2016 IL App (1st) 152340-U

No. 1-15-2340



FIFTH DIVISION
September 30, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| KEVIN HARDY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>THE CITY OF CHICAGO and OFFICER SHAWN SINGLETON,<br><br>Defendants-Appellees. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>Cook County<br><br>No. 12 L 2632<br><br>The Honorable<br>Casandra Lewis,<br>Judge Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

**O R D E R**

¶1 *Held*: The circuit court properly exercised its discretion by: allowing the testimony of a previously-disclosed expert witness; excluding evidence that was more prejudicial than probative for the defendants; reading a third *Prim* instruction to the jury following three jury notes indicating a deadlock; and not apprising the parties of crossed-out messages on the backs of two jury notes.

¶2 Plaintiff Kevin Hardy was injured in an incident in which he attempted to flee from the police but was tased in the face. Plaintiff sued defendants, the City of Chicago and Chicago police officer Shawn Singleton, for willful and wanton conduct, battery, and intentional infliction of emotional distress. The jury rendered a verdict in favor of defendants, and the circuit court subsequently denied plaintiff's motion for a new trial.

¶3 On appeal, plaintiff argues the circuit court abused its discretion by: (1) allowing the testimony of a controlled expert witness who was previously disclosed by both parties and deposed, but withdrawn before the trial; (2) excluding testimony regarding two prior tasing incidents on the basis that the testimony would be more prejudicial than probative; (3) reading a third *Prim* instruction to the jury following three jury notes indicating a deadlock; and (4) not apprising the parties of crossed-out messages on the backs of two jury notes. Based on the following, we affirm the judgment of the circuit court.

¶4 I. BACKGROUND

¶5 On August 7, 2011, defendant Singleton and two other Chicago Police Department ("CPD") officers responded to a call regarding an individual breaking into cars. When plaintiff attempted to flee from the two other police officers, defendant Singleton positioned himself to block plaintiff's path of escape. Singleton deployed his taser, which struck plaintiff in the face and permanently blinded him in one eye.

¶6 Plaintiff sued the City of Chicago and later added defendant Singleton to the suit in July 2012. At his February 2013 deposition, plaintiff testified that he had been tased during a prior arrest in November 2010. In his February 2013 deposition, Singleton testified that he had been present at plaintiff's November 2010 arrest but another officer had tased plaintiff. Additionally,

defendants produced a CPD tactical response report from the 2010 arrest, which indicated another officer rather than Singleton had tased plaintiff.

¶7 In July 2013, defendants filed amended answers to interrogatories, which disclosed Sergeant Larry Snelling as an independent expert witness to testify about the CPD's use of force policy in relation to the propriety of Singleton's actions. In November 2013, defendants filed a motion to withdraw Sergeant Snelling as an independent expert witness but reserved the option to later re-name him as a controlled expert witness. Plaintiff later deposed Sergeant Snelling in April 2014, and he testified that he had been certified to train officers on the use of tasers in 2006 and recertified to use tasers in 2010, and had taught the CPD's use of force class from 2001 to 2010. He explained the CPD's use of force policy, effective taser usage, and whether it was appropriate for an officer to deploy his taser under the same circumstances Singleton had faced. Plaintiff planned to call Snelling as his witness at trial.

¶8 In March 2015, the circuit court held a hearing on motions *in limine*. Defendants moved to exclude testimony that plaintiff allegedly had been tased by Singleton in November 2010. Defendants also moved to bar plaintiff from questioning Singleton regarding another individual's 2006 lawsuit involving Singleton. In that lawsuit, Damian Hopkins alleged Singleton and two other officers tased Hopkins after he burned Singleton with a cigarette and refused to leave a convenience store. Hopkin's lawsuit, however, was later settled out of court. The circuit court granted both defense motions but limited the ruling regarding plaintiff's 2010 tasing incident to allow him to testify that Singleton was present when plaintiff was tased in 2010 and that experience caused plaintiff to stop running when he encountered Singleton during the 2011 incident at issue in this case.

¶9 At trial, the parties disputed whether plaintiff, before he was tased by Singleton, had continued to run at Singleton or had stopped running and surrendered. Plaintiff's retained expert, former Oakland, California police officer Michael Leonesio, testified regarding proper taser usage as well as the CPD use of force policy. Leonesio disagreed with Sergeant Snelling's assessment of Singleton's taser usage and suggested Singleton should have attempted to tackle plaintiff instead of tasing him. When asked whether he expected Sergeant Snelling to testify, Leonesio answered in the affirmative.

¶10 The next day, the circuit court barred plaintiff from introducing a July 2010 Facebook post made by Singleton in response to the shooting death of a police officer near Singleton's home. The post read:

> "This is truly terrible! Another officer struck down in the street like a roach. We need to start going ole school on them sons-of-b*** and let them know that Chicago ain't going to be a killing field no more! Weis and Daley get the F*** outta town and let the police be the POLICE!"

The circuit court found that the introduction of the Facebook post would be more prejudicial to the defendants than probative of the relevant facts.

¶11 On Sunday, March 15, 2015—three days following Leonesio's testimony—plaintiff's counsel informed defendants that plaintiff was withdrawing Snelling as a witness. That same day, defendants notified plaintiff that they would call Snelling to testify. Plaintiff moved to bar Snelling's testimony on the grounds that defendants had not disclosed him as their witness in their most recent written interrogatories. The court denied the motion and ruled that defendants were permitted to call Snelling as a witness because plaintiff had already deposed him and defendants had reserved the right to re-name him as a controlled expert witness. Snelling

proceeded to testify that tackling a subject and tasing a subject were both viable tactics to get a subject off his feet, but varying circumstances determined which method was more favorable.

¶12 Following closing arguments, the jury began deliberations on March 18, 2015 at 2:45 p.m. and continued until 5 p.m. During this time, the jury sent a note to the court requesting a copy of the CPD's use of force policy, which the court granted. The jury reconvened on March 19, 2015 at 9:30 a.m. Throughout the course of the day, the jury sent six notes to the court. Two notes were requests to see specific exhibits, and the third asked "What do we do if there is not an understanding of law and CPD policy?" The court answered all three by stating that the jury had all the evidence it needed to decide the case.

¶13 At approximately 11 a.m., the jury sent a note stating "We[']re locked up. What should we do[?] 11-1[.]" In response, the court read to the jury Illinois Pattern Jury Instructions, Civil, No. 1.05 (2011) (hereinafter, IPI Civil (2011) No. 1.05). Later, the jury sent a second note stating "We are still deadlocked." The circuit court indicated it was inclined to declare a mistrial, but the parties objected and the court read IPI Civil (2011) No. 1.05 to the jury a second time. At 5 p.m., the jury sent a third note stating "We still can[']t break the deadlock[,] can we go home[?] No hope in si[ght]." Plaintiff moved for a mistrial, but the court denied plaintiff's motion, read the jury IPI Civil (2011) No. 1.05 a third time, and then excused the jury for the day. The jury resumed its deliberations on March 20, 2015 at 10 a.m. and returned a unanimous verdict for defendants at 12 p.m. Subsequently, the circuit court entered judgment on the jury's verdict that day.

¶14 The jury notes were entered into the record. Each note was marked with the case number and name, the circuit court judge's date stamp, and the clerk's date stamp, with the exception of the March 18th request for the CPD use of force policy, which was twice stamped with the

judge's date stamp only. The jury notes were written on 3-hole punched filler paper that was ruled on the front side and blank on the back side. The record on review contains only photocopies of the jury notes.

¶15 In April 2015, plaintiff filed a motion for a new trial. In July 2015, the circuit court denied the motion. The court reasoned that the jury's deliberations were not so lengthy as to justify a mistrial, given that 15 witnesses including experts had testified over the course of five days. Additionally, the court stated that, because it had read the exact language of IPI Civil (2011) No. 1.05, the third *Prim* instruction to the jury was not coercive. The court also ruled that Sergeant Snelling's trial testimony had been disclosed through his deposition and there was no surprise to plaintiff, who had previously disclosed Snelling as plaintiff's own witness. Finally, the court held plaintiff had failed to establish Singleton had previously tased either plaintiff in 2010 or Hopkins in 2006, and presenting those matters to the jury would have improperly required the jury to decide collateral matters.

¶16 In August 2015, plaintiff filed a timely appeal, contending he was entitled to a new trial because the circuit court abused its discretion by: (1) admitting Sergeant Snelling's testimony despite his already having been withdrawn as a witness by both parties; (2) excluding testimony alleging that Singleton had previously tased plaintiff and Hopkins; (3) reading a third *Prim* instruction to the jury following multiple jury notes indicating a deadlock; and (4) not apprising the parties of crossed-out messages on the backs of two jury notes. Plaintiff also filed a bystander's report describing the time frame of the jury deliberations, the jury notes indicating that it was deadlocked, and the circuit court's ruling on plaintiff's request for a mistrial.

¶17 II. ANALYSIS

¶18 We review a circuit court's grant or denial of a motion for a new trial for an abuse of discretion. *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150, 156 (2003). In determining whether a circuit court abused its discretion, this court considers whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Buckholtz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 168 (2003). However, this court will not find that a circuit court abused its discretion unless the circuit court "acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. [citation]" *In re Marriage of Aud*, 142 Ill. App. 3d 320, 326 (1986).

¶19 A. Admission of Expert Testimony

¶20 First, plaintiff contends the circuit court's decision to allow Sergeant Snelling to testify as a controlled expert witness midway through the trial and after both parties had withdrawn him as a witness was barred by Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007) and constituted an abuse of discretion. Plaintiff argues the admission of Snelling's testimony amounted to a "trial by ambush," the surprise prevented plaintiff from preparing an adequate trial strategy, and Rule 213 was designed to prevent this type of gamesmanship. Plaintiff further argues he had no idea what Snelling would testify about and should not have been expected to anticipate the testimony of every individual the defense initially identified but subsequently withdrew as a witness. Plaintiff asserts Snelling was not qualified to offer the opinions he ultimately expressed, and the circuit court's decision to allow him to testify as defendants' witness prejudiced plaintiff and resulted in an unfair trial.

¶21 Rule 213(f) provides that a party must answer a written interrogatory by providing the identities of witnesses who will testify at trial. An independent expert witness is an expert witness who is not the party's retained expert or current employee. Ill. S. Ct. R. 213(f)(2) (eff. Jan. 1, 2007). For each independent expert witness, a party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. *Id*. A controlled expert witness is the party or the party's retained expert or current employee. Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007). For each controlled expert witness, a party must disclose (1) the subject matter on which the witness will testify, (2) the conclusions and opinions of the witness and the bases for such testimony, (3) the witness's qualifications, and (4) any reports prepared by the witness about the case. *Id*. The testimony that can be given upon direct examination at trial is limited to that which was disclosed in either an answer to a Rule 213(f) interrogatory or a deposition. Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). However, a witness is permitted to elaborate on a disclosed opinion as long as the testimony is a logical corollary to the already disclosed opinion. *Foley v. Fletcher*, 361 Ill. App. 3d 39, 47 (2005). The overriding principle is to liberally construe Rule 213 to do substantial justice between or among the parties. Ill. S. Ct. R. 213(k) (eff. Jan. 1, 2007).

¶22 The purpose of discovery rules regarding the disclosure of expert witnesses is to "avoid surprise and discourage strategic gamesmanship." *Foley*, 361 Ill. App. 3d at 46; see also Committee Comments to Ill. Sup. Ct. R. 213(f). A circuit court abuses its discretion where an exclusion of evidence constitutes a denial of a fair trial. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 45 (2010). However, whether to admit or exclude evidence—including whether to admit expert testimony—rests within the discretion of the circuit court and will not be disturbed absent an abuse of discretion. *Id.* at 36-37. Similarly, even where discovery rules have been violated, the

imposition of sanctions is within the circuit court's discretion. *Sohaey v. Van Cura*, 158 Ill. 2d 375, 381 (1994). Thus, circuit courts need not necessarily disqualify expert testimony outright for technical violations of discovery rules. *Id*. at 383; see also Committee Comment to Ill. Sup. Ct. R. 213(k). When considering whether to impose sanctions for violation of discovery rules and what sanctions to impose, the circuit court may consider several factors, including: (1) the surprise to the adverse party; (2) the prejudicial effect of the witness's testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection; and (6) the good faith of the party seeking to offer the testimony. *Sullivan v. Edwards Hospital*, 209 Ill. 2d 100 (2004); *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 68 (2007).

¶23 Upon review of the record, we find that the circuit court did not abuse its discretion in admitting Sergeant Snelling's testimony. Defendants disclosed Snelling as a 213(f)(2) independent expert witness in their July 26, 2013 answer to interrogatories, as well as the topics on which Snelling would testify and the opinions he was expected to give. Later, in their November 2013 motion to withdraw Snelling, defendants explicitly reserved the right to later call him as a 213(f)(3) witness and once again disclosed the topics on which he would testify and the opinions he would give. Moreover, Snelling gave this exact testimony during his deposition in April 2014, and plaintiff also had previously planned to call him as a witness at trial. Although plaintiff urges this court to strictly construe Rule 213 against defendants, we note that the provision of this rule should be construed liberally to do substantial justice among the parties.

¶24 As the circuit court noted, the admission of Snelling's testimony did not cause plaintiff any surprise because plaintiff had deposed Snelling and planned to call him at trial. Furthermore, because plaintiff did not withdraw Snelling as plaintiff's witness until the middle of trial, plaintiff's trial strategy clearly had already taken into account Snelling's testimony. Plaintiff

cannot credibly claim he had no idea what Snelling would testify about because Snelling testified exclusively on the topics and opinions elicited during his April 2014 deposition and stated his opinions in defendants' answer to interrogatories—as required by Rule 213(g). The record establishes plaintiff had ample time to strategize about Snelling's testimony, which contradicted the testimony of plaintiff's expert Leonesio regarding whether it was appropriate for Singleton to deploy his taser.

¶25 We disagree with plaintiff's characterization of defendants' ultimate decision to call Snelling as their witness as gamesmanship. Defendants initially decided not to call Snelling as their witness based on plaintiff's disclosure that he would be calling Snelling at trial. If plaintiff had called Snelling as planned, then defendants could simply have cross-examined him to elicit the same opinions he gave when the defense ultimately called him as their witness at trial. Moreover, if plaintiff had timely withdrawn Snelling as plaintiff's witness prior to trial, then defendants likely would have timely disclosed him as their own Rule 213(f)(3) witness. Rule 213's prohibition of gamesmanship applies to all parties, and plaintiff's decision to wait midway through trial to withdraw a witness whose testimony was adverse to plaintiff's case and then complain when the defense called the same already-disclosed witness is the type of gamesmanship Rule 213 is intended to prevent. Additionally, if the circuit court had barred Snelling's testimony, plaintiff still may have incurred a missing witness jury instruction, which would have allowed the jury to infer that plaintiff's decision not to call Snelling indicated that his testimony would have been adverse to plaintiff's case. See *Bargman v. Economics Laboratory, Inc.*, 181 Ill. App. 3d 1023, 1028 (1989) (the circuit court should have given a missing witness instruction where a party failed to provide adequate reason for not calling one of its witnesses.) Also, as the circuit court noted, plaintiff failed to request an opportunity to present rebuttal

evidence. Considered with Rule 213(k)'s instruction to interpret Rule 213 so as to do substantial justice among the parties, we cannot find that plaintiff was prejudiced or deprived of a fair trial by the admission of Snelling's testimony.

¶26 Finally, plaintiff contends that Snelling opined on topics that had not been previously disclosed and on which he was not qualified to speak. Our review of the record, however, establishes that Snelling testified exclusively on the same topics and opinions elicited in his April 2014 deposition and disclosed by defendants' answer to interrogatories, *i.e.*, the proper usage of a taser and whether it was appropriate for Singleton to deploy his taser under the circumstances. We also find no deficiency concerning Snelling's credentials. He taught the CPD's use of force class for nine years, was certified to train officers on the use of tasers in 2006 and then recertified to use a taser in 2010. Accordingly, he was fully qualified to testify from his experience and training. Overall, plaintiff fails to offer any convincing argument or case law to support the notion that a party cannot call a witness who was previously disclosed and deposed, and who testified at trial consistently with the substance of his deposition. Therefore, we hold that the circuit court did not abuse its discretion by admitting Sergeant Snelling's testimony.

¶27 B. Exclusion of Evidence

¶28 Next, plaintiff asserts the circuit court abused its discretion by excluding evidence of Singleton's 2010 Facebook post and evidence of two alleged prior tasing incidents involving Singleton. According to plaintiff, the prior alleged tasing incidents involved Singleton tasing Damian Hopkins in 2006, and Singleton tasing plaintiff in 2010. Plaintiff argues the 2006 and 2010 tasing incidents and the Facebook post would have established Singleton's *modus operandi* of punishing those who failed to comply with police orders and Singleton's motive to punish plaintiff for failing to comply specifically with the orders of Singleton and his fellow officers.

Additionally, plaintiff asserts that his testimony that Singleton allegedly tased him in 2010 was admissible to challenge Singleton's credibility by rebutting his deposition testimony that he was not the officer who had previously tased plaintiff.

¶29 All evidence that is relevant is admissible, subject to certain limits and exceptions. Illinois R. of Evidence 402 (eff. Jan. 1, 2011). Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character or propensity to commit wrongful acts. Illinois R. of Evidence 404(b) (eff. Jan. 1, 2011); *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Such evidence, however, may be otherwise admissible under Rule 404(b) to prove, *inter alia*, motive and *modus operandi*. Nevertheless, evidence that is otherwise relevant and admissible may still be excluded under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011)) if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Additionally, evidence introduced to establish motive or *modus operandi* requires a showing that the underlying events actually took place. *People v. Rozo*, 303 Ill. App. 3d 787, 790 (1999). *Modus operandi* evidence—evidence establishing a pattern of behavior—is admissible where identity is at issue. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 369 (2011). The circuit court's exclusion of such evidence will not be reversed on appeal without a showing of an abuse of discretion. *Rozo*, 303 Ill. App. 3d at 790. Where a witness's credibility is crucial to a case, the parties must be permitted "wide latitude" in impeaching and rehabilitating that witness's credibility on cross-examination. *Bianchi v. Mikhail*, 266 Ill. App. 3d 767, 777 (1994). However, "[i]n Illinois, a witness's credibility may not be impeached by inquiry into specific acts of misconduct which have not led to a criminal conviction." *Podolsky & Associates L.P. v. Discipio*, 297 Ill. App. 3d 1014, 1026 (1998); see also *People v. Pecoraro*, 175 Ill. 2d 294, 309 (1997).

¶30 As an initial matter, we reject plaintiff's argument that the disputed evidence was admissible under Rule 404(b) as *modus operandi* evidence. Evidence to establish *modus operandi* is relevant only where the identity of a wrongdoer is in question; in the instant case, there was no dispute that Singleton tased plaintiff. See *People v. Barbour*, 106 Ill. App. 3d 993, 999-1000 (1982) (*modus operandi* evidence was insufficient to establish that a particular criminal defendant was the perpetrator of a series of rapes). The relevance of evidence is crucial to its admissibility; thus, the circuit court did not abuse its discretion in excluding irrelevant evidence concerning *modus operandi*.

¶31 The circuit court attempted to find an acceptable compromise between the parties, recognizing that plaintiff wanted to testify that he stopped running because he recognized Singleton from plaintiff's 2010 arrest and tasing. The circuit court thus allowed plaintiff to testify that Singleton was present at the 2010 tasing but barred plaintiff from testifying that Singleton was the officer who had tased him. Plaintiff, however, asserts this compromise was not sufficient and the circuit court abused its discretion by excluding evidence intended to establish Singleton's motive in tasing plaintiff in the instant case. We disagree.

¶32 For evidence of prior bad acts to be admissible as evidence of motive, the prior acts must be shown to have actually taken place. *Rozo*, 303 Ill. App. 3d at 790. However, the record overwhelmingly shows that evidence of the alleged prior tasings was speculative at best. Although plaintiff claims that the allegations of the lawsuit by Damian Hopkins established that Singleton factually tased Hopkins, that case settled out of court so no official determination of liability resulted. Similarly, plaintiff's assertion that Singleton tased him in 2010 is contradicted by the record; the CPD tactical response report indicated that another officer—not defendant

Singleton—tased plaintiff in November 2010. Plaintiff's assertion that the alleged prior tasing incidents actually occurred has no support in the record.

¶33 Plaintiff would have the court conduct mini-trials on these collateral matters in order for the jury to determine whether plaintiff's unsupported testimony was more convincing than the official CPD reports and proceedings. On this basis, the circuit court correctly invoked Rule 403 to exclude plaintiff's testimony about the alleged prior tasing incidents because its probative value was significantly outweighed by the potential for confusing the jury's perception of the issues as well as prejudicing defendants. The speculative nature of the excluded evidence rendered it devoid of probative value, and would have served only to needlessly prolong the course of trial and muddle the jury's understanding of the issues charged to it. Any probative value of such testimony was further depreciated by the fact that the circuit court permitted plaintiff to support his testimony that he stopped running upon seeing Singleton by testifying that Singleton was present at plaintiff's 2010 tasing although Singleton was not the tasing officer.

¶34 Even assuming, *arguendo*, that the prior tasings actually occurred, the probative value of that evidence to establish motive was slight, and plaintiff's claims that it constituted "direct evidence" was an exaggeration. Singleton's alleged tasing of Hopkins in 2006 had no rational connection in terms of motive to Singleton's tasing of plaintiff in 2011. Although Singleton's alleged tasing of plaintiff in 2010 could have some relation to the 2011 tasing, it does little to establish plaintiff's suggested motive of punishing plaintiff. Similarly, there is little to suggest a connection for purposes of establishing motive between Singleton's emotional catharsis in his July 2010 Facebook post regarding the death of a fellow officer and Singleton's tasing of plaintiff over one year later. Under the circumstances of this case, the circuit court correctly assessed the negligible probative value of such evidence.

¶35 Conversely, the prejudicial effect of the admission of the prior tasings and Facebook post was abundantly clear, and the circuit court did not abuse its discretion by invoking Rule 403 to exclude the disputed evidence, which at most spoke to Singleton's character and his propensity to commit certain acts and thus was inadmissible under Rule 404(b). The admission of such evidence would serve to over-persuade the jurors to dislike Singleton because they felt he had an immoral character and deserved to be punished, regardless of the evidence of any actual wrongdoing. See *People v. Manning*, 182 Ill. 2d 193, 213-14 (1998) (evidence of a criminal defendant's commissioning the contract killing of a witness in his pending case was propensity and character evidence that would only serve to show that the defendant was a bad person, and thus was more prejudicial than probative). Admitting testimony alleging that Singleton previously tased two people, including plaintiff, would clearly prejudice defendants by convincing the jury that Singleton was an inherently bad or immoral person. Therefore, we hold that the circuit court did not abuse its discretion by excluding plaintiff's evidence on the basis that it was more prejudicial to defendants than probative of the relevant facts.

¶36 C. Jury Coercion

¶37 Next, plaintiff asserts the circuit court coerced the jury's deliberations—and thus abused its discretion—by reading the so called *Prim* instruction to the jury a third time after two days of deliberations had passed and the court received jury notes indicating a deadlock. Plaintiff contends, without citation to any relevant authority, that the *Prim* instruction may be read to a jury a maximum of only twice during the course of any deliberation because the IPI Civil (2011) provided only two instructions concerning deadlocked juries. Plaintiff argues the third reading of the *Prim* instruction to the jury here coerced it to think it did not have the option to remain deadlocked but instead had to deliberate until it reached a unanimous verdict.

¶38 A circuit court has "great latitude in determining how long a jury should be permitted to deliberate before a mistrial is declared." *People v. Iozzo*, 195 Ill. App. 3d 1078, 1086 (1990). It is not an abuse of discretion for the circuit court to direct the jury to continue deliberating after receiving a jury note indicating the numerical division of the juror's votes. *Id.* In deciding whether to give a *Prim* instruction, the court should consider the length of time spent in deliberation, as well as the complexity of issues facing the jury. *People v. Preston*, 76 Ill. 2d 274, 283-84 (1985).

¶39 IPI Civil (2011) No. 1.05 was derived from the decision in *People v. Prim*. 53 Ill. 2d 62 (1972). In that case, the court concluded that the supplemental instructions to a deadlocked jury, which ultimately became the text of the *Prim* instruction at issue here, were not inherently coercive. *Id.* at 76. Although the *Prim* court did not address whether it was appropriate to read multiple deadlock jury instructions, the court directed Illinois courts to defer to the American Bar Association *Minimum Standards Relating to Jury Trials*, the commentary of which provides that it may be appropriate for a court to repeat jury instructions. *Prim*, 53 Ill. 2d at 76; ABA Standards Section 1-5.4, Commentary, at 260 (3d ed. 1996).

¶40 We conclude that the third reading of the *Prim* instruction here did not constitute coercion. The trial in this case lasted over five days, included significant amounts of evidence pertaining to multiple parties, and several witnesses testified—some of whom were expert witnesses. The jury's deliberations went on for two-and-a-half days, during which the jury notified the court of a deadlock three times. We agree with the circuit court's assessment that, given the length and complexity of the trial, two-and-a-half days of jury deliberations was not such a significant length of time as to merit a mistrial.

¶41 Plaintiff contends that, because the IPI Civil (2011) provided only two instructions concerning deadlocked juries, a maximum of only two *Prim* instructions may ever be given during the course of any jury deliberation. Plaintiff cites no case law, statute or rule to support this contention, which has no basis in law. Furthermore, the length of jury deliberations is not a static phenomenon but rather is wholly dependent on the complexity of the circumstances of the trial.

¶42 Plaintiff further argues the fact that the first jury note indicated a deadlock of 11-1 shows the other jurors were "ganging up" on a holdout juror and the reading of a third *Prim* instruction served only to amplify that coercion. This view is not supported by the record. Beyond the first jury note stating the vote breakdown, there was no indication of what the vote tally was at 5:00 p.m. when the circuit court read the *Prim* instruction a third time. Furthermore, no other evidence supports an inference that jurors were necessarily coercing one another. A mistrial is not necessarily merited every time there is a deadlock with a minority holdout; rather, it is only natural for jurors to attempt to persuade one another during the course of deliberations. This is the precise admonition of the *Prim* instruction: that jurors should "not hesitate to re-examine [their] own views and change [their] opinion," as long as they "do not surrender [their] honest conviction as to the weight or effect of evidence solely because of the opinion of [their] fellow jurors or for the mere purpose of returning a verdict." IPI Civil (2011) No. 1.05.

¶43 The cases plaintiff cites to support his assertion that reading a third *Prim* instruction was coercive are distinguishable from the present case. In both *People v. Wilcox*, 407 Ill. App. 3d 151, 164 (2010), and *People v. Ferro*, 195 Ill. App. 3d 282, 291-92 (1990), the courts gave jury instructions that explicitly departed from the language of IPI Civil (2011) No. 1.05. Similarly, in *Preston v. Simmons*, the court gave additional instructions combined with the *Prim* instruction.

321 Ill. App. 3d 789, 799-800 (2001). Plaintiff also relies heavily on *People v. Danielly*, claiming the court in that case held the circuit court erred when it denied a motion for a mistrial after a third deadlock note and instead read another *Prim* instruction. 274 Ill. App. 3d 358, 364-66 (1995). Plaintiff, however, misrepresents the holding in that case; the *Danielly* court, rather than basing its decision solely on the reading of the *Prim* instruction, found instead that the judge's *ex parte* communication with the jury in combination with the *Prim* instruction may have coerced the jury. *Id.* at 366. None of the cases relied on by plaintiff are comparable to the instant case, in which the circuit court read the exact text of IPI Civil (2011) No. 1.05 with no extraneous comments or instructions. Therefore, we hold that the circuit court did not abuse its discretion by reading the *Prim* instruction to the jury a third time.

¶44 D. Withholding of Jury Notes

¶45 Finally, plaintiff alleges the circuit court abused its discretion by withholding jury notes from the parties and thus depriving plaintiff of a fair trial.

¶46 Communications from the judge to the jury should be made in the presence of the parties. *People v. Johnson*, 146 Ill. 2d 109, 150-51 (1991). While failing to inform the parties to a suit of a jury note is "highly improper," a reviewing court will not set aside a jury verdict unless some prejudice resulted from subsequent *ex parte* communication between the circuit court and the jury. *Id.* Additionally, a circuit court's withholding of the numerical division of juror's votes "does not convert [its] response into an improper *ex parte* contact." *People v. Morgan*, 259 Ill. App. 3d 770, 786 (1994).

¶47 Plaintiff contends the alleged withheld jury notes contained crucial information that indicated the jury was "ganging up" on a lone juror. To support this contention, plaintiff implicitly advances the novel theory that a crossed-out message on the unstamped side of a

stamped jury note should be considered as part of the whole message of the note the jury intended the court to receive. The record, however, does not support plaintiff's claim that he suffered prejudice from not being apprised of the backs of the jury notes.

¶48 Plaintiff's argument emphasizes the crossed-out message that read "We are having a hard time with one jury." Our review of the photocopies of the jury notes in the record establishes that this crossed-out message was on the front side of the same sheet of paper that bore on the back side the deadlock message that read "We[']re locked up. What should we do[?] 11-1[.]" This conclusion is obvious because faint inks marks from the circuit court's stamp on the deadlock message on the back side of the paper can be seen on the crossed-out message on the front side. Furthermore, the 3-hole punched paper was torn or removed from some type of binding, and the manner in which the tear marks around the three holes line up in the left margin establishes that the crossed-out message and the deadlock message were both on the same piece of paper. Consequently, there is no doubt that the crossed-out note was simply the original draft of the deadlock note, rather than a separate deadlock note received and surreptitiously disposed of by the circuit court judge. Apprising the parties of the crossed-out message would not have imparted any information that was not contained in the deadlock message. We note that when the circuit court informed the parties of the 11-1 deadlock note, plaintiff did not move for a mistrial. Consequently, plaintiff cannot credibly claim on appeal that he experienced any prejudice from not being apprised of the crossed-out message on the back of that deadlock note.

¶49 The second note that plaintiff claims was withheld is similar in nature. The cross-out message read "Poster map of area," and appears in the record immediately after a message requesting the poster map of the area, which had been used as evidence during the trial. Based on the condition of the paper and the ink markings from the judge's stamp, the record clearly

establishes that the crossed-out message was simply a draft written on the back-page of the actual jury note sent to the circuit court judge. Clearly, plaintiff did not suffer any prejudice from not being apprised of the draft of the jury's request to see a map of the area.

¶50 Aside from the two crossed-out messages, all the other jury notes in the record were stamped and dated for either March 18 or 19, 2015, during which the jury was deliberating. Plaintiff can point to no other part of the record to support his contention that the circuit court withheld jury notes, rendering his claim utterly without merit. We therefore hold that the circuit court did not abuse its discretion by not apprising the parties of two crossed-out messages on the backs of two jury notes.

¶51 III. CONCLUSION

¶52 We find that the circuit court properly exercised its discretion by admitting Sergeant Snelling's testimony; by excluding evidence regarding alleged prior tasings by defendant Singleton; by reading a third *Prim* instruction to the jury; and by not apprising the parties of the crossed-out messages on the backs of two jury notes. For the foregoing reasons, we affirm the judgment of the circuit court.

¶53 Affirmed.