2016 IL App (1st) 113492-UB

FOURTH DIVISION
September 22, 2016

No. 1-11-3492

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 18462
	)	
PATRICK TAYLOR,	)	Honorable
	)	Hyman I. Riebman,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices Fitzgerald Smith and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant entitled to new trial in light of Illinois Supreme Court's holding in *People v. Lerma*, 2016 IL 118496, where defendant's expert on eyewitness identifications would have offered relevant testimony and State's case hinged on accuracy of eyewitness identifications.

¶ 2 After a jury trial, defendant was convicted of the first-degree murder of Marquis Lovings and sentenced to life in prison. Defendant appealed from his conviction, arguing that the trial court erred in excluding expert testimony on the reliability of eyewitness identifications, that the court improperly precluded him from cross-examining a witness for the State on his outstanding warrants, that the court improperly answered questions sent out by the jury during its deliberations, that the statute enhancing his sentence was unconstitutionally vague, and that his mittimus incorrectly reflected multiple convictions for murder. In an unpublished order, this

court affirmed defendant's conviction and corrected his mittimus. *People v. Taylor*, 2014 IL App (1st) 113492-U.

¶ 3 Defendant petitioned for leave to appeal to the Illinois Supreme Court. While defendant's petition was pending, the Illinois Supreme Court decided *People v. Lerma*, 2016 IL 118496, ¶ 32, which held that, under the facts of that case, the trial court had abused its discretion in precluding the defendant from introducing expert testimony on the reliability of eyewitness identifications. After deciding *Lerma*, the supreme court denied defendant's petition for leave to appeal in this case, ordered us to vacate our judgment in *Taylor*, 2014 IL App (1st) 113492-U, and remanded with instructions to reconsider this case in light of *Lerma*. On May 16, 2016, pursuant to the supreme court's supervisory order, we vacated our judgment in *Taylor*, 2014 IL App (1st) 113492-U.

¶ 4 On reconsideration, we conclude that, in light of *Lerma*, the trial court erred in excluding the expert eyewitness testimony. Defendant's proposed expert would have offered helpful and relevant testimony on common misperceptions regarding eyewitness identifications and the reliability of police identification procedures, some of which were similar to the expert's conclusions the supreme court found to be relevant in *Lerma*. And the trial court's stated reasons for excluding the testimony were unreasonable in light of *Lerma* and the proposed expert's conclusions. We vacate defendant's conviction and remand for a new trial.

¶ 5 I. BACKGROUND

¶ 6 A. Pretrial Proceedings

¶ 7 Before trial, defendant moved to suppress the State's identification testimony. He argued that the photo array shown to the eyewitnesses was suggestive because his photograph was different from the photographs of the fillers in the array. With respect to the physical lineup

identification, defendant argued that two eyewitnesses, Kevin Gholston and Armando Vera were allowed to see defendant when he was being treated by paramedics prior to the physical lineup, thus tainting any subsequent identification. He also argued that the fillers in the physical lineup appeared different from him.[1]

¶ 8 At the hearing on defendant's motion, Detective Dan Cook of the Rolling Meadows police department testified that, on August 19, 2006, he was assigned to investigate a home invasion that had occurred at an apartment at 4406 Euclid Avenue in Rolling Meadows, Illinois. Two men entered the apartment and took cash, cell phones, and watches from Charles Bjelica, Armando Vera, Michael Barraza, Kevin Gholston, Marya Klein, and Marquis Lovings. One of the men shot Lovings, who eventually died of a gunshot wound.

¶ 9 On August 19, 2006, Cook went to Northwest Community Hospital to interview the victims. At that point, Lovings had already died. Bjelica told Cook that the first intruder was black, 25 to 30 years old, 5'10" tall, 190 pounds, with "razor-short hair" and a "very dark" complexion. The first intruder was wearing a two-piece orange jumpsuit. Bjelica described the second intruder as a black man, 25 to 30 years old, 5'10" tall, 200 pounds, with a light complexion, wearing a light blue shirt and blue jeans.

¶ 10 Cook testified that Bjelica told him that the two intruders robbed the occupants of the apartment and argued with Lovings about the combination to a safe. Bjelica said that he heard gunshots, then heard the intruders flee.

[1] Defendant also filed a motion to quash his arrest and suppress evidence, which was heard simultaneously with his motion to suppress the identification testimony. The trial court denied the motion to quash, and defendant raises no challenge to it on appeal.

¶ 11 After interviewing Bjelica, Cook learned of another home invasion that had occurred in Streamwood, Illinois, involving two men, Robert Wasp and Vernial Trotter. Cook created a photo array containing Wasp and Trotter's pictures.

¶ 12 On August 22, 2006, Cook showed Barraza the photo array at Lutheran General Hospital. Before showing Barraza the array, Cook read a lineup advisory form to him. The form said that the suspect may or may not be in the photo spread, that Barraza was not required to make an identification, and that Barraza should not assume that Cook knew whether the suspect was in the array or not. Barraza signed the form.

¶ 13 Cook showed Barraza the photo array containing Wasp and Trotter, but Barraza did not identify any of the individuals in the array as the intruders he saw on August 19.

¶ 14 Cook also showed the same array to Vera, who did not identify any of the pictures as a picture of the intruders.

¶ 15 Cook testified that he spoke with Sergeant Gadomski on October 3, 2006, and Gadomski told Cook that he had a phone conversation with Bjelica, in which Bjelica told Gadomski that he thought one of the offenders might be someone known as "Black Pat" who was living in Harvey, Illinois. Cook learned that "Black Pat" was defendant, and that defendant was a 28-year-old black man with a dark complexion who weighed 160 pounds. Cook compiled a new photo array containing defendant's picture.

¶ 16 The next day, Cook showed the photo array to Bjelica, after he reviewed an advisory form. Bjelica identified defendant's picture as a picture of the intruder in the orange jumpsuit. On October 5, 2006, Cook showed the photo array to Barraza, but Barraza did not make an identification of anyone in the array. On the same day, Cook showed Gholston the array, and Gholston also identified defendant as the intruder in the orange jumpsuit. On October 6, 2006,

both Vera and Klein identified defendant in the photo array. Each of the witnesses viewed the array separately.

¶ 17 On August 6, 2007, Cook and several other police officers from both the Rolling Meadows and Chicago police departments arrested defendant at a gas station at 79th Street and Martin Luther King Drive in Chicago.

¶ 18 The next day, Cook arranged a lineup that Gholston, Klein, Bjelica, and Vera all viewed. Cook testified that he was in the room with each of the witnesses when they observed the lineup. Cook testified that he performed a sequential lineup, having each witness view a single person one-at-a-time, because defendant had not been compliant and he thought that defendant might act up during the lineup.

¶ 19 Cook testified that, when defendant was brought into the viewing room, he started screaming, covering his face with his shirt, and crawling around the room. Cook testified that he called paramedics in to restrain defendant on a stretcher. Each of the four witnesses, who viewed defendant separately, identified defendant as the robber with the orange jumpsuit. Cook testified that six people, including defendant, were used in the lineup and that none of the witnesses recognized any of the five fillers.

¶ 20 On cross-examination, Cook testified that, when completing the photo array containing defendant's picture, he tried to find individuals with similar attributes to defendant. Cook found photos of other individuals of similar height and weight on the Illinois Department of Corrections' website. He did not remember how many photographs he looked at before he found all of the five fillers used to complete the array. Cook also testified that he showed each of the witnesses all six of the photographs at once; he did not show the witnesses the photographs one-at-a-time.

¶ 21 Detective Mark Recker testified that he showed Bjelica and Klein a photo array that did not contain defendant's photograph on August 23, 2006. Neither Bjelica nor Klein made an identification, but they both said that one of the individuals in the array resembled one of the intruders.

¶ 22 Gholston testified that the police showed him "a lot" of different photo arrays; he estimated that he had seen "maybe four, five, maybe more." Gholston said that he had identified one of the people in the array as the man in the orange jumpsuit but that he asked the police if he could view a live lineup so that he could "look at his face just to double check." But, Gholston said, he had already made his mind up that the person in the array was one of the robbers.

¶ 23 Gholston testified that he went to the Rolling Meadows police station to view a live lineup, although he was not sure of the date. He testified that paramedics brought defendant before him in a wheelchair. Gholston testified that defendant was fighting with them and trying to block his face with his hands. Gholston then viewed "at least three" other people in wheelchairs. Gholston testified that other eyewitnesses were at the station to view the lineup as well, but that the police separated Gholston from them before they conducted the lineup began.

¶ 24 Gholston identified a lineup advisory form which he had signed before viewing the lineup. It informed Gholston that he did not have to select anyone out of the lineup. The police officers who performed the lineup told Gholston that the suspect may not even be in the lineup.

¶ 25 Klein testified that, on August 7, 2007, she and Bjelica went to view a lineup at the Rolling Meadows police department. Detective Cook picked her and Bjelica up from his apartment in Chicago. Klein said that, before Cook picked them up, she and Bjelica talked about the incident "very briefly." She also testified that Gholston was at the police station and that Vera "could have been" there as well.

¶ 26 Klein testified that, before going in to view the lineup, she sat in a waiting room. She could not recall whether anyone else was in the waiting room with her. She testified that the police officers conducting the lineup did not tell her anything except that she would be viewing a lineup.

¶ 27 Klein testified that the officers brought her into a room where she looked through glass and saw a single person sitting in an office chair. Klein said that this person was one of the robbers. She testified that he was "moving around and just yelling." She noticed that there was a plastic bag by the man. Klein testified that she "saw a lot of different people" after the first viewing, seeing each person one-at-a-time. She could not remember whether any police officers were in the room with her when she viewed the individuals.

¶ 28 On cross-examination, Klein testified that she had seen a photo array containing a picture of the robber prior to viewing the in-person showup.

¶ 29 Defendant also called Bliss Dupes, an investigator with the Cook County public defender, to testify regarding an interview of Gholston that she and defense counsel had conducted prior to the hearing. Dupes testified that Gholston told her that the police had only shown him one person during the live lineup, and that that person was defendant. Gholston also said that it appeared that defendant had been shot and that he had a colostomy bag.

¶ 30 The court denied defendant's motion to suppress the identifications. With respect to the photo arrays, the court found that nothing made defendant's photo stand out when compared to the fillers' photos. The court acknowledged that defendant had a darker complexion than some of the fillers but noted that other fillers had a darker complexion than defendant. And with respect to the live showup, the court found that defendant made himself stand out by not cooperating with the lineup. The court found that the police made efforts to avoid any suggestiveness, noting

that they did not coach the witnesses, kept the witnesses separate during the viewing, had the fillers sit in chairs like defendant, and informed the witnesses that they were not required to make an identification. And the court found that the witnesses who had testified in court—Gholston and Klein—"had a high level of certainty" about their identifications.

¶ 31 The State filed a motion *in limine* seeking to bar the testimony of Dr. Daniel Wright, a professor of legal psychology at Florida International University, who specialized in studying event memory and had focused his research on eyewitness testimony.

¶ 32 For purposes of the hearing on the motion *in limine*, the trial court accepted Wright as an expert in eyewitness identifications and memory. There is no dispute on appeal regarding Wright's qualifications.

¶ 33 Wright testified that a popular misconception regarding memory was that memory operates as "a snapshot of [one's] visual field," allowing a person to store a "snapshot" of an entire event. Wright said that, in reality, people remember fragments of a past event, then reconstruct the remaining elements of an image. A person can fill these gaps in a memory "with things that [he hears] from other people, with things that [he thinks] should be what happened, or with things that are just part of [his] general knowledge."

¶ 34 Wright added that another popular misconception regarding memory is that memory operates like a "file cabinet": an individual simply needs to access the memory, and it will be perfectly accurate. Rather, Wright testified, memory is "dynamic," in that it changes based on new information that people receive. Wright said that, if an individual was given inaccurate information about an event after experiencing it, that person would be more likely to report inaccurate information about the event. And, Wright said, an individual's expectations of how

certain situations should play out will affect their ability to remember how an event actually occurred.

¶ 35 Wright described circumstances that can affect the quality of a person's memory. If a person viewed an event in the dark, or for a short amount of time, those circumstances would tend to make a person's memory worse. Wright also testified that, during stressful situations, a person's attention tends to be focused like a "spotlight," so that his or her attention is drawn to one object—such as a gun—rather than the images around it.

¶ 36 Wright said that people tend to have "worse memory in *** highly emotional settings." Wright explained that people's descriptions of highly emotional events tend to be warped by "rehearsed conversation that happens over and over and over again." A person's memory is "filtered through these rehearsals," so it may not be an accurate memory of the incident.

¶ 37 Wright also testified that laypeople tended to overestimate the importance of an eyewitness's confidence when evaluating the eyewitness's testimony. Wright said that there was some correlation between an eyewitness's confidence and the accuracy of their memory, but not as much as an average person would generally believe. And people tend to value an eyewitness's confidence more highly than more important factors, such as the lighting when the eyewitness saw the perpetrator or the time the eyewitness had to view the perpetrator.

¶ 38 Wright described the phenomenon of "memory conformity," whereby two individuals who have perceived the same event will tend to alter their memories to conform with one another if they discuss the event after it occurred. Wright said that memory conformity can affect the identification process because "witnesses may talk and it may mean that they come up with a description that's more similar to each other than they should." Wright noted that, if witnesses

know one another, it may mean that they are more likely to talk about the event simply because they have more opportunities to speak with one another.

¶ 39 Wright also described the phenomenon of "unconscious transference," which occurs "when people remember something from one time and misattribute it to some other time." Wright described one case where a woman had been raped while a nearby television was on. The woman remembered her rapist's face as the face of a person she had seen on the TV "because she just had that face in her mind during that point and transferred it onto the perpetrator."

¶ 40 Wright explained that unconscious transference can occur when a police officer shows an eyewitness a photo array containing the suspect, then the eyewitness sees a live lineup containing the same suspect. Wright said that, in such a case, the processes "could make th[at] person stand out" to the eyewitness during the subsequent lineup.

¶ 41 Wright testified that an individual's familiarity with another person's face will also affect his or her ability to recall the person's facial features. If an individual is familiar with someone, the individual will be able to remember that person's face much better than if the individual saw a person's face for the first time. Generally, if an individual sees someone for the first time, the individual will recall that "global information" about the person—the person's general size, the general shape of the person's hair and face—rather than the detailed information, such as "the difference between the eyes, the exact shape of the nose, the shape of the lips, and things like that."

¶ 42 Wright testified regarding factors that can make lineup identifications more or less reliable. Wright said that simultaneous lineups, where the eyewitness looks at a group of possible suspects simultaneously, more often produce accurate identifications of individuals who are actually guilty, but also more often create false identifications of innocent people. By contrast,

sequential lineups, where the eyewitness looks at a series of photographs one at a time, "are better for protecting the innocent." Wright explained that, during a simultaneous lineup, a person may tend to choose the individual with the characteristics most closely resembling the suspect, even if that person is not actually the suspect. Wright said that this problem with simultaneous lineups occurs "often." Thus, Wright concluded, "on the whole the cognitive psychologists and eyewitness testimony researchers have believed the sequential lineup is better."

¶ 43 Wright testified that he had reviewed the reports and photo spreads from this case. He said that it appeared that the police showed the eyewitnesses "all six pictures simultaneously" when conducting the photo spread.

¶ 44 Wright also testified that using the same fillers in the same lineups for multiple eyewitnesses, as the police did in this case, could lead to misidentifications of an innocent person. Wright said that, in any lineup, it was possible that an innocent suspect could more closely resemble the perpetrator than the five fillers. According to Wright, this possibility increased when the same fillers were used in multiple lineups.

¶ 45 Wright testified that, when conducting a lineup, it was best for police to a "double blind" procedure, where the officer who knows which of the lineup participants is the suspect is not in the room with the eyewitness making the identification. Wright testified that, when the officer knows which participant is the suspect, he or she can give off unconscious "cues" to the eyewitness about which participant is the suspect. Even if the officer tried to avoid giving off cues, it was possible that he or she would do so. Wright said that, as best as he could tell from the reports, the police did not use the double blind method in this case.

¶ 46 Wright testified that the longer an eyewitness waited to make an identification after an event made it less likely that the eyewitness could remember details about the event—what

Wright referred to as the "forgetting curve." Wright acknowledged that this was something that most jurors would probably understand.

¶ 47 On cross-examination, the State focused on whether Wright could opine as to the reliability of any of the witnesses in this case. Wright said that, without conducting tests, he could not tell which of the eyewitnesses in this case would have a better ability to remember faces than others. But the circumstances of each identification—such as the length of time the eyewitness had to view the offender—could generally suggest whether his or her memory of the offender's face would be more reliable.

¶ 48 Wright also testified that he could not say with absolute certainty whether any of the factors he described would have affected the eyewitnesses in this case. Rather, he said that he was "looking at *** what happens for humans in general." At one point, the prosecutor asked Wright whether he could tell whether any of the specific witnesses in the case were influenced by any particular factors, and defense counsel interjected that the defense did not plan to ask Wright to opine on the credibility of any of the eyewitnesses. On redirect examination, Wright again clarified that he would not offer an opinion as to the credibility of any specific witness.

¶ 49 The trial court granted the State's motion *in limine*. While recognizing that "the trend might be that in the future this is admitted," the court stated that Dr. Wright's testimony would not offer anything beyond what a juror could understand. The court noted that the effects of factors such as a delay in identification, the presence of a weapon, whether two eyewitnesses talked to one another after an event were all effects that the jury could understand without the benefit of expert testimony. And, the court noted, there was no evidence that the police had given conscious or unconscious cues to the eyewitnesses during the lineups, meaning that Wright's testimony about those cues would be speculative.

¶ 50 B. Trial

¶ 51 At trial, Bjelica, Gholston, Vera, and Klein all testified about the incident. At the time, Lovings was dealing drugs and had two apartments, one in Chicago and one in Rolling Meadows. Vera was Lovings' roommate in Chicago, Gholston and Bjelica knew Lovings from college, and Klein was Bjelica's girlfriend.

¶ 52 On August 19, 2006, Bjelica, Gholston, Vera, and Klein left Lovings' Chicago apartment and went to his apartment in Rolling Meadows. Lovings, Vera, and Klein arrived first, meeting Barraza in the parking lot of the apartment building. The four of them went inside, leaving the door half-open for Gholston and Bjelica, who had not yet arrived. Lovings went into his bedroom, while Vera, Klein, and Barraza went into the kitchen.

¶ 53 About two minutes after they had gone into the apartment, two armed men, one of whom Klein and Vera identified as defendant, burst in and told everyone to lie on the ground. All of the witnesses testified that defendant wore orange clothes during the robbery. Vera and Klein described defendant's clothes as a one-piece jumpsuit, whereas Bjelica said that defendant wore matching sweatshirt and pants. Vera described the jumpsuit as "some sort of apparatus where it's like a tank top and some shorts." Vera testified that defendant wore an orange nylon cap, Klein testified that defendant had his hair in corn rows without a cap, and Bjelica testified that defendant had short hair with no cap. Vera also testified that he did not "see enough to know [whether] they were[ ] wearing gloves."

¶ 54 Vera testified that defendant kicked in the door to Lovings' bedroom, dragged Lovings out, and forced Lovings to lie on the floor.

¶ 55 At that point, Gholston and Bjelica arrived. They knocked on the apartment door, and defendant answered it, pointed his gun at them, and knocked Bjelica to the floor. Gholston

testified that defendant and his accomplice told him to put a pillow over his head, but Gholston periodically lifted the pillow to see what was happening. Gholston said he got a good look at defendant's face when defendant opened the door.

¶ 56 Defendant ordered Lovings to give him the combination to a safe in Lovings' bedroom and took Lovings into the bedroom. Eventually defendant dragged Lovings back into the dining room, where Lovings said that defendant had all the cash and marijuana they came for and asked defendant not to kill him. Defendant hit Lovings in the head with his gun and demanded the combination to a second safe in the other bedroom. Lovings replied that he did not have the combination to that safe, and defendant threatened to kill Klein.

¶ 57 Defendant's accomplice then covered Bjelica's and Klein's heads with couch cushions. Bjelica testified that he could still see defendant's feet. Vera testified that he could see defendant's orange pants next to Lovings. The witnesses heard a struggle, two gunshots, and the sound of people running out of the apartment.

¶ 58 Vera testified that he stood up, saw that Lovings had been shot, and ran outside for help. In the parking lot, he saw Barraza, who had been shot, screaming. Back in the apartment, Klein ran to the bathroom while Bjelica tended to Lovings. Gholston locked the door to the apartment.

¶ 59 Lovings died by the time the paramedics arrived. They took Lovings, Barraza, and Bjelica to the hospital. The police questioned Gholston, Klein, and Vera at the scene.

¶ 60 Bjelica testified that, several months after the shooting, Lovings' brother called him and told him that someone named "Black Pat" was involved in the killing. Bjelica relayed that information to the police.

¶ 61 Detective Cook described the process of formulating the photo arrays and lineups consistently with his testimony at the hearing on defendant's motion to suppress. Bjelica,

Gholston, Vera, and Klein all identified defendant's photograph in a photo array in October 2006 and identified in person during the live sequential lineup in August 2007.

¶ 62 Kenneth Slaughter, who used to buy drugs from Lovings, testified that, in September 2006, he saw defendant arrive at a park in Harvey in a new minivan. Defendant, who was dressed in nice clothes, began handing out money to children at the park. One week later, Slaughter asked defendant where he had gotten the money, and defendant said that he had to "lay *** down *** a shorty from Popeye's." Slaughter believed that defendant was referring to Lovings because Lovings used to work at a Popeye's Chicken. Slaughter contacted Lovings' brother about what defendant had said.

¶ 63 Slaughter acknowledged that, when he first spoke to the police, he told them that he did not recall having a conversation with defendant, but later changed his mind and decided to tell them about defendant's statement. Defense counsel attempted to ask Slaughter whether he had two outstanding warrants for possession of marijuana when he first talked to the police, but the trial court sustained the State's objection to that question. The trial court only allowed defense counsel to ask Slaughter whether he believed that he had received any benefit by telling the police what he knew.

¶ 64 The gun used to shoot Lovings was found in the home of an individual who was not charged in connection with the shooting. None of the fingerprints left at the scene could be linked to defendant.

¶ 65 The jurors deliberated for about 2 ½ hours when they sent out a note asking: (1) if they needed to finish deliberating that day; (2) if they needed to deliver their verdict if they had reached a decision that day; and (3) how late they would be held to deliberate. The court told the jurors to keep deliberating, and, twenty minutes later, they returned a verdict finding defendant

guilty of first-degree murder. The trial court subsequently sentenced defendant to natural life imprisonment. Defendant appealed.

¶ 66 II. ANALYSIS

¶ 67 Defendant first argues that the trial court deprived him of his right to present a complete defense where it excluded the testimony of Dr. Wright, who would have offered testimony on the reliability of eyewitness testimony that was beyond the ken of the average juror.

¶ 68 A criminal defendant has a constitutional right to a " 'meaningful opportunity to present a complete defense.' " *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 133 (quoting *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 43); see also U.S. Const., amends. VI, XIV; Ill Const. 1970, art. I, § 8. When, as in this case, a party claims that his right to present a complete defense was denied due to improper evidentiary rulings, we apply an abuse-of-discretion standard of review. *Burgess*, 2015 IL App (1st) 130657, ¶ 133. We also review the decision to admit or exclude expert testimony for an abuse of discretion. *Lerma*, 2016 IL 118496, ¶ 23. "A trial court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." (Internal quotation marks omitted.) *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 69 "[G]enerally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." *People v. Enis*, 139 Ill. 2d 264, 288 (1990). When deciding whether to admit expert testimony, the trial court should balance the probative value of the testimony against its prejudicial effect and should "carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case before admitting that testimony for the jury's consideration." *Lerma*, 2016 IL 118496, ¶ 23. "Expert

testimony addressing matters of common knowledge is not admissible 'unless the subject is difficult to understand and explain.' " *Id.* (quoting *People v. Becker*, 239 Ill. 2d 215, 235 (2010)).

¶ 70 As we mentioned above, the Illinois Supreme Court recently weighed in on the admissibility of expert testimony on eyewitness identifications in *Lerma*, 2016 IL 118496. In that case, the defendant was convicted of murder based solely on two eyewitness identifications: (1) the victim's statement, admitted at trial under the excited utterance exception to the hearsay rule, that defendant had shot him; and (2) the victim's friend, who testified that she saw defendant shoot the victim. *Id.* ¶¶ 5-6. The evidence at trial showed that, around 11:20 p.m., the victim and his friend were sitting on the porch of the victim's house when a gunman approached the porch and shot the victim several times. *Id.* ¶ 5. The victim told his friend that " 'Lucky' "—the defendant's nickname—had shot him. *Id.* The victim's friend testified that the defendant was the shooter, that he was dressed in black during the shooting, and that he was wearing a hooded sweatshirt with the hood down. *Id.* ¶ 6. The friend identified the defendant in a photo array, in a one-person show-up, and several times in court during the trial. *Id.*

¶ 71 The friend testified inconsistently about her familiarity with the defendant. *Id.* At trial, she said that she had seen the defendant on the porch across the street from the victim's house about 10 times in the six months to a year before the shooting. *Id.* But she was impeached with her testimony at the grand jury, where she said she had only seen the defendant once or twice before the shooting. *Id.* The friend acknowledged that she had never spoken to the defendant, had never been in the same room with the defendant, and that she " 'did not know him.' " *Id.*

¶ 72 Prior to trial, the defendant had sought to introduce the testimony of an expert who would identify and explain "several 'common misperceptions' that exist concerning the accuracy and reliability of eyewitness identifications":

> "[T]hat the witness's level of confidence does not necessarily correlate to the accuracy of the identification; that numerous factors can undermine the accuracy of an eyewitness's identification, including the stress of the event itself, the presence of a weapon, the passage of time, the 'forgetting curve,' the wearing of partial disguises such as hoods, exposure to postevent information, nighttime viewing, and suggestive police identification procedures; that eyewitnesses tend to overestimate time frames; and that cross-racial identifications tend to be less reliable than same-race identifications." *Id.* ¶ 8.

The expert also stated that he would not offer his opinion as to the credibility of any particular witnesses and that a witness's familiarity with the suspect did not necessarily make the witness's identification more reliable. *Id.* ¶ 14. The trial court denied the defendant's request to introduce the expert testimony, finding that the testimony would not be probative because the victim and his friend knew the defendant (*id* ¶¶ 10, 15), and because the expert's testimony risked offering an opinion on the credibility of the eyewitnesses (*id.* ¶ 10).

¶ 73 On appeal, the Illinois Supreme Court began by noting that there had been "a dramatic shift in the legal landscape, as expert testimony concerning the reliability of eyewitness testimony has moved from novel and uncertain to settled and widely accepted." *Id.* ¶ 24. The court highlighted a "clear trend" supporting the admission of such expert testimony because "findings of the sort described" by the expert in *Lerma*, while "widely accepted by scientists, *** are largely unfamiliar to the average person" and may be counterintuitive. (Internal quotation marks omitted.) *Id.* While recognizing that it had previously expressed caution in admitting such testimony, the court stated, "[T]oday we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." *Id.*

¶ 74 The court then concluded that the trial court had abused its discretion in excluding the testimony of the expert. *Id.* ¶ 25. The court began by discussing four reasons why the expert's testimony would be relevant and appropriate in the case. *Id.* ¶ 26. First, the court noted that the State's only evidence against the defendant was the eyewitness identifications, meaning that the defendant's guilt hung "100% on the reliability of [the] eyewitness identifications." *Id.* Second, the court noted that several of the factors which the expert had identified as potentially undermining an eyewitness identification were "either present or possibly present," including "the stress of the event itself, the use and presence of a weapon, the wearing of a partial disguise, exposure to postevent information, nighttime viewing, and cross-racial identification." *Id.* Third, only one of the identifications was subject to cross-examination, as the victim's statement that the defendant shot him was admitted as hearsay. *Id.* Fourth, the court found that the eyewitness's acquaintance with the defendant was "far from clear," since the friend had testified inconsistently about how many times she had seen defendant before the shooting. *Id.*

¶ 75 The court then found that the trial court's two reasons for excluding the testimony did not hold water. *Id.* ¶¶ 27-28. With respect to the trial court's fear that the expert would opine as to the witnesses' credibility, the supreme court noted that the expert expressly said he would not render such an opinion. *Id.* ¶ 28. And with respect to the trial court's finding that the testimony would be irrelevant because the witnesses knew the defendant, the supreme court noted that the expert would testify that familiarity with the suspect does not necessarily make an identification reliable and that the evidence of the friend's familiarity with the defendant was unclear. *Id.* ¶¶ 28-29. The court concluded that the trial court "effectively substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert." *Id.* ¶ 28.

¶ 76 We now turn to a discussion of *Lerma*'s applicability to this case. Like the court in *Lerma*, we first address whether this case was one where expert testimony on the reliability of eyewitness identifications would be relevant and appropriate. In *Lerma*, the court discussed four "considerations" regarding the relevance and appropriateness of the expert testimony: (1) the importance of the eyewitness identifications to the State's case; (2) whether the factors identified by the expert as undermining the reliability of eyewitness identifications were present in the case; (3) whether the eyewitnesses were available for cross-examination; and (4) the eyewitnesses' prior familiarity with the suspect. *Id.* ¶ 26. We address each of these factors in turn.

¶ 77 The first factor is present in this case. The State's case hinged on the reliability of the eyewitnesses' identifications of defendant as the armed man in orange. There was no physical evidence linking defendant to the case—the firearm used to kill Lovings was not found in defendant's possession and none of the fingerprints at the scene were identified as defendant's. We recognize that, in some respects, the evidence in this case was stronger than in *Lerma*. Unlike *Lerma*, where the evidence consisted of one hearsay identification and one live identification, this case involves the identifications of four eyewitnesses, all of whom testified in court. But the amount of eyewitness identifications does not change the fact that the State's case relied mostly on eyewitness testimony, on which Dr. Wright's testimony would have been appropriate.

¶ 78 We also acknowledge that there was some evidence that inculpated defendant beyond the eyewitness identifications. Specifically, Kenneth Slaughter testified that, after the shooting, he saw defendant handing out money, and that defendant told him he had to "lay *** down" someone who worked at Popeye's, whom Slaughter presumed was Lovings. While this testimony

certainly strengthened the State's case, it was not a direct confession to the crime. Nor was it memorialized in any official way, either by the police or any other individual. Rather, it was an oblique reference to the shooting recounted by a witness with a history of involvement in drug dealing. Standing alone, Slaughter's testimony is of little value. Thus, the State's case, like the State's case in *Lerma*, heavily relied on the reliability of the eyewitnesses.

¶ 79 We now turn to the second factor in *Lerma* regarding the relevance and propriety of expert testimony on eyewitness identifications—whether the expert has identified reasons for an identification's unreliability that are present in the case. Like the expert in *Lerma*, Dr. Wright testified that high-stress situations, especially those involving a weapon, can negatively impact an individual's memory of an event. The offense in this case was certainly a high-stress situation—the two intruders held the eyewitnesses at gunpoint, forced them to lay on the ground, and threatened to kill them. And they carried firearms, which Wright identified as a factor that could draw a witness's attention away from the offenders' faces.

¶ 80 Also, each of the eyewitnesses focused on the intruder's orange jumpsuit as one of the main identifying factors. As Wright explained, during stressful situations, a person's attention may be focused like a "spotlight," such that they fixate on a particular item, such as a gun or, perhaps, an orange jumpsuit, rather than a person's face. Indeed, Gholston testified that the orange jumpsuit stuck out in his mind after the incident, but that the other intruder's clothes did not.

¶ 81 Moreover, Wright identified specific factors about the identification procedures used in this case that could have undermined their reliability. Wright noted that using a sequential photo lineup—showing the eyewitnesses one photograph at a time—generally leads to fewer misidentifications of innocent suspects than showing the witnesses a photo array. That is because

there is an increased chance that, when viewing several photos simultaneously, a witness will simply select the individual who most closely resembles the offender. In this case, Detective Cook used a photo array rather than a sequential photo lineup. And Wright noted that using the same fillers in multiple photo arrays, which Cook did in this case, increases the likelihood that a witness will select a person simply because he or she appears to be most like the offender.

¶ 82 Moreover, Wright testified that the lack of a "double blind" procedure in this case—using an officer who does not know which person in the photo array is the suspect to conduct the photo array or lineup—could have led to Detective Cook giving off unconscious cues about whom to select in the photo array. We recognize that, as the trial court noted, there was no evidence that Cook gave off any unconscious cues, but we fail to see how defendant could present any such evidence when such cues, by definition, operate on an unconscious level. And Wright's testimony was not that Cook actually gave off any cues in this case; his testimony was that the failure to use a double-blind procedure increased the *risk* of such cues being given.

¶ 83 Wright also identified several popular misconceptions about memory and eyewitness testimony that would be beyond the common understanding of most jurors. First, Wright testified that jurors commonly overemphasize the importance of an eyewitness's confidence. This factor would certainly be present in this case, as the trial court, in denying defendant's motion to suppress the identifications, specifically stressed Gholston and Klein's "high level of certainty" as a reason why their identifications were reliable.

¶ 84 Second, Wright said that most people incorrectly believe that memory operates like a snapshot of an event and that, once a memory is located, it remains accurate. But, Wright explained, memory is dynamic and changes depending on the passage of time and outside information. For example, Wright described "memory conformity" as a scenario in which

individuals will conform each other's memories of an event to align with each other if they discuss it after it occurred. In this case, Gholston, Klein, Bjelica, and Vera were all friends. Vera testified that, after the incident, he continued to speak to Gholston, Bjelica, and Klein. It is thus reasonable to infer that they discussed the incident with one another, and that memory conformity was a possible result.

¶ 85 Finally, in his report attached to defendant's motion *in limine*, Dr. Wright indicated "that having four people identify a suspect does not provide four times more evidence against the suspect than having a single identification." Wright noted that this was true "in almost every case with multiple identifications," but was especially true here because the eyewitnesses all knew each other. This was not a fact that a common juror would understand, and it certainly would come into play in this case, where the State presented four eyewitness identifications of defendant at trial.

¶ 86 To summarize, several of the factors that Dr. Wright said might compromise an eyewitness identification were present in this case. Pursuant to *Lerma*, this weighs in favor of admitting Wright's testimony.

¶ 87 The third consideration referenced in *Lerma*—whether the witnesses were available for cross-examination—weighs against the admissibility of Wright's testimony. Here, all four eyewitnesses testified in court. Defense counsel could—and did, extensively—test the reliability of their identifications through cross-examination. Thus, unlike *Lerma*, where only one of the eyewitnesses could be cross-examined, defendant had a better opportunity to elicit flaws in the eyewitnesses' identifications.

¶ 88 The fourth factor—whether the witnesses knew the offender—is not present. None of the four eyewitnesses knew the men who burst into Lovings' apartment before that night. The

witnesses' lack of familiarity with the offender decreases the reliability of their identifications and increases the relevance of Dr. Wright's testimony.

¶ 89 Considering all of these factors, we conclude that this was a case where expert eyewitness testimony would have been relevant and appropriate. The State's case rested largely on the four eyewitness identifications, and Dr. Wright could have offered testimony about certain factors present in this case that could have rendered their identifications less reliable.

¶ 90 We thus turn to the next question asked in *Lerma*: whether the trial court abused its discretion in denying defendant's request to admit Dr. Wright's testimony. *Id.* ¶ 27. In resolving this question, the court in *Lerma* looked to the trial court's reasons for denying the expert and determined whether they were reasonable in light of the proffered testimony. *Id.* ¶¶ 27-29. We do the same.

¶ 91 At the outset, we note that the trial court anticipated that, at a future date, testimony like Dr. Wright's would be admissible:

> "I can see sometime in the future this testimony coming into evidence, and you can already see the cases are recognizing that it may have a place. And the trend might be that in the future this is admitted. I mean, the witness talked about tests done in our state, as a matter of fact, about identification procedures, double blind and things of that nature. And I think the legislature may be thinking that or exploring the possibility that there's something to the identification procedures. I should say that they may be subject to suggestiveness or worse. And so I can see in the appropriate case in the future this coming into evidence."

These statements indicate that the trial court believed that Wright's testimony bore some relevance, but that the state of the law was such that expert eyewitness testimony was generally

disfavored. And to be sure, that was the state of the law at the time the trial court excluded Wright's testimony. See *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 55 ("Illinois continues to reject, at least in practice, expert testimony on the reliability of eyewitnesses."). But the change in law anticipated by the trial court has since come to pass with the Illinois Supreme Court's decision in *Lerma*. See *Lerma*, 2016 IL 118496, ¶ 24 ("[T]oday we are able to recognize that *** research [on eyewitness identifications] is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony."). Thus, a significant portion of the trial court's rationale in excluding Wright's testimony—that courts should be generally hesitant to admit such testimony—has since been undercut by *Lerma*.

¶ 92 The next reason offered by the court for excluding Wright's testimony was that he did not offer "any specialized evidence *** that's not common to the lay person." Specifically, the court noted that the fact that memory deteriorates with the passage of time, that the stress of an event can affect a person's memory, and that the involvement of a gun can distract an individual during an event were all things that were "common knowledge to ordinary lay people."

¶ 93 We cannot agree. Our supreme court has recognized that two of these exact topics—the "the stress of the event itself" and "the use and presence of a weapon"—are precisely the types of topics appropriately addressed by expert eyewitness testimony. *Id.* ¶ 26. Nor do we agree that most people would conclude that the presence of a weapon or stress could have a negative effect on an eyewitness's identification. It would be reasonable to infer the converse—that, in a stressful situation or a situation involving a gun, a person's memory of all the surrounding circumstances would be *better* because the event would stand out in his or her mind. Thus, it is not apparent that the effect of firearms and stress on a person's memory is "common knowledge," as the trial court found.

¶ 94 And, although any juror could understand that the passage of time between an event and an identification could create a less reliable identification, that was not all that Dr. Wright would have said. Rather, he noted that "the amount of decline [in a memory] depends on certain factors," especially the type of information being remembered. Wright said that "well-learned information," such as faces of former classmates or vocabulary from a foreign language class, can be accurately remembered "decades later." But a person's memory of a stranger's face "declines more rapidly." So, while it is common knowledge that memory tends to deteriorate over time, it is not necessarily common knowledge that one's memory of certain things—of particular relevance here, a stranger's face—would be forgotten more quickly than the memory of other things.

¶ 95 Furthermore, Dr. Wright offered testimony on numerous other factors affecting memory that were not addressed by the trial court and that were beyond the common knowledge of most jurors. For example, as we discussed above, Wright would testify as to the possible problems with using a simultaneous photo array rather than a sequential photo lineup, with the absence of double-blind procedures during a photo array, and the possibility of memory conformity when witnesses discuss an event after the fact. It cannot be said that Wright's testimony on these areas would be irrelevant or unhelpful; each of these factors was possibly present in this case, and the jury was being asked to determine the credibility of the eyewitnesses. Thus, we must respectfully disagree with the trial court’s determination that Wright's testimony would offer no specialized knowledge.

¶ 96 The trial court also based its exclusion of Dr. Wright's testimony on the possibility of prejudice—specifically, the "danger that the trier of fact may put too much weight on the expert's opinion[ ]." The trial court was correct that expert testimony can carry the risk of unfair prejudice

because it may "tend[ ] to 'overpersuade in favor of the party introducing it.' " *People v. Perry*, 147 Ill. App. 3d 272, 276 (1986) (quoting *Coffey v. Hancock*, 122 Ill. App. 3d 442, 448 (1984)). But the prejudice in this case would have been limited, as Wright expressly said that he would not testify as to the credibility of any of the witnesses. And the jury would have been instructed that it was the only judge of the witnesses' credibility, not Wright. See Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000) ("Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them.").

¶ 97 Finally, the trial court found Wright's testimony to be inadmissible because there was no evidence that Detective Cook had made any "unwitting clues" during the identification procedures, making Wright's testimony about any such clues "pure speculation." The trial court misapprehended Wright's testimony on this point. As we pointed out above, Wright testified that Cook's failure to use a double-blind procedure during the photo arrays increased the *risk* of unconscious cues being given that could have led the witnesses to select a particular person. And of course Wright could not testify as to whether or not any such unconscious cues were actually given—such cues are, by definition, not consciously made or noticed by either the officer or the witness.

¶ 98 We find that, in light of *Lerma*, the trial court erred in excluding Dr. Wright's expert eyewitness testimony. Wright's testimony would have been relevant in a case where the accuracy of eyewitness identifications was critical, would have aided the jurors by providing them information beyond their common knowledge, and would not have been unduly prejudicial. And the trial court's reasons for excluding that testimony were flawed.

¶ 99 Next, we must address whether this error was harmless. See *Lerma*, 2016 IL 118496, ¶ 33 (addressing harmless error). In *Lerma*, the supreme court applied each of the following

approaches in order to determine whether the exclusion of expert eyewitness testimony was harmless: "(1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in the case overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence would have been duplicative or cumulative." *Id.* We address the court's analysis of each of these approaches in *Lerma* and discuss the applicability of that analysis to this case.

¶ 100 Under the first approach, the court in *Lerma* found that the exclusion of the expert's testimony unquestionably contributed to the defendant's conviction because it "prevented the jury from hearing relevant and probative expert testimony relating to the State's sole testifying eyewitness, in a case lacking any physical evidence linking defendant to the crime." *Id.* This conclusion applies with equal force here, where the court prevented the jury from hearing relevant testimony on the State's most important evidence, and the State lacked physical evidence tying defendant to the crime. While there was more than one testifying eyewitness in this case, Dr. Wright planned to explain why the existence of multiple eyewitness identifications did not necessarily lead to a proportional increase in the reliability of the identifications.

¶ 101 Under the second approach, the court in *Lerma* found that the other evidence aside from the eyewitness testimony did not overwhelmingly support the defendant's conviction, even though it was sufficient to convict him, because it consisted only of "a hearsay excited utterance from a nontestifying witness." *Id.* Here, the only evidence against defendant other than the eyewitness identifications was Slaughter's testimony regarding defendant's out-of-court statement that he got money after he had to "lay *** down" someone who worked at Popeye's. Like the court in *Lerma*, we cannot say that this vague statement by defendant after the incident

is such overwhelming evidence of his guilt as to render the exclusion of Wright's testimony harmless.

¶ 102 Finally, under the third approach, the court in *Lerma* found that "the excluded testimony from [the expert] was neither duplicative nor cumulative of other evidence, as the jury in this case heard precisely nothing in the nature of expert eyewitness testimony." *Id.* The same can be said here. Thus, under any of the three approaches applied in *Lerma*, we hold that the exclusion of Dr. Wright's testimony was not harmless error. We vacate defendant's conviction and remand for a new trial.

¶ 103 In light of our disposition of this issue, defendant's arguments concerning his sentence and his mittimus are moot. Nor do we reach defendant's argument regarding the propriety of the court's response to the jury note, since it is unlikely to recur on retrial. See *People v. Walker*, 335 Ill. App. 3d 102, 114 (2002) (declining to reach propriety of court's answer to jury's note because it was unlikely to recur on retrial).

¶ 104 But we do address defendant's argument that the trial court improperly curtailed his cross-examination on Kenneth Slaughter's outstanding warrants at the time he made his statement to the police. In our previous disposition of this case, we did not address whether the trial court erred in limiting the cross-examination of Slaughter, finding that, even if the trial court did err, any error was harmless because Slaughter gave the same statement to Lovings' brother a year earlier, when no warrants were outstanding against him. *Taylor*, 2014 IL App (1st) 113492-U, ¶¶ 40-41.

¶ 105 It is proper to impeach a witness with evidence that the witness was arrested or charged with a crime "where it would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely." (Emphasis and internal quotation marks omitted.)

People v. Triplett, 108 Ill. 2d 463, 475 (1985). "In addition, the defendant need not show before cross-examining a witness as to the witness' possible bias, interest, or motive that any promises of leniency have been made or any expectations of special favor exist in the mind of the witness." (Internal quotation marks omitted.) *Id.* at 476.

¶ 106 Here, defendant sought to question Slaughter regarding his outstanding warrants in order to show that he had an incentive to curry favor with the police and falsely testify that defendant had confessed to killing Lovings. Thus, he should have been permitted to ask Slaughter about the outstanding warrants. Defendant was not required to show that the police actually made any offers of leniency, or even that Slaughter believed that he would receive leniency, which is the only question the trial court permitted defendant to ask. On retrial, defendant should be permitted to inquire into Slaughter's possible motive to testify falsely.

¶ 107 III. CONCLUSION

¶ 108 For the reasons stated, we vacate defendant's conviction and remand for a new trial.

¶ 109 Vacated and remanded.