FIRST DIVISION
July 25, 2016

No. 1-13-0344
2016 IL App (1st) 130344-B

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. 10 CR 14512
SANTOS CALAFF,	)	
Defendant-Appellant.	)	The Honorable Nicholas Ford, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Delort and Harris concurred in the judgment.

ORDER

Held: Trial court properly denied defendant's motion to suppress identification evidence that was made in a group showup; in light of a recent Illinois Supreme Court decision, the trial court abused its discretion in denying defendant's request to allow expert testimony on the reliability of eyewitness identifications; reversed and remanded.

¶ 1 Following a jury trial, defendant Santos Calaff was convicted of first degree murder, two counts of attempted first degree murder, and aggravated discharge of a firearm in connection with the shooting death of the victim, Emanuel Leeks. Defendant was sentenced to natural life in

prison, with three additional determinate prison terms to run consecutively to that term. Defendant appealed his convictions, arguing that (1) the court should have suppressed the show-up identifications of defendant as "grossly suggestive," (2) the court's denial of defendant's motion to call an expert in psychology to testify about memory and identifications was an abuse of discretion, (3) the State violated defendant's right to a fair trial by arguing that defendant had "evilness in his soul" and that the State's witnesses feared him, (4) it was error for the jury to have received the instruction that it could find defendant guilty of attempted first degree murder if it found he had an intent to kill "an individual," (5) the trial court judge assumed an improper adversarial role during the posttrial hearing, (6) the court erred by relying on defendant's gang affiliation to impose a sentence of natural life, and (7) defendant's conviction for aggravated discharge of a firearm, and one of his two convictions for murder, violate the one-act, one-crime rule. This court affirmed the judgment of the trial court on March 23, 2015, but remanded for a new sentencing hearing and to correct the mittimus. On January 22, 2016, the Illinois Supreme Court published *People v. Lerma*, 2016 IL 118496, which discussed the issue of expert testimony regarding the reliability of eyewitness testimony. The Illinois Supreme Court directed us to vacate our March 23, 2015 order, and to reconsider this case in light of *Lerma*. For the following reasons, we affirm in part, reverse in part, and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with multiple counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm in connection with the shooting death of the victim. Prior to trial, defendant filed a motion to suppress in which he stated that certain witnesses were improperly allowed to view him in a "one-on-one" show-up. Defendant alleged that police officers brought defendant, who was handcuffed, in a police car to the scene of the

crime, where they displayed him to all of the eyewitnesses simultaneously. Defendant argued that the conduct of the officers improperly suggested the identification of defendant as the perpetrator. Defendant further contended that the emotional and physical condition of the witnesses impaired their ability to make a fair, rational, and reasoned identification of the offender. A hearing was held on defendant's motion on September 15, 2011.

¶ 4 Officer Steven Rivera testified first at the hearing, stating that on the night in question he was working with his partner, Officer Hernandez. They were in an unmarked car, monitoring the radio when they heard a call about a shooting. They immediately went to the location and saw a vehicle on the curb. There were two people inside the car, one black female and one black male with a gunshot wound to his stomach. There was another black woman nearby. One of the witnesses gave Officer Rivera a description of the shooter, which was a "male Hispanic with long hair wearing a blue shirt." Officer Rivera testified that he used his radio to give that description over the air and then remained at the scene.

¶ 5 Officer Rivera testified that the two women at the scene were upset and that one of the women had been "grazed" by a bullet on her leg. Two other officers came over the air stating that they had a "possible" suspect and attempted to get Officer Rivera and his partner to bring the witnesses to the location where they had stopped the possible suspect. However, because of another gunshot call, there were not enough cars to transport the witnesses, so Officer Rivera told the other officers to bring the suspect to the scene.

¶ 6 Officer Rivera testified that the officers arrived at the scene in a marked police vehicle. They parked "maybe a quarter of a block" away from the crime scene, and Officer Rivera was able to bring one witness over to them. Officer Rivera could not recall which witness he brought

over, but he testified that it was one of the two women. The woman immediately identified defendant as the shooter.

¶ 7 Officer Rivera testified that he "believed [defendant] was handcuffed" and that he was in the back of the police vehicle. Officer Rivera then retrieved the second woman and brought her over to the police vehicle. He testified that he "believed" she made a positive identification, but could not recall what she said.

¶ 8 On cross-examination, Officer Rivera testified that one of the descriptions given out over the radio was that the suspect was wearing his hair in a ponytail. Officer Rivera testified that his partner gave a description that the suspect was wearing shorts, and that he believed his partner also stated that the suspect was "heavy-set."

¶ 9 Officer Rivera further testified that neither of the women he spoke to at the scene mentioned any tattoos on the suspect.

¶ 10 Officer Michael Tews testified next, stating that on the night in question he heard a call over the radio about a shooting. A description of the subject was given over the radio by Officer Rivera. Officer Tews described that description as "male Hispanic, long hair, blue t-shirt." Officer Tews testified that "a few minutes" later, Officer Hernandez came over the radio and stated "male Hispanic, ponytail, heavy-set," and that the suspect wore a blue t-shirt. Officer Tews further testified that he believed the dispatcher also gave a description over the radio of the suspect as a male Hispanic, with black hair, blue t-shirt, and white gym shoes. Officer Tews testified that the dispatcher stated that an anonymous citizen had called and said the shooter got into a gray Cadillac and went westbound on Dickens.

¶ 11 Officer Tews testified that he and his partner then toured the area, and after about 10 minutes, they noticed a person, defendant, fitting the description of the suspect. Officer Tews

testified that defendant looked in the direction of the officers and then began jogging and entered a vestibule. The officers followed him into the vestibule and did a pat-down of defendant. They did not find any weapons on him. Officer Tews testified that defendant was sweating, seemed nervous, and was slightly out of breath.

¶ 12 Officer Tews testified that he handcuffed defendant despite not having a warrant for his arrest. Officer Tews testified that he brought defendant to the scene and that two women approached the police vehicle, one at a time, and identified defendant as the shooter.

¶ 13 Officer Tews testified that when he first saw defendant, defendant was about two and a half blocks away from the scene of the crime.

¶ 14 Officer George Moussa's testimony was substantially the same as Officer Tews' testimony. He testified that as defendant was stepping out of the vehicle at the crime scene, a woman positively identified him as the shooter. Officer Moussa testified that the second woman also positively identified defendant as the shooter. He stated that the witnesses at no point had any occasion to speak to each other while they were being brought to the back of the car.

¶ 15 After hearing all the testimony, the court stated that the testimony of the officers was "some of the better testimony that I've heard." The court stated that that the officers were "firmly accurate, and honest, and forthright in their portrayal of the events on [the night in question]." The court noted that 10 minutes had passed from when the original call of shots fired came in until when defendant was apprehended. The court further noted that defendant was apprehended less than two and a half blocks away from the crime scene. The court also stated that defendant had unique characteristics that fit the description given by the witnesses. The court stated that from the distance it was from the defendant, his facial tattoos were less visible than when he was closer to the court. And while the court agreed it raised a question of why the

tattoos were not a part of any information brought forth by the witnesses, "its absence do [*sic*] not fail on that, especially when compared with all the other information that was brought forth that Officer Tews and Moussa had at the time of their encounter with defendant." The court denied defendant's motion to suppress the evidence.

¶ 16 Also prior to trial, defense counsel filed a motion to introduce the expert testimony of Daniel Wright. Defense counsel stated in the motion that Wright, an expert in the field of eyewitness identification, would testify on the issues of stress, suggestive identification procedures, and cross-racial status of the defendant, and would also explain to the jurors the effects of these particular issues. A hearing was held on the motion, and arguments were made by both parties. At the conclusion of the arguments, the trial court noted that the question before him was whether Wright's expert testimony would "shed some unique light on what is generally an issue regarding eyewitness identification." The trial court stated that "issues regarding how long you saw the victim and cross-racial identification and identification under stressful circumstances, I don't see any of it as being beyond the ken of an average citizen, not one." The court went on to state:

> "And what I do see, what I do feel is the case in certain circumstances, and in this sense, I'm only creating dictum perhaps on my own personal view of this, is a desire on the part of the people in the psychological and psychiatric professions, mostly the psychological profession, to professionalize their area of study so as to increase their degree of remuneration. That's a way of saying I think they're in it for the money. I don't know if that's the case of Mr. Wright. And I believe I have to follow *Aguilar* and *Allen* in this case and only allow this testimony where it's

> appropriate and where I think it enhances the jury's ability to understand the evidence."

¶ 17 The judge then noted that in this case there were several people who identified defendant, and that at least one of them had no affiliation with any of the parties concerned in the case. He further stated that he believed the defense was going to be able to bring to the attention of the jury any issues regarding identification of defendant without the use of an expert witness. Defense counsel's motion to introduce expert testimony was denied.

¶ 18 The following evidence was adduced at trial. Stephanie Campbell and Ashley Stewart picked the victim up in Stephanie's car a little after midnight on July 17, 2010, outside of the Save-A-Lot grocery store where the victim worked. Ronnie Jordan was driving a separate van carrying Joe Miller and Rakim Clay. The entire group, with the victim driving Stephanie's car, proceeded to the victim's house so he could change clothes.

¶ 19 The victim parked Stephanie's car on Springfield. The van driven by Jordan was already parked on the street when they got there. Stephanie testified that she then saw defendant, who she identified in open court, walking towards the car with a girl. They came out of the gangway of a house located near the corner. The girl remained on the sidewalk while defendant crossed the street and approached Stephanie's car with his hand behind his back. Defendant then pulled what looked like a .9 millimeter semi-automatic gun out from behind his back and tapped it on the passenger side window. Defendant stated, "fuck y'all doing over here?" Stephanie testified that no one answered, and that after 10 seconds the victim put the car in reverse and drove backwards. Defendant started shooting.

¶ 20 Stephanie testified that defendant shot at her car three times before aiming his gun at the men in the van and shooting at them two or three times. Defendant then chased her car while

shooting at it. Bullets came through the passenger side of the car and the windshield. The victim told Stephanie that he had been hit by a bullet before passing out with his foot on the gas pedal. The car jumped over a curb and then hit a tree. When the car stopped, a different male came up and asked, "[i]s he hit; is he hit?" Stephanie thought this man was there to help, but he just looked inside the car, made a hand motion, and then ran away towards Springfield. Stephanie looked out the back window and saw defendant run past the car toward Pulaski and Dickens.

¶ 21 Stephanie further testified that she called 9-1-1 and that police arrived within five minutes. She described defendant as a heavy-set Hispanic male with his hair pulled back in a ponytail, wearing a blue shirt with a white shirt under it, white shorts, and white tennis shoes, and that he had tattoos on his face. The ambulance arrived and she stood with Ronnie, Rakim, Ashley, and Joe as the paramedics worked on the victim. After about 10 minutes, police officers drove up and asked her if she could identify the shooter if she saw him. The officers parked their vehicle about a half block away and asked her to look at someone. The whole group saw defendant at the same time when the police took him out of the car in handcuffs. Stephanie identified defendant as the shooter.

¶ 22 Ashley Stewart testified to substantially the same events as Stephanie. She stated that she was in Stephanie's car when she noticed defendant, who she identified in open court, walking near the victim's house with a woman. Defendant approached them with his hand behind his back. She noticed his devil horn tattoos. Defendant approached the passenger side window and knocked on it with a gun. The victim looked at defendant, then put his hands up "like no we not on that." The victim then put the car in reverse, but defendant shot through the window. Defendant shot at the car three times. He also shot at Ronnie's van, and at Stephanie's tires as the car drove away. The victim drove the car into a tree and then passed out. Another man

approached the car and confirmed that the victim had been hit by giving a signal to a group of people standing on the corner, including defendant. Defendant then ran past Ashley's group.

¶ 23 Ashley testified that she described the shooter to police officers and told them he had devil horn tattoos on his face. Shortly after that, a police officer approached her and Stephanie and asked if they could identify the shooter. Ashley was standing with Stephanie, Ronnie, Joe, and Rakim when she made the identification. Defendant was dressed in the same clothes except that the blue shirt he had been wearing was around his neck.

¶ 24 Ronnie, Joe, and Rakim all testified that they were previously convicted of felony offenses. They were in Ronnie's van parked at the intersection of Springfield and Shakespeare when they saw defendant, who they all identified in open court, walk towards Stephanie's car with his hand behind his back. Defendant tapped on the passenger side window with his gun and they heard defendant ask the victim why he was there, or what he was doing there, and then saw the victim gesturing with his hands. Defendant then shot into the car as the victim pulled away. Defendant next turned the gun on the van. None of the men saw what defendant did after that. The men each identified defendant as the shooter when police officers brought him to the scene. They also each identified defendant as the shooter the next day when they viewed separate lineups.

¶ 25 Mary Turner testified that on the date in question she lived across the street from where the victim had parked. She testified that she knew defendant from when she stayed near Cortland and Keystone. On the night of the incident, Turner was sitting on her porch when she saw the victim pull up. She testified that she also saw defendant and a "young lady" leave a nearby gangway. The young lady gave defendant something and defendant then approached the victim's car with his hand behind his back. He knocked on the car window and when the car

began to move, he started shooting. Turner testified that defendant shot at the car five or six times, and that defendant was wearing a white shirt and blue jean shorts.

¶ 26 Turner further testified that she did not call the police because she was scared of "the gang bangers over there." During the police investigation the next day, she spoke to the canvassing police officers, and eventually identified defendant in a lineup.

¶ 27 Officer Rivera's testimony and Officers Moussa's testimony were substantially the same as their testimony at the suppression hearing before trial.

¶ 28 Officer Lisa Decker, an evidence technician, testified that she recovered four shell .9 millimeter shell casings on Springfield and opined that a semiautomatic weapon was used to shoot the victim. Stephanie's car had a bullet hole in the passenger-side door and a bullet hole in the passenger side window.

¶ 29 Mary Wong, a forensic scientist, testified that the samples taken from defendant to determine if there was gunshot residue on either of his hands resulted in the conclusion that he "may not have discharged a firearm with either hand. If he did, then the particles were not deposited, removed by activity, or not detected by the procedure."

¶ 30 It was stipulated that Diana Pratt, an expert in firearms identification, would testify that the four shell casings recovered from the scene were all fired from the same firearm.

¶ 31 After the State rested, Gina Piemonte, an assistant public defender, testified on defendant's behalf. She testified that she was present when defense counsel had a conversation with Ashley. There, Ashley provided a description of the shooter but said nothing about tattoos. Ashley also stated that the shooter left the area of the shooting in a black Cadillac. Piemonte testified that she did not take notes of the conversation but she reviewed the notes taken by

defense counsel and there was nothing in the notes about Ashley's comments regarding tattoos in the notes.

¶ 32 Stephen Ramsey, an investigator employed by the public defender, testified that he interviewed Mary Turner on January 7, 2011, and that she said she had been drinking on the night of the shooting. There were no notes or reports generated during that interview.

¶ 33 After closing arguments, the jury found defendant guilty of first degree murder of the victim, guilty of attempted first degree murder of Stephanie Campbell, guilty of attempted first degree murder of Ashley Stewart, and guilty of aggravated discharge of a firearm.

¶ 34 Defendant then filed a posttrial motion asking for a new trial. The defense called Richard Lopez as a witness, who testified that he was in custody in Cook County jail awaiting trial for shooting at a car. Lopez testified that he was previously convicted of possession of a controlled substance and aggravated battery of a police officer. He testified that he is a member of the Maniac Latin Disciple street gang. Lopez testified that he knows defendant from the neighborhood and knows him to be a member of the Young Latin Organization Disciple street gang.

¶ 35 Lopez testified that on July 17, 2010, he was with friends in the backyard of a home on the block near where the incident occurred. He saw a Cadillac pull into the alley. Lopez then went to the front of the house and saw a man Lopez knew as Javoney or Garfield come out of the gangway. Lopez described Javoney as Hispanic, about 5 feet, 9 inches tall, weighing about 200 pounds, with long hair. Lopez stated that Javoney was alone. Lopez further testified that Javoney approached the victim's car, shot from about eight feet away, and then ran back into the gangway toward the Cadillac. Lopez saw the Cadillac driving the wrong way down Springfield, with a van chasing and shooting at the Cadillac. Lopez testified that he told police officers at the

scene that the shooter was Javoney, but the officer told him to "shut up." Lopez claimed that he did not know defendant was charged with murder until he saw him in Cook County Jail. They were on the same "deck" in September 2012 after defendant was convicted.

¶ 36 The trial court questioned Lopez about when he first interacted with defendant, what they talked about, when he spoke to defendant's attorney, and the gang affiliations of both Lopez and defendant. Detective Sheamus Fergus interviewed Lopez prior to the hearing, where Lopez told him that he was severely injured in a motor vehicle accident and that he had been on crutches at the time of the shooting. Officers Plovanich, Hernandez, Rivera, Moussa, Tews, and Detectives John Graham and Sheamus Fergus each testified that they never saw a person on crutches near the scene of the shooting, and that they were never approached by Lopez and told that someone other than defendant committed the shooting.

¶ 37 Detective Fergus testified that he and several other detectives went to the porch where Lopez claimed to have viewed the shooting, and concluded that Lopez could not clearly see what took place because there was no clear line of sight from the porch to the location of the shooting.

¶ 38 The trial court concluded that Lopez provided "pure perjurious testimony" and denied defendant's motion for a new trial. The trial court then sentenced defendant to natural life in prison for first degree murder, two consecutive sentences of 40 years in prison for each count of attempted murder, and a consecutive 15 year sentence for aggravated discharge of a firearm. Defendant's motion to reconsider his sentence was denied, and he now appeals.

¶ 39 II. ANALYSIS

¶ 40 On appeal, defendant contends that (1) the court should have suppressed the show-up identifications of defendant as "grossly suggestive;" (2) the court's denial of defendant's motion to call an expert in psychology to testify about memory and identifications was an abuse of

discretion; (3) the State violated defendant's right to a fair trial by arguing that defendant had "evilness in his soul" and that the State's witnesses feared him; (4) it was error for the jury to have received the instruction that it could find defendant guilty of attempted first degree murder if it found he had intent to kill "an individual;" (5) the court assumed an improper adversarial role during the posttrial hearing; (6) the court erred by relying on defendant's gang affiliation to impose a sentence of natural life; and (7) defendant's conviction for aggravated discharge of a firearm and one of his two convictions for murder violate the one-act, one-crime rule.

¶ 41 Suppression Hearing

¶ 42 Defendant's first contention is that the trial court erred when it failed to grant his motion to suppress the show-up identification evidence due to the overly suggestive nature of the show-up. Defendant relies on evidence produced at trial to assert that police used suggestive identification procedures. Defendant argues that while the police officers testified at the hearing on the motion to suppress that Stephanie Campbell and Ashley Stewart were brought separately to the police vehicle to identify defendant one at a time, the witnesses' accounts at trial were different. Defendant states that at trial, the witnesses stated that the officers showed defendant to all five witnesses at the same time.

¶ 43 Defendant argues that, in ruling on the trial court's decision on a motion to suppress, the reviewing court can consider evidence introduced at trial as well as the suppression hearing. Defendant cites *People v. Alfaro*, 386 Ill. App. 3d 271, 290 (2008), and *People v. Slater*, 228 Ill. 2d 137, 149 (2008) for this proposition. However, in *Alfaro*, the same evidence that was used at the motion to suppress was also used in overturning the trial court's denial of the motion to suppress. The question was whether the motion to suppress should have been granted based on the recorded interviews of defendant in a police interrogation room. These same interviews were

used to overturn the trial court's finding on appeal. Similarly in *Slater*, the issue was whether the defendant had voluntarily given a statement to police prior to trial, and the same evidence was used to analyze the issue on appeal as was used in the pretrial hearing. Unlike *Alfaro* and *Slater*, defendant in this case attempts to use new evidence which was presented at trial to overturn the trial court's finding on his motion to suppress. In other words, defendant is asking us to overturn the trial court's ruling on the motion to suppress based on evidence that came out at trial. *People v. Brooks*, 187 Ill. 2d 91, 108-09 (1999) (the analysis is different in this situation, where a defendant is asking the reviewing court to use trial testimony to overturn the decision on a motion to suppress).

¶ 44 When a reviewing court affirms a trial court's suppression ruling based on evidence that came out at trial, "it is akin to a harmless error analysis." *Id*. at 109. "The reviewing court is essentially saying that whether the court's decision was supported by sufficient evidence at the suppression hearing becomes irrelevant when evidence to support the trial court's decision is introduced at trial. One reason this is so is that the pretrial ruling on a motion to suppress is not final and may be changed or reversed at any time prior to final judgment." *Id*. Our supreme court has found that this reasoning does not apply equally when a defendant asks us to rely upon trial evidence to *reverse* a trial court's decision on a pretrial suppression ruling, "particularly when the defendant fails to object when the relevant evidence is introduced" at trial. *Id*. See also *People v. Ramos*, 339 Ill. App. 3d 891, 898 (2003) (a defendant cannot challenge the propriety of the trial court's denial of the defendant's pretrial motion to suppress by citing subsequent trial testimony where the defendant failed to renew his objection at trial).

¶ 45 At the suppression hearing, three officers testified that two women were taken to the police vehicle one at a time to identify defendant. At trial, evidence was introduced through

several of the witnesses that defendant was brought out and presented to a group of witnesses. When such trial testimony was introduced, defense counsel "should have asked the court to reconsider its decision on the motion to suppress." *Id*. As stated, that decision was subject to change until final judgment, but by not asking the court to reconsider its ruling when that evidence was introduced at trial, "defendant has waived his right to argue it on appeal." *Id*.

¶ 46 Accordingly, we can only look to the evidence presented at the hearing on the motion to suppress in assessing whether the show-up was overly suggestive. 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); *People v. Lippert*, 89 Ill. 2d 171, 188 (1982);.

> "Although one man show-ups are generally condemned, they have been consistently upheld when they are justified by the circumstances. One of the circumstances in which a show-up has been justified by the court is when it is necessary to facilitate a police search for the real offender, and the Supreme Court has consistently upheld prompt identification of a suspect by a witness or victim near the scene of the crime where [it fosters] the desirable objectives of a fresh, accurate, identification, which may lead to the immediate release of an innocent subject and at the same time enable the police to resume the search for the fleeing offender while the trail is still fresh." *People v. Hicks*, 134 Ill. App. 3d 1031, 1036 (1985).

¶ 47 The weight to be given identification evidence is presumptively a question for the trier of fact. *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994). Only where a pretrial encounter resulting in an identification is "unnecessarily suggestive" or "impermissibly suggestive" so as to

produce "a very substantial likelihood of irreparable misidentification" is evidence of that and any subsequent identifications excluded by operation of law under the due process clause of the fourteenth amendment. *Moore*, 266 Ill. App. 3d at 796-97 (citing *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)).

¶ 48 The due process analysis has two steps. First, defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. If the defendant meets this burden, the burden falls to the State to establish that the identification is independently reliable. *Moore*, 266 Ill. App. 3d at 797. The factors to be weighed in determining the independent reliability of the identification include the opportunity of the witnesses to view the criminal at the time of the crime, the witnesses' degree of attention, the accuracy of their prior description of the criminal, the level of certainty demonstrated by the witnesses at the confrontation, and the length of time between the crime and the confrontation. *Id*. The standard of review of a trial court's denial of a motion to suppress a show-up identification is whether the trial court's decision was "manifestly erroneous." *Id*. at 796.

¶ 49 We agree with the trial court that defendant did not meet his burden of showing that the show-up procedure was so unnecessarily suggestive and conducive to irreparable misidentification that defendant was denied due process of law. At the suppression hearing, Officer Rivera testified that one of the two women at the crime scene gave him a description of the shooter as "male Hispanic with long hair wearing a blue shirt." A few minutes later, Officer Hernandez indicated on the police radio that the shooter was "male Hispanic, ponytail, heavy-set," and was wearing a blue t-shirt. Officer Tews testified that he heard both descriptions over the radio, and that after touring the area for under 10 minutes, they saw defendant about two

blocks away from the crime scene. When defendant noticed the officers, in a marked police vehicle, he jogged into an apartment vestibule. When he was apprehended, he seemed nervous and was sweating. Officers Rivera, Tews, and Moussa all testified that the two female witnesses who were originally at the crime scene when Officer Rivera arrived were individually brought to the police vehicle to view defendant. Officer Rivera testified that the first woman positively identified defendant as the shooter, but he could not recall if the second woman identified defendant as the shooter. Officers Tews and Moussa both testified that each of the two women separately identified defendant as the shooter, outside of the presence of each other.

¶ 50 Based on the evidence at the suppression hearing, we determine that the trial court's decision to deny defendant's motion to suppress the identification evidence as unnecessarily suggestive was not manifestly erroneous.

¶ 51 Expert Testimony

¶ 52 We next address defendant's contention that the trial court abused its discretion when it barred defendant's introduction of expert testimony on memory and identifications. Defendant contends that the expert testimony had a logical connection to the facts of the case, and would have assisted the jury in deciding the case.

¶ 53 In Illinois, an individual will generally 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). Trial courts are given broad discretion when the determining the admissibility of an expert witness. *Id*. at 290. When considering the reliability of expert testimony, the court should balance its probative value against its unfairly prejudicial effect. *Id*. In the exercise of his discretion, the trial judge should also carefully consider the necessity and

relevance of the expert testimony in light of the facts in the case before him prior to admitting it for the jury's consideration. *Id*. Our supreme court has held that expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). We review the trial court's decision to admit expert witness testimony for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234. An abuse of discretion occurs only where the trial court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 54 In this case, the defense sought to introduce the testimony of Daniel Wright, a professor in psychology, about "the effects of stress, divided attention, suggestive identification procedures, *** cross-racial status of perpetrator and witness *** [and] the dangerous and pervasive misconception that witness certainty and witness accuracy are positively correlated." Our supreme court in *Enis* cautioned against using this type of expert testimony when it stated:

> "We caution against the overuse of expert testimony. Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony and, eventually, to the use of experts to testify as to the unreliability of expert testimony. So-called experts can usually be obtained to support most any position. The determination of a lawsuit should not depend upon which side can present the most or the most convincing expert witnesses. We are concerned with the reliability of eyewitness expert testimony [citations], whether and to what degree it can aid the jury, and if it is necessary in light of defendant's ability to

> cross-examine eyewitnesses. An expert's opinion concerning the unreliability of eyewitness testimony is based on statistical averages. The eyewitness in a particular case may well not fit within the spectrum of these averages. It would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable." *Enis*, at 289-90.

¶ 55 Subsequent Illinois appellate cases have held that a trial court may exclude expert testimony on eyewitness identification if the court finds that the testimony is not relevant or would not aid the trier of fact. In *People v. Tisdel*, 338 Ill. App. 3d 465, 468 (2003) (*Tisdel II*), this court held that a trial court "should carefully scrutinize the proffered testimony to determine its relevance – that is, whether there is a logical connection between the testimony and the facts of the case." In *People v. Allen*, 376 Ill. App. 3d 511, 526 (2007), this court found that the trial court did not carefully scrutinize the probative value and relevance of the testimony before concluding with "no considered basis," that the proposed testimony would confuse the jury. And in *People v. Aguilar*, 396 Ill. App. 3d 43, 54 (2009), this court held that the trial court gave the requisite consideration to the proposed expert testimony before concluding that it was not relevant and would not help the jury.

¶ 56 However, most recently in *Lerma*, our supreme court revisited this issue. In *Lerma*, the court noted that the last time it addressed the admission of such testimony was in *Enis*, "which was decided more than 25 years ago when the relevant research was in its relative infancy." *Lerma*, 2016 IL 118496, ¶ 24. Our supreme court stated that the decades since *Enis* "have seen 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.* The court noted that there is a clear trend among state and federal courts permitting the admission of

eyewitness expert testimony, and that the reason for this trend is that the findings by such experts are largely unfamiliar to the average person. *Id*. Our supreme court in *Lerma* also noted that advances in DNA testing have confirmed that eyewitness misidentification is the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined. *Id*. The court found that "today 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*.

¶ 57 The issue then becomes whether, given the specific facts of this case, the trial court abused its discretion in denying defendant's request to allow Wright's expert testimony. Here, as in *Lerma*, the only evidence of defendant's guilt is the eyewitness identifications. There is no physical evidence connecting defendant to the crime, and there is no confession. Accordingly, the State's case against defendant was entirely dependent on the reliability of the eyewitness identifications of defendant. The factors that Wright identified as potentially contributing to the unreliability of eyewitness testimony included stress, suggestive identification procedures, and cross-racial identification, all of which were present in this case. However, the trial court found that "issues regarding how long you saw the victim and cross-racial identification and identification under stressful circumstances, I don't see any of it as being beyond the ken of an average citizen, not one." We now know, however, that research has shown that it is widely accepted by scientists that such factors can contribute to the unreliability of eyewitness testimony. Accordingly, the trial court's finding that Wright's information was not beyond the ken of an average citizen was an abuse of discretion.

¶ 58 The final question is whether the trial court's error was harmless. Defendant contends that the State has forfeited this claim by failing to argue harmless error on direct appeal. We

need not address the issue of forfeiture since we nevertheless would find that the error was not harmless beyond a reasonable doubt. Our supreme court has recognized three approaches to determine whether error is harmless beyond a reasonable doubt: (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. *Lerma*, 2016 IL 118496, ¶ 11; *People v. Blue*, 205 Ill. 2d 1, 26 (2001). Here, each of the three approaches reveal that the trial court's decision to exclude Wright's testimony was not harmless beyond a reasonable doubt. First, the error contributed to defendant's conviction because the exclusion of Wright's testimony prevented the jury from hearing relevant and probative expert testimony relating to the State's eyewitnesses in a case lacking any physical evidence linking defendant to the crime. *Id*. Second, the evidence in this case did not overwhelmingly support defendant's conviction, as it was based entirely on eyewitness testimony. And third, the excluded testimony was neither duplicative nor cumulative of other evidence. *Id*.

¶ 59 We therefore reverse the trial court's order excluding this testimony and remand the cause for a new trial with directions to allow expert testimony on eyewitness identification. We note that the totality of the evidence presented at defendant's trial was sufficient to prove defendant's guilty beyond a reasonable doubt, such that no double jeopardy violation will occur on retrial. *People v. Ward*, 2011 IL 108690, ¶ 50. Because defendant's remaining issues on appeal all related to the trial, we need not address them at this time.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, we affirm in part and reverse in part the judgment of the Circuit Court of Cook County, and remand for a new trial, with directions.

¶ 62 Affirmed in part, reversed in part and remanded.