apprehended. Everyone in the van was sweating, and defendant could tell "something had happened," but he "didn't know what." The driver was erratic, and the police had signaled for the van to stop, but it did not. Defendant did not see any guns in the van or being thrown from the van. At that point, defendant phoned Agent Lambert,

[2]We take judicial notice that Google maps reflects that J & J Fish is three buildings south of Darece's home at 12648 S. Paulina Street, and thus closer to 127th Street. See *People v. Clark*, 406 Ill. App. 3d 622, 632-33 (2010). Defendant, however, testified at trial that the restaurant was located at 127th Street and Ashland Avenue, which is south and several blocks east of Darece's home.

but when he could not reach her, he then phoned Lieutenant James Sanchez of the Chicago Police. Defendant, as set forth, was placed into police custody and participated in the show-up.

¶ 20 The parties stipulated that Lieutenant Sanchez would testify that he was familiar with defendant and that he had a professional relationship with him, wherein defendant assisted Lieutenant Sanchez in a number of cases up until about the first week in September 2010, when Sanchez was transferred to a different department. On October 8, 2010, the day the crimes occurred, defendant called Sanchez and told him he was being chased by police and not driving.

¶ 21 In rebuttal, the State called FBI Agent Post who confirmed that defendant was a confidential informant for the FBI helping to purchase guns but said that in 2010, she was only in sporadic contact with defendant. On the day in question, defendant texted Agent Post that he was "looking at something for you now," and she responded "k" meaning okay. They had multiple other texts between them that day, but their content was not disclosed at trial. As to the one text that was disclosed, Agent Post was unsure what defendant meant and explained that defendant was required to call and inform her of each potential gun buy prior to any investigation. She had not given him any such authorization or direction on October 8. Defendant did not simply have "blanket authorization to go and look at guns" himself even if he had a lead of some sort. And, in fact, on October 8, defendant did not contact her to say he was with Pistol Pete and going to buy guns. If that had been the case, he would have arranged it several days in advance, with many more details laid out such as an in-person meeting with the FBI, a detailed operational plan, and traceable money.

¶ 22 Following evidence and argument, the jury retired. During deliberations, the jury asked whether police had fingerprinted the guns tossed from the white van or anything from the

victim's house. The parties agreed to respond by stating that the jury had heard all the evidence and should continue to deliberate.

¶ 23 The jury found defendant guilty of the offenses, and he was then sentenced to concurrent 30-year terms for the home invasion and armed robbery. This appeal followed.

¶ 24 ANALYSIS

¶ 25 *Motion to Suppress Identification Testimony*

¶ 26 Defendant first contends that the circuit court erred by denying his motion to suppress Antoinet and Darece's identification testimony because the show-up from which it was procured was unduly suggestive. Criminal defendants have a due process right to be free from identification procedures that are unnecessarily suggestive resulting in irreparable mistaken identification. *People v. Jones*, 2017 IL App (1st) 143766, ¶ 27; see also *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008) (noting that sometimes an identification is so unnecessarily suggestive that the due process clause prevents it from ever reaching the jury). Illinois courts employ a two-part test in such cases. If the defendant can show that a pretrial identification was impermissibly suggestive, then the burden shifts to the State. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999); *Jones*, 2017 IL App (1st) 143766, ¶ 28. The State must then demonstrate by clear and convincing evidence that the identification is reliable under the totality of the circumstances, *i.e.* that the witness identified the defendant based on her independent recollection of the incident. *Id.* To make that determination, courts consider " 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' 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.' " *People v. Manion*, 67 Ill. 2d 564, 571 (1977) (quoting *Neil v. Bigger*s, 409 U.S. 188, 199 (1972)).

¶ 27 The circuit court's factual determination that an identification procedure was not unduly suggestive will not be reversed unless it is against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001); *Jones*, 2017 IL App (1st) 143766, ¶ 29. Nonetheless, the court's ultimate decision to grant or deny a motion to suppress is reviewed *de novo*. *Id*.

¶ 28 On appeal, defendant maintains that, in general, show-ups are inherently improper and this particular show-up was rendered unduly suggestive by several facts. One was that on the scene, police notified the victims that they needed to make an identification of the individuals police had "apprehended" or "caught" and who were in the house. Another is that the victims, as a group, all viewed the offenders from within their vehicle. Last, defendant maintains the show-up was unnecessary, as the police easily could have conducted a station line-up like they did for the other two individuals who jumped from the van.

¶ 29 Despite defendant's argument to the contrary, Illinois courts have long held that an immediate show-up identification near the scene of the crime is proper police procedure. *People v. Thorne*, 352 Ill. App. 3d 1062, 1076 (2004) (and cases cited therein). Such a procedure is designed to aid police in determining whether to continue or to end the search for culprits. *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). Furthermore, show-up identifications are permissible and not unnecessarily suggestive where the witness had a clear opportunity to observe the offender during the commission of the offense and where the police are in pursuit of the offender within minutes of the offense. See *People v. Hughes*, 259 Ill. App. 3d 172, 177 (1994). In conducting a show-up, it is not improper for police to inform a victim that the police located the offenders. *Thorne*, 352 Ill. App. 3d at 1076; see also *Rodriguez*, 387 Ill. App. 3d at 831 (noting, "if a show-up could be invalidated on the ground that the police indicated that they had found a suspect, then no show-up could pass muster."). Nonetheless, whether the witness

was under any pressure to make a certain identification may be significant. *People v. Enis*, 163 Ill 2d 367, 399 (1994).

¶ 30 Here, the show-up promptly occurred within 20-30 minutes of the criminal offense, where at least two of the victims had ample opportunity to view defendant and the other two codefendants. See *Hughes*, 259 Ill. App. 3d at 177 (an identification within 20 minutes of an offense where witnesses all had ample opportunity to observe defendant was not questionable). Following the 911 call, police immediately pursued the fleeing van containing five men, two of whom jumped from the vehicle. See *People v. Johnson*, 262 Ill. App. 3d 781, 792 (1994) (" noting, " 'show-up' identification procedures are appropriate in situations involving a fleeing offender."). The show-up can thus be justified since it aided police in facilitating their search of the offenders.

¶ 31 Defendant argues that the show-up was unnecessary because the police could have transported all five men from the van into the police station for a formal line-up. Defendant's 20/20 hindsight argument defies the reality of on-the-street police work. Here, Officer Lewis stated at trial that after apprehending one of the men who had jumped from the van, he returned to the expressway to recover the tossed guns while his fellow officers continued to chase the fleeing van. *People v. Murdock*, 2012 IL 112362, ¶ 35 (noting, a reviewing court may consider all trial evidence in determining whether the trial court's decision denying a motion to suppress was correct). Officer Lewis stated that he did not know how the police chase would end or that there would be a show-up. Given the chaos and danger the criminals inspired, an on-the-scene show-up was perfectly reasonable.

¶ 32 And, contrary to defendant's suggestion otherwise, the police did not pressure the victims to identify him. Darece specifically testified that the police did not tell her who to identify and

did not inform her that the people they apprehended were in fact the offenders. And, while it would have been better for the victims to each separately view the suspects, we cannot say the simultaneous viewing, by itself, was enough on the particular facts of this case to find that this show-up was unnecessarily suggestive. See *Rodriguez*, 387 Ill. App. 3d at 832 (finding same). Here, Antoinet and Darece testified that they immediately identified defendant, whereas Chamara was more tentative in her identification, and Chakira essentially testified that she could not identify defendant. Antoinet stated that she did not identify him based on the other victims' identifications. If defendant's argument is that the victims felt pressured into identifying him based simply on the fact that they were all in the vehicle, then that argument falls flat on the evidence. "Since any alleged pressure cut both ways, it drops out as an issue on the facts of this case." *Id*. We further note that to the extent defendant relies on scientific studies to challenge the identifications in this case, we reject his argument. He did not cite any such studies or raise the argument in the trial court. See *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994) (noting, facts not properly of record cannot be considered by this court on review). In light of the totality of the circumstances, the trial court's finding that the show-up identification was not unnecessarily suggestive and therefore did not give rise to a substantial likelihood of misidentification was not manifestly erroneous.

¶ 33 Moreover, even assuming that defendant's show-up was unduly suggestive, he would still not be entitled to relief because Antoinet and Darece's identification was independently reliable under the aforementioned *Biggers* factors and thus admissible at trial. First, as noted, Antoinet had ample opportunity to observe defendant when he first entered the home and at various points throughout the 5 to 10 minute interaction under well-lit conditions. Darece also saw defendant's face initially and also when he argued back and forth with Antoinet. Antoinet displayed a high

degree of attention and provided an accurate description of defendant. While the record is largely silent on the description the victims immediately reported to 911 and police, we do know that one said there was a tall slim guy with a stocking cap, which partially matched later descriptions of one of the three offenders. Darece's boyfriend (who apparently was not inside when the crime occurred) also saw three men escape in a white van, according to Sergeant Smith.[3]

¶ 34 In addition, both Antoinet and Darece displayed a high degree of certainty when identifying defendant notwithstanding the fear or upset the offense inspired in both women. See *People v. Gabriel*, 398 Ill. App. 3d 332, 342 (2010) (finding eyewitness identification of the defendant reliable even though the defendant was pointing a gun at the witness). Antoinet stated she was 100 percent positive that defendant was in the bedroom with her and Chamara, as she "wouldn't forget his face." Darece stated that at the show-up she "instantly" recognized defendant by his face when police shined the light on him as the man who pointed the gun at Antoinet and, "I could see visualizing him being in my home and just going through the whole ordeal." As set forth, the identification took place within a short period of the offense. For all these reasons, we find that the trial court correctly denied defendant's motion to suppress.

¶ 35 *Denial of Motion for a Mistrial and Ineffective Assistance*

¶ 36 Defendant next contends the trial court abused its discretion in denying his motion for a mistrial. Defendant moved for a mistrial when, on cross-examination, Darece stated several times that all the victims had identified defendant during the show-up. Defendant now maintains this violated his motion *in limine* and his constitutional right to confront the witnesses against

[3]Sergeant Smith testified that he was told "three black males all with guns" had fled in a white van, but he received no other description of the offenders. In a separate suppression hearing, Officer Mario Smith testified that from a radio communication, he believed the victim described one of the offenders as a "[t]all slim guy in a stocking cap." Again, a reviewing court may consider all trial evidence in determining whether the trial court's decision denying a motion to suppress was correct. *Murdock*, 2012 IL 112362, ¶ 35.

him since neither Chamara nor Chakira testified at trial. He notes Darece's statements were false to a degree, as well, since Chakira could not even identify him.

¶ 37 A trial court has broad discretion to determine whether to declare a mistrial, and it should generally only be granted when some trial occurrence was of such character and magnitude that the party seeking mistrial is deprived of his right to a fair trial. *People v. Hall,* 194 Ill. 2d 305, 341 (2000). In other words, the error must be so grave that it infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice. *People v. Bishop*, 218 Ill. 2d 232, 251 (2006). Accordingly, the violation of a motion *in limine* will constitute a ground for mistrial only where the violation deprived the defendant of a fair trial. *Hall*, 194 Ill. 2d at 342.

¶ 38 In response to defendant's argument, the State in its brief[4] does not deny that Darece's statements on cross-examination violated the motion *in limine*, but maintains any such error with respect to the confrontation clause was harmless. In determining whether a constitutional error or the improper admission of evidence is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005); *People v. Lindsey*, 2013 IL App (3d) 100625, ¶ 39. The State bears the burden of proof. *Id*. There are three different approaches for measuring error under this harmless-constitutional-error test: (1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *Id.*

[4]At oral argument, the State expressly argued that there was no violation of the motion *in limine*; however, its brief focuses on a harmless error analysis.

¶ 39 As to the first factor, reading Darece's complained-of comments in light of the entire cross-examination, spanning some 47 pages of the record, we cannot say that they contributed to defendant's conviction. The comments arose as defense counsel, in an effort to cast doubt on the identification testimony, repeatedly questioned Darece about her statements at the pretrial motion to suppress hearing. Defense counsel first noted that all the victims were in the same car and arrived at the appointed show-up area, where they remained in their vehicle. Counsel asked if one of the police officers instructed "you folks present to point them out," to which Darece responded that the police "were going to shine the light and we point them out." A similar line of inquiry repeated as defense counsel attempted to impeach Darece so as to demonstrate that the show-up procedure was suggestive.

¶ 40 Just preceding the comments defendant now complains of, defense counsel noted again that all the victims ("you four who were in the house") were in their car at the show-up and then inquired whether the police asked them individually to identify each suspect or as a group, to which Darece responded, "We all identified him." Counsel basically asked her the same question again, and she repeated her answer. Outside the jury's presence, defense counsel moved for a mistrial claiming Darece violated the motion *in limine*. The trial court denied the motion finding "no basis," since defense counsel's "vigorous cross" in essence referenced the victims as a group and essentially opened the door for the claimed violation.

¶ 41 We cannot say the court's assessment of the situation and denial of the motion for a mistrial was unreasonable. See *In re Commitment of Fields*, 2012 IL App (1st) 112191, ¶ 60, *affirmed by* 2014 IL 115542 (noting, an abuse of discretion occurs when the court's decision is fanciful, arbitrary, or unreasonable such that no reasonable person would agree with it). Defense counsel set the stage for a violation of the motion *in limine*, clearly finding that impeaching

Darece and casting doubt on her identification was more important. Moreover, throughout the cross, Darece was clearly confused by many of the questions, and there were stops and starts to her cross in between objections. At one point, the trial court expressly directed her to answer defense counsel's questions. On this record, we do not believe her references to "all" the victims without specifying which ones and in response to defense counsel's cross was unduly prejudicial. The jury could have taken her comments during the lengthy cross as just one more non-responsive answer.

¶ 42 As to factor two in the harmless error analysis, we agree with the State that the evidence in this case was compelling if not overwhelming such that it supports defendant's conviction notwithstanding any claimed error. Darece and Antoinet testified consistently and competently that defendant was one among three offenders who invaded Darece's home, held the four women at gunpoint, forced them to the ground, and riffled through their belongings to ultimately rob them. They corroborated one another in describing the crimes that took place, and defendant's presence in the home. Both women identified him at the show-up and also in court, stating that they recognized his face.

¶ 43 While defendant denied being present at the armed robbery, we find his defense strained credulity for several reasons. See *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 31 (courts have found no "credibility contest" when one party's version of the events was either unrefuted, implausible, or corroborated by other evidence). First, a jury would be hard-pressed to believe defendant simply hopped into the van with a bunch of individuals he didn't know, even when directed by the van's occupant (or Pistol Pete). Second, if the van's occupants had indeed committed the home invasion and armed robbery, as defendant concedes, then the logistics of how they did so but then had enough time to then pick up defendant while being chased by

police remain unlikely and unclear. Sergeant Smith testified at trial that he observed a white van leaving the scene.[5] Officer Lewis saw the van fleeing northbound about a block from the residence, at 125th and Paulina. There, the van exited the alley with its lights off, and when Officer Lewis attempted to curb the van, it fled east, then north, and hopped onto the interstate going northbound. No one testified to seeing the van flee southbound to 127th, which is where defendant was located. In addition, while defendant testified he did not see any guns tossed from the van, several officers testified to the contrary. Third, and most importantly, defendant offered no corroborating evidence that he was not actually present at the armed robbery. Testimony that he called the police while in the van or that he was in fact an FBI informant supported only tangential facts but not the ultimate fact of where defendant was when the offenses occurred. The State's evidence, when measured against defendant's own self-serving testimony, was overwhelming.

¶ 44 We thus reject defendant's reliance on *People v. Sebby*, 2017 IL 119445, ¶ 63, to argue the evidence was closely balanced. In that case, the conflicting accounts by the State and defense were equally consistent, plausible, and there was no corroborating extrinsic evidence. We also reject defendant's speculative contention that the jury note asking for fingerprint evidence demonstrates that the erroneously admitted identification testimony contributed to the guilty verdict. See *Patterson*, 217 Ill. 2d at 435. While the note might suggest curiosity on the jury's part, it does not create a reasonable probability, or even a reasonable possibility, that the jury relied on Darece's several statements on cross to reach its verdict. See *id*. Moreover, the State

[5]Sergeant Smith's testimony at the motion to suppress hearing was more detailed. At that hearing, Sergeant Smith stated that when he arrived at the scene, he spoke with Darece's boyfriend who said he saw three offenders come from the rear of the residence and get into a white van. Sergeant Smith stated that he himself also saw the van fleeing northbound in the alley between Paulina and Page.

did not reference the improper identification testimony in opening or closing argument, but instead emphasized the identification testimony of Antoinet and Darece.

¶ 45 As to factor three in the harmless error analysis, we also agree with the State that the improperly admitted identification evidence is merely cumulative and duplicates the properly admitted identification evidence of Antoinet and Darece.

¶ 46 Taking all of the above factors into consideration, we conclude any error as to erroneously admitted evidence was harmless beyond a reasonable doubt. In other words, there is no reasonable probability that the verdict would have been different if the evidence in question had been excluded. See *Lindsey*, 2013 IL App (3d) 100625, ¶ 39. Defendant was not deprived of a fair trial, and the court did not abuse its discretion in denying his motion for a mistrial.

¶ 47 In reaching this conclusion, we also cannot countenance defendant's claim that his trial counsel was constitutionally ineffective for failing to strike the statements set forth above. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Dupree*, 2018 IL 122307, ¶ 44. A reasonable probability is a probability sufficient to undermine confidence in the result at trial, and actual prejudice must be shown rather than mere speculation as to prejudice. *People v. Bew*, 228 Ill. 2d 122, 135 (2008); *People v. Graham*, 206 Ill. 2d 465, 476 (2003). In considering whether counsel's performance was deficient, we indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, *i.e.* that the challenged action is considered sound trial strategy. *People v. Luna*, 2013 IL App (1st) 072253, ¶ 87. A defendant must satisfy both prongs of the *Strickland* test. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶ 48 Here, as set forth, defense counsel clearly found highlighting pretrial evidence that the show-up was suggestive outweighed any potential reference to the victims' identifying defendant. Moreover, had defense counsel requested that the testimony be stricken, as defendant now urges, this could have potentially drawn more attention to the specific statements. In that sense, counsel strategically moved for a mistrial outside the jury's presence rather than striking the testimony. Moreover, the defense was zealous in representing defendant. The defense filed pretrial motions to suppress, motions *in limine*, and vigorously cross-examined the witnesses, in addition to presenting a defense theory. We cannot say the defense attorneys were deficient.

¶ 49 Nor can we say Darece's statements, when considered in context, resulted in prejudice given the evidence of defendant's guilt delineated above. We do not believe that absent the comments the result of the proceeding would have been different. Defendant's ineffective assistance claim therefore also must fail.

¶ 50 *Denial of Right to Present a Defense*

¶ 51 Defendant next contends he was denied his constitutional right to present a complete defense when the trial court barred defendant from testifying at trial that Pistol Pete ordered him into the white van. Trial counsel noted that the offer of proof specifically provided that defendant "received a phone call from Pistol Pete who told him to get into a white van and he acted in conformity with that directive." The trial court excluded this testimony on the basis of improper hearsay, as an out-of-court statement offered to establish the truth of the matter asserted. See *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008).

¶ 52 The State effectively concedes this was error since an out-of-court statement offered to prove its effect on a listener's mind or to show why the listener subsequently acted as he did is

not hearsay and is admissible. See *id*. Nonetheless, the State maintains defendant was not precluded from presenting his defense and thus suffered no prejudice. We agree.

¶ 53 Even when a court excludes otherwise admissible evidence, reversal is not required unless defendant was prejudiced and the error affected the verdict. *People v. Weatherspoon*, 394 Ill. App. 3d 839, 850-51 (2009).

¶ 54 Defendant still testified that Pistol Pete spoke with the men in the white van, then both vehicles left. Defendant then spoke with Pistol Pete, the white van returned, and an occupant waved defendant to enter the van. At the very least, the evidence showed he was directed to enter the vehicle by others. Moreover, according to the defense theory, defendant was acting as an informant for the FBI during the relevant time, as he spent hours viewing guns with Pistol Pete (about 4 p.m. to 8 p.m.), and he only entered the van with these unknown offenders after the home invasion and armed robbery had already occurred since the van was clearly fleeing from police. Defendant's theory of defense was quite apparent and would not have been made much clearer with the proposed offer of proof. See *People v. Reppa*, 104 Ill. App. 3d 1123, 1128 (1982) (finding no constitutional violation where the defendant's testimony was sufficient to acquaint the jury with evidence that was compatible with his innocence). To the extent there was error, it did not affect the verdict, and defendant suffered no prejudice.

¶ 55 CONCLUSION

¶ 56 Based on the foregoing, we affirm the judgment of the trial court.

¶ 57 Affirmed.