Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-033

NOVEMBER TERM, 2019

State of Vermont v. Brandon Brown*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1909-6-18 Cncr

Trial Judge: Michael S. Kupersmith (Ret.), Specially Assigned

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of felony unlawful trespass. On appeal, he argues that the court erred in denying his motion for judgment of acquittal because there was insufficient evidence to show that he was the person who allegedly trespassed. He also argues that one probation condition should be amended to reflect a modification made at the sentencing hearing. We affirm.

Defendant was charged with unlawful trespass in June 2018. At trial, the complainant had the following interchange with the prosecutor:

> Q. Now, do you know a person by the name of Brandon Brown?
>
> A. Yes.
>
> Q. Do you see that person here in court?
>
> A. Yes.
>
> Q. Can you identify an article of clothing that person's wearing?
>
> A. Black jeans.

Complainant testified that she had dated "Mr. Brown" for several months and the relationship ended in May 2018. She stated that afterwards, he would come to her house but she would not allow him in if he was intoxicated. On the night in June 2018, she heard a knock at the door. She described what happened next:

> A. I look through the peephole.

Q. And what did you see?

A. I saw him.

Q. "Him" Brandon?

A. Yeah.

Q. The defendant?

A. Yeah.

She stated that she opened the door a crack to see if he was intoxicated and as soon as she did, she could tell that he had been drinking. Complainant testified that she asked defendant to leave, but defendant stuck his head into the door and entered the apartment. He urinated on the floor in the complainant's bathroom and passed out on the complainant's bed for a moment. After he came to, defendant grabbed a beer from his bag. Complainant told him she would call the police if he opened it. Defendant proceeded to open the beer, and the complainant called the police. The responding officer testified. He stated that when he arrived at the complainant's home, he approached the individual who had entered the complainant's home. The state's attorney asked if the individual was "the person you see here in court?" and the officer responded, "Yes, sir." Police then escorted defendant from the complainant's home. The officer stated that defendant smelled of alcohol and appeared heavily intoxicated. Defendant did not testify or present any evidence.

At the close of the evidence, defendant moved for judgment of acquittal. Defendant argued that the State had not presented enough evidence for the jury to identify defendant as the person who trespassed into complainant's apartment. The State argued that the complainant had identified defendant by indicating an article of clothing worn by defendant. The court concluded that there was enough evidence to get the question to the jury. The jury found defendant guilty.

Defendant filed a post-trial motion for judgment of acquittal, arguing, among other things, that the State failed to identify defendant as the Mr. Brown who entered the complainant's residence. The court denied the motion on the basis that the complainant testified that Brandon Brown forced his way into her apartment, and that he was the same person in the courtroom wearing black jeans. The court explained that at that point the witness looked in the direction of defendant and the court observed that defendant was wearing "dark-colored trousers."

Defendant appeals the denial of his motion for acquittal. This Court reviews the denial of a motion for acquittal de novo. State v. Erwin, 2011 VT 41, ¶ 10, 189 Vt. 502. The standard of review for a motion for judgment of acquittal is whether the evidence, when viewed in the light most favorable to the state, is sufficient "to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." Id. (quotation omitted).

Here, defendant asserts that there was insufficient evidence to establish his identity as the perpetrator of the crime. Identity of the accused " 'is an essential element in the establishment of guilt beyond a reasonable doubt.' " Id. ¶ 11 (quoting United States v. Weed, 689 F.2d 752, 754 (7th Cir. 1982)). Identity does not have to be established by an eyewitness, however, and can be

inferred from all the facts and circumstances that are in evidence." Id. (quoting Weed, 689 F.2d at 754).

Defendant argues that the complainant's testimony that defendant was wearing black jeans was insufficient to establish his identity because the State did not request that the record reflect that defendant was wearing black jeans that day. Defendant also asserts that it was improper for the court to rely on its own observations that the complainant looked at defendant when she identified his clothing and that defendant was wearing dark-colored trousers that day.

We do not reach the question of whether the court erred in relying on its own observations of the witness and defendant at trial in denying the motion for acquittal because we conclude that the remaining evidence was sufficient to support a reasonable inference that defendant was the same Brandon Brown who entered the complainant's apartment. See United States v. Alexander, 48 F.3d 1477, 1490 (9th Cir. 1995), as amended on denial of reh'g (Apr. 11, 1995) (affirming denial of motion for acquittal due to alleged lack of identification despite lack of in-court identification because jury could reasonably infer identity from testimony referring to defendant by name and officer's testimony that persons arrested were named defendants). The complainant testified that she personally knew Brandon Brown, that Brandon entered her apartment, and that he was in the court wearing black jeans. She also affirmatively answered that "Brandon" was defendant. The responding officer testified that the person who entered the complainant's apartment was present in the courtroom. Defendant was identified as "Brandon Brown" at the start of trial, and at no point did any witness deny that defendant was the Brandon Brown who perpetrated the alleged crime. See United States v. Boyd, 447 F. App'x 684, 690 (6th Cir. 2011) (explaining that identity of defendant as person who perpetrated crime charged can be established through circumstantial evidence including that defendant has same name as person charged and "failure of witnesses who observe a defendant in the courtroom to deny the defendant's identity"). In fact, mistaken identity was not alleged in this case. Defendant's defense was that he did not know that at the time he was not allowed into complainant's apartment. This evidence, when taken as a whole, was sufficient for the jury to reasonably infer beyond a reasonable doubt that defendant was the perpetrator of the crime.

Defendant next argues that his probation order must be amended to reflect the oral pronouncement of his sentence. At sentencing, defendant objected to Condition A, which stated that defendant must not "be convicted of another crime or engage in criminal behavior." Defendant asserted that the language "or engage in criminal behavior" was overly broad. The court agreed to modify Condition A to read be convicted of another crime or commit another crime." The probation order contained the unmodified version of Condition A, and defendant signed that order. Citing federal law, defendant asserts that where there is a conflict between the oral pronouncement of a sentence and the written sentence, the oral pronouncement controls. See United States v. Rosario, 386 F.3d 166, 168 (2d Cir. 2004). Although defendant did not raise this below, defendant asserts that on appeal this Court can correct the written order to reflect the modification made at the sentencing hearing under Vermont Rule of Criminal Procedure 35 or 36.

We conclude that this argument is not properly preserved for appeal at this time. See State v. Lumumba, 2018 VT 40, ¶ 11, 207 Vt. 254 (explaining that defendant must preserve objection to probation conditions by raising issue at sentencing, in motion to reconsider, or through Rule 35 motion). This Court will not address a Rule 35 or 36 motion for the first time on appeal. Where

the issues were not raised below, we will not reach the questions of whether the court's statements during the sentencing hearing in this case amounted to an oral pronouncement of sentence, nor whether, if so, the oral statement or written probation conditions trump in the event of a conflict. Defendant should raise these issues with the trial court in the first instance.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice