THIRD DIVISION
September 29, 2017

No. 1-15-0726

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 12502 (03)
	)	
TOYIOUS TAYLOR,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder is affirmed and defendant's conviction for felony murder based on attempt (armed robbery) is affirmed; where the eyewitness testified to the circumstances surrounding his observation of defendant and defendant's attorney vigorously challenged the reliability of the identification based on those circumstances, the evidence was sufficient to prove defendant guilty of first degree murder based on accountability beyond a reasonable doubt and defendant was not denied the right to effective assistance of counsel; the circumstantial evidence proved defendant's co-offenders intended to commit a robbery; the trial court erred in overruling defense counsel's objection to the State's description of the eyewitness as a "trained observer" but the error was cured by the jury instructions; and the trial court properly admitted recordings of 9-1-1 calls.

¶ 2 Following a jury trial the circuit court of Cook County convicted defendant, Toyious Taylor, of first degree murder for the death of Thomas Wortham IV and felony murder for the death of Brian Floyd, a co-offender in the acts leading to Wortham IV's death. The State's primary witness was the victim's father, Thomas Wortham III, a retired Chicago Police Department (CPD) officer (hereinafter Wortham Sr.). His son, Wortham IV, was a current CPD officer (hereinafter Wortham Jr.). Wortham Jr. was off duty when he was killed. Taylor was tried in a separate but simultaneous jury trial with Paris McGee. Both Taylor and McGee were tried on a theory of accountability for the acts of cousins Marcus Floyd and Brian Floyd. The Floyds approached Wortham Jr. as he was beginning to ride his motorcycle away from his parents' home after a visit. The Floyds stopped Wortham Jr. in the street and one or both of the Floyds pointed a handgun at him. Wortham Jr. pulled his gun, announced "Police," and shots were fired. Two men arrived in a vehicle that apparently drug Wortham Jr., and urged the Floyds to get into the car. Wortham Sr., who saw the Floyds accost his son and returned to his residence to retrieve his handgun, testified the passenger of the car fired at him after Wortham Sr. returned with his gun to assist his son. Wortham Sr. ultimately killed Brian Floyd and wounded Marcus Floyd. The vehicle and its occupants escaped. Wortham Sr. provided a description of the occupants, who were later apprehended after the vehicle was located at Brian Floyd's mother's residence. Wortham Sr. identified Taylor as the driver and McGee as the passenger.

¶ 3 Defendant appeals his convictions, arguing the State failed to prove him guilty beyond a reasonable doubt of the murder of Wortham Jr. or Brian Floyd because Wortham Sr.'s identification is unreliable, he received ineffective assistance of counsel because his attorney failed to call an expert to testify about the factors that affect the reliability of eyewitness identifications, the trial court erroneously allowed the State to bolster Wortham Sr.'s credibility,

the court erroneously admitted evidence of Mrs. Wortham's 9-1-1 calls and Wortham Jr.'s last words, and the State failed to elicit any evidence of an attempt armed robbery. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 The evidence adduced at trial will be discussed in greater detail to the extent necessary in connection with our resolution of defendant's arguments on appeal. At approximately 11:30 p.m. in May 2010 Officer Thomas Wortham IV left his parents' home in Chicago after visiting them. His father, retired police officer Thomas Wortham III, watched from his front porch as his son got on his motorcycle. Wortham Sr. saw Marcus and Brian Floyd approach his son. Brian put a gun to Wortham Jr.'s head and Marcus pointed his hand at him, but Wortham Sr. could not tell if Marcus had a gun. Wortham Sr. yelled for the men to get away from his son and Brian pointed his gun at Wortham Sr. and told him to get back into the house. Wortham Jr. then shouted "Police," and Wortham Sr. heard gunfire. Wortham Sr. ran into the house to retrieve his gun and told his wife to dial 9-1-1.

¶ 6 Mrs. Wortham tried to call 9-1-1 but could not dial from the first phone she tried. Mrs. Wortham looked out her front door and saw two men pointing guns at her son. Wortham Jr. was off of his motorcycle and had his gun drawn. She heard Wortham Jr. yell "Chicago police," and then saw a muzzle flash from one of the other men's guns. She then ran to the kitchen and called 9-1-1. During the trial the State played recordings of both of Mrs. Wortham's 9-1-1 calls for the jury over defendant's objection.

¶ 7 After Wortham Sr. ran back outside with his gun he saw a red car in front of his home facing the wrong direction on the one-way street. The driver and passenger were yelling "Get in." The passenger was outside the car. Wortham Sr. saw the Floyds "pop up" behind his daughter's car, which was parked in front of his home. He ran toward the red car and told the

driver and passenger to get away from the Floyds. The passenger got back into the car and the driver backed away. Wortham Sr. testified the passenger fired a gun at him as the car drove away. Wortham Sr. went back to the car the Floyds were crouching behind. He saw Wortham Jr.'s gun on the ground, picked it up, and approached the Floyds. Brian pointed at gun at him and Wortham Sr. opened fire, striking both Brian and Marcus. After making sure the Floyds were no longer moving Wortham Sr. looked for his son. He saw Wortham Jr. on the ground approximately 25 to 30 yards west of his original location. Wortham Sr. went to him and Wortham Jr. said "It hurts." Wortham Sr. then ran back into the house and again told Mrs. Wortham to call 9-1-1. Mrs. Wortham then called 9-1-1 a second time.

¶ 8 Police arrived and identified Brian Floyd through his driver's license, which was in his pocket. Police went to Brian's mother's home and told her that her son was dead. Brian's mother was brought to the scene. A detective interviewed her and as a result began looking for "Paris" and "Luke," a name defendant was known by. Brian's mother told police Brian was friends with Taylor from the neighborhood and McGee and Brian were childhood friends. When she returned home with police, Brian's red car was parked in front of her house. Brian's mother told police Brian often shared his car with other people. Police compiled and showed Wortham Sr. a nine-person photo array less than four hours after Wortham Jr. was killed. Wortham Sr. identified Brian and Marcus Floyd as the two men who approached his son on the street and identified McGee as the passenger in the red car who shot at him. Approximately one-half hour later Wortham Sr. viewed a second photo array and identified defendant as the driver of the red car. The following day police asked Wortham Sr. to view a lineup. Wortham Sr. identified McGee as the passenger in the red car. The next day Wortham Sr. viewed a second lineup and identified defendant as the driver of the red car.

¶ 9 Police recovered pieces of a broken taillight near the scene that were matched to Brian's car. An autopsy revealed that Wortham Jr. had injuries consistent with being dragged by a car. Fibers that could have originated from Wortham Jr.'s t-shirt were recovered from the undercarriage of the car. Police recovered a motorcycle helmet from the scene that looked like it had been dragged across concrete. Police discovered defendant's DNA on a drinking cup recovered from the red car. Defendant's fingerprints were also on a drinking cup. Police also located DNA on the driver's interior door handle and the front passenger's interior door handle. Forensic testing could not exclude defendant as a contributor to the mixture of DNA profiles on the door handles.

¶ 10 Defendant's attorney objected to the Illinois Pattern Jury Instruction on factors the jury is to consider in weighing eyewitness testimony and asked the trial court to give the jury a modified instruction which included additional factors. Defendant's attorney also asked the court to give the jury non-pattern jury instructions relating to eyewitness identification. The trial court refused defendant's attorney's proffered instructions. During closing arguments, the State referred to Wortham Sr. as a veteran CPD officer and "trained observer" who will "never forget" the "face of one of his son's killers." The State also referred to Wortham Jr.'s last words and his status as a CPD officer and lieutenant in the Wisconsin National Guard.

¶ 11 The trial court denied defendant's motion for a new trial. This appeal followed.

¶ 12 ANALYSIS

¶ 13 Defendant argues on appeal that: (1) the State failed to prove him guilty on a theory of accountability where the State's primary eyewitness had only seconds to observe the driver of the red car and the witness's attention was on armed individuals outside of the car, (2) trial counsel was ineffective in failing to call an expert witness to testify about the reliability of eyewitness identification where counsel's trial strategy was to attack the reliability of Wortham

Sr.'s identification, (3) the State failed to adduce evidence of an armed robbery, (4) the trial court erroneously allowed the State to bolster Wortham Sr.'s credibility by referring to him as a "trained observer" and to extol the victim, and (5) the trial court erroneously introduced evidence of Wortham Jr.'s last words and his mother's 9-1-1 calls because that evidence was not probative and was unduly prejudicial.

> "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. [Citations.] This standard of review gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. [Citations.] Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. [Citation.] Although these determinations by the trier of fact are entitled to deference, they are not conclusive. Rather, a criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. [Citation.]" (Internal quotation marks omitted.) *People v. Brown*, 2013 IL 114196, ¶ 48.

We address each of defendant's arguments in turn.

¶ 14 (1) Reliability of the Witness's Identification

¶ 15 Defendant argues Wortham Sr.'s identification of him as the driver of the red car is not credible where Wortham Sr. had only five or six seconds to look at the scene during which the driver sat inside the car on the side furthest away from him and codefendant McGee stood

outside of the car with a gun. "The reviewing court is not permitted to substitute its judgment for that of the trier of fact on questions involving the weight to be assigned evidence or the credibility of witnesses. [Citation.] Accordingly, a judgment of conviction will not be disturbed unless the evidence presented at trial is so 'unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt [citation].' [Citation.]" *People v. Pryor*, 282 Ill. App. 3d 92, 97-98 (1996). "A positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction. [Citation.]" *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007).

> "Where identification is the main issue, the State must prove beyond a reasonable doubt the identity of the individual who committed the charged offense. [Citation.] In assessing identification testimony, Illinois courts utilize a five-factor test established in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). [Citation.] The factors are:
>
> > '(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation.' [Citation.]"
>
> *People v. White*, 2017 IL App (1st) 142358, ¶ 15.

¶ 16 Defendant argues that applying the five factors listed above to this case, Wortham Sr.'s testimony is insufficient to prove defendant should be held accountable for the murder of Wortham Jr. and the felony murder of Brian Floyd. Defendant argues the only opportunity Wortham Sr. had to view the driver of the car was five to six seconds at which time the driver

was sitting in the car furthest from him, McGee stood outside the car closest to him with a gun, and the Floyds were armed and hiding behind his daughter's car. Defendant asserts there was no evidence the driver ever brandished a weapon and was never outside the car during the chaos, and that Wortham's attention would have been focused on the individuals with guns and on the guns themselves. Further, there was no evidence Wortham Sr. had ever seen the driver of the car before, increasing the risk of misidentification.

¶ 17 Wortham Sr. testified he had been retired from CPD for 13 years, after having been a police officer for 32 years. Wortham stated as soon as he got outside from retrieving his gun, he saw a parked car and an individual standing outside of the car saying "Get in, get in." Wortham testified there was an individual standing by the front door of the car and Wortham Sr. was going in that direction. Wortham Sr. identified codefendant McGee as that man. He testified he was running in the direction of the car and said "get away from them." Wortham got within 10 feet of the car at the curb of the street. Wortham also testified he was able to see the driver of the car, which he said was red or maroon in color. Wortham identified Taylor in court as the driver. Wortham testified he said to McGee "Get away from them," and defendant "jumped back in the car." When he said that to McGee, defendant backed the car up across the intersection at a high rate of speed. He testified that as defendant drove the car backwards McGee shot at Wortham Sr. He also testified that at that point he was watching the red car.

¶ 18 On cross-examination, Wortham Sr. testified that when the Floyds first approached his son he could not hear what was being said between them. Wortham testified that after he ran into the house to retrieve his gun, when he first returned, he approached the red car and the man standing by the car had a gun in his hand. Then the Floyds popped up from behind his daughter's car, Wortham rushed to the car, and the red car pulled away. Wortham saw the passenger outside of the car with a gun in his hand yelling "Get in, get in." Wortham agreed that

when he saw the passenger yelling to the Floyds to get in the car he (Wortham Sr.) pointed his gun at the car, the passenger got in the car, and the car left. When the passenger was out of the car he was on the side of the car closest to Wortham Sr. Wortham Sr. testified the driver would have been on the side furthest from him, and he never saw the driver get out of the car. He stated that within seconds of coming out of the door of his home he saw the car; then, the Floyds popped up and "[a]ll of this happens within a matter of five, six seconds." He stated "[t]hat's where my attention was focused to. I knew who they were." After the Floyds popped up, he did not start shooting but instead talked to the passenger of the red car. The red car pulled off a few seconds after Wortham Sr. pointed his gun at the car because the passenger had to get back in.

¶ 19 "The most important factor is whether the witness had an adequate opportunity to view the offender at the time of the crime. [Citations.] An identification may be positive even though the witness viewed the accused for a short period of time. [Citations.]" *People v. Wehrwein*, 190 Ill. App. 3d 35, 39-40 (1989). Based on Wortham Sr.'s testimony we cannot say that no rational trier of fact could have found Wortham Sr. had an adequate opportunity to observe the driver of the red car when he exited his home. Wortham Sr. testified that the red car was the first thing he saw when he exited his home and that he initially moved in the direction of that vehicle. Wortham Sr. also testified he was able to see the driver of the vehicle as he was moving toward the car and both defendant and McGee were yelling to the Floyds to get in. He also testified that at that time he did not know if the individuals were involved in the attack on his son. Therefore, a reasonable juror could infer that Wortham Sr.'s attention was on the driver and passenger of the red car, albeit for a short time. "The sufficiency of the opportunity to observe is for the trier of fact to determine. [Citation.]" *Id.* at 39-40. Here, the trier of fact determined that Wortham Sr. had an adequate opportunity to observe defendant to make a reliable identification. We will not substitute our judgment for that of the trier of fact because the evidence surrounding

Wortham Sr.'s identification is not so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Pryor*, 282 Ill. App. 3d at 97-98.

¶ 20 Defendant also argues the presence of a weapon negatively impacts a witness's ability to make a reliable identification, and Wortham's attention was more focused on McGee and the Floyds, and particularly on Brian Floyd, who were armed. In *People v. Jones*, 148 Ill. App. 3d 133, 139 (1986), this court held that the witness's "understandable fear when he saw two guns pointed at him does not necessarily render his identification testimony unworthy of belief." *Jones*, 148 Ill. App. 3d at 139. This court also noted that the witness's identification was "strong and corroborated by his identification of [the] defendant's photograph." *Id.* In this case, the trier of fact could find Wortham Sr.'s identification was not negatively affected by the presence of guns. Wortham Sr.'s identification of defendant as the driver has been unwavering. Wortham Sr. identified defendant immediately from both a photo array and a physical lineup. The evidence also refutes defendant's argument Wortham Sr. was too distracted by the guns to have an opportunity to view the driver of the car. Wortham Sr. testified his attention was drawn to the men at the red car. Although within a matter of seconds the Floyds popped up behind his daughter's car, the red car was close to his daughter's car. Wortham Sr. also testified that he could see the driver and was looking at the red car as it backed away. Therefore, even as Wortham Sr. was moving forward to where the Floyds were hiding and despite his concern for them, a reasonable trier of fact could infer Wortham Sr. was briefly focused on the occupants of the red car. "The credibility of identification witnesses and the weight accorded their testimony is within the unique province of the trier of fact." *People v. Godinez*, 191 Ill. App. 3d 6, 10 (1989). In *Godinez*, the witness observed the defendant for only a few seconds. (Another witness who could not see the defendant's face testified it took the defendant 10 seconds to run 25 feet to a gangway. The eyewitness at issue observed the defendant in that gangway, which

was only 10 feet long. *Godinez*, 191 Ill. App. 3d at 9, 11.) This court noted the witness "steadfastly maintained that she was able to observe [the] defendant" and that she "never faltered in her identification, from the time of the lineup through the trial." *Id.* at 12. This court held that "under the appropriate standard of review *** we must conclude that a rational jury could find the essential elements of a reliable identification which could support a conviction beyond a reasonable doubt." *Id.* Here, as in *Godinez*, it is reasonable to find Wortham Sr. credible and find he had sufficient time to observe defendant in the car on the opposite side, even if defendant was still behind the wheel. See *id.*

¶ 21 Defendant states Wortham Sr. was not able to provide a description of the driver, other than a Black male, because his focus was not on the driver. (Co-defendant McGee argued a motion to suppress identification and during the hearing on the motion, a detective testified that Wortham Sr. described the driver of the red car as thin with short hair.) We do not find that the lack of detail totally destroys the reliability of Wortham Sr.'s identification of defendant as the driver of the red car.

> "An identification *** is usually not made by distinguishing separate physical features but by the total impression made upon the witness. [Citation.] Therefore, omissions in preliminary descriptions, where the witness had an adequate opportunity to observe the offender, do not affect the credibility of the witness' identification nor do they raise a reasonable doubt of the defendant's guilt." *People v. Hemphill*, 62 Ill. App. 3d 977, 982 (1978).

We will not substitute our judgment for that of the trier of fact on questions involving the weight to be assigned evidence. *Pryor*, 282 Ill. App. 3d at 97-98. The fact Wortham Sr. had never seen the driver of the car before also goes to Wortham Sr.'s credibility and the weight to be given his testimony. Both are matters within the purview of the trier of fact. *Pryor*, 282 Ill. App. 3d at 97-

98. Defendant also attacked the weight to be given Wortham Sr.'s identification by arguing courts have repeatedly noted that there is a low correlation between a witness's confidence in an identification and the accuracy of that identification. Defendant cites, *inter alia*, *People v. Allen*, 376 Ill. App. 3d 511 (2007), as well as federal and foreign authority, in support of this proposition. In *Allen*, the court addressed the trial court's refusal to allow the testimony of an expert in eyewitness identification. *Allen*, 376 Ill. App. 3d at 513. The defendant in that case made an offer of proof of the expert's proposed testimony in the form of a report by the expert. *Id.* at 524. The *Allen* court observed that the report stated that "studies show jurors tend to rely on a witness's confidence in her identification as a guide to accuracy, but that there are low correlations between the witness's confidence and the accuracy of her identification." *Id.* at 524. The *Allen* court did not expressly accept that proposition but did note that the "[r]eliability of the studies rarely is questioned." *Id.* at 525. The court held the trial court erred in failing to "conduct a meaningful inquiry into [the expert's] proposed testimony" but expressed "no opinion on whether the trial court on remand should allow any part of [the] offer of proof to be heard by the jury." *Id.* at 526. "The trier of fact determines what weight to give identification testimony and that determination will not be subject to reversal on appeal 'unless [it is] so contrary to the evidence as to be unjustified.' [Citation.]" *People v. Hunley*, 313 Ill. App. 3d 16, 32 (2000). "[O]ur supreme court has held that the five factors listed in [Illinois Pattern Jury Instruction 3.15, including '[t]he level of certainty shown by the witness when confronting the defendant'] are an accurate statement of the law 'for assessing the reliability of identification testimony.' [Citation.]" *People v. Rodriguez*, 387 Ill. App. 3d 812, 823 (2008). Absent a clear statement by our supreme court we may not depart from this law. In this case the trier of fact heard the circumstances of Wortham Sr.'s identification of defendant and observed his demeanor when identifying him in court and testifying as to his prior identifications. The weight to be given his

testimony based on his level of certainty was for the trier of fact and we will not substitute our judgment for theirs.

¶ 22 Finally, we reject defendant's argument that Wortham Sr.'s identification is questionable "given the lack of additional evidence that directly implicates Taylor in the offense." First, this court has consistently held "a single eyewitness identification can sustain a conviction." *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23. "[T]he absence of physical evidence corroborating eyewitness identifications is not in itself a reason for reversal." *Id.* Second, physical evidence does corroborate defendant's participation in the crime. Wortham Sr. described the red car that tried to facilitate the Floyds' escape. A red car was located at Brian Floyd's mother's house, that car was connected to the crime scene by the broken taillight and paint transfer to the car it hit as it was fleeing the crime, and defendant's DNA and fingerprints were found on a cup in the car.

> "Where evidence is presented and such evidence is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution. [Citations.] The trier of fact is not required to accept or otherwise seek out any explanations of the evidence that are consistent with a defendant's innocence; nor is the trier of fact required to disregard any inferences that do flow from the evidence. [Citations.]" *People v. Bogan*, 2017 IL App (3d) 150156, ¶ 26.

Although defendant argues there is an innocent explanation for his fingerprints and DNA being on a cup in the car, the trier of fact was not required to accept that explanation. In light of Wortham Sr.'s identification and some physical evidence corroborating defendant's presence in the automobile that was involved in the crime, the trier of fact could reasonably infer defendant's participation in the crime from all of the evidence. We hold the State proved defendant guilty beyond a reasonable doubt where the evidence is not so unreasonable, improbable, or so

unsatisfactory that no rational trier of fact could find the essential elements of a reliable identification.

¶ 23 (2) Ineffective Assistance of Counsel

¶ 24 Defendant argues he received ineffective assistance of counsel at trial because his attorney failed to call an expert to testify about the reliability of eyewitness identification in support of her strategy of misidentification. Defendant asserts that "expert testimony on the various factors that can affect the reliability of an identification was clearly 'relevant and appropriate.' "

> "A defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing that counsel's performance was deficient and the deficient performance prejudiced the defense. To satisfy the first prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] The second prong requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (Internal quotation marks omitted.) *People v. Williams*, 2017 IL App (1st) 152021, ¶ 36.

¶ 25 In *People v. Lerma*, 2016 IL 118496, ¶ 24, our supreme court recognized that scientific research concerning the reliability of eyewitness identifications is "well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." In *Lerma*, the defendant filed a pretrial motion *in limine* to allow an expert to testify on the topic of memory and eyewitness identification. *Id.* ¶ 8. The defendant's motion stated the expert would identify

and explain "several 'common misperceptions' that exist concerning the accuracy and reliability of eyewitness identifications." *Id.* The expert's testimony would include "the following scientifically documented findings, all of which are beyond the common knowledge of the average layperson: that 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.* The trial court denied the defendant's motion. *Id.* ¶ 10. Our supreme court found the case before it was "the type of case for which expert eyewitness testimony is both relevant and appropriate" because the State's case rested "100% on the reliability of its eyewitness identifications" and "several of the factors [the expert] identified as potentially contributing to the unreliability of eyewitness testimony *** are either present or possibly present in this case." *Id.* ¶ 26. Our supreme court held the trial court abused its discretion because it denied the defendant's request "to present relevant and probative testimony from a qualified expert that speaks directly to the State's only evidence against him, and [did] so for reasons that are both expressly contradicted by the expert's report and inconsistent with the actual facts of the case." *Id.* ¶ 32.

¶ 26 The factors impacting the reliability of eyewitness identification defendant argues are present in this case, making expert testimony "relevant and appropriate," are (a) the presence of multiple guns, (b) this was a high-stress situation, (c) there was no evidence Wortham Sr. had ever seen defendant before, and (d) the jury was presented with Wortham Sr.'s confidence in his identification. Defendant argues the failure to provide evidence in support of the defense theory

of misidentification "cannot be excused as trial strategy where the testimony was critical to the defense, which otherwise remained unsupported."

> "Judicial scrutiny of counsel's performance is highly deferential ***. [Citation.] To establish deficient performance, defendant must identify counsel's acts or omissions that allegedly are not the result of reasonable professional judgment and overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. [Citations.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. [Citation.] Defendant must show that counsel's errors were so serious and [her] performance was so deficient that [s]he did not function as the counsel guaranteed by the sixth amendment. [Citation.]" *Williams*, 2017 IL App (1st) 152021, ¶ 37.

We cannot say defendant has met this high burden.

¶ 27 In closing argument, defendant's attorney began by saying: "Chaos and confusion. That is the situation that the Floyd brothers created. Chaos and confusion." Defendant's attorney proceeded to argue that when Wortham Sr. returned from his home with his gun, "[h]is attention was focused on three things. Essentially three guns," including Floyd's gun and the gun Wortham Sr. saw co-defendant McGee holding. Defendant's attorney recounted Wortham Sr.'s testimony that he did not see the red car strike another car as it was fleeing the scene, then argued:

> "You know why he didn't see it? One of the things is, he's certainly not going to be turning and looking at what the car is doing when he's got the Floyds still laying on the ground, and he doesn't know what they're going to do next."

Defendant's attorney continued, attacking the evidence that the red car and its occupants were involved in the Floyds' crime. Defense counsel then argued:

> "Again, what you have is a chaotic situation leading to confusion which leads to misidentification. You've got three bodies on the ground. You've got shooting. It's dark outside. Mr. Wortham III has just seen his son in a gun battle when he runs into the house to go get his gun to try to help him.
>
> And then he comes out, and now there is a red car on the scene with the passenger out, and lo and behold, that person has got a gun. He has no idea where his son is. But what does he say? I'm not focusing on that, because I got to deal with the situation that's in front of me right now. I got three people possibly with guns.
>
> * * *
>
> And with respect to the red car that came up, what's he focusing on? Well, he's got the two guys on the ground that have popped up, and then he's got the guy that got out of the passenger side with a gun in his hand. And he's yelling at them. He is not looking at the driver. The driver has not gotten out of the car. The driver hasn't done anything. The driver is not flashing a gun. And you better believe that based on what has been happening at 85th and King Drive before Mr. Wortham went in the house, he is concerned about those guns. And that Ladies and Gentlemen, is where he's keeping his focus; who's got the guns and what are they doing with them.
>
> And this is happening in seconds. Remember? He said it happened in seconds. This isn't like some long, 20 minute drama playing out. It's seconds.

So that car is there for seconds. And that passenger is out. That's who's capturing all the attention, is the passenger, not the driver."

Defendant's attorney argued the street was not well-lit by the street light and stated "[e]ven if it [(the street light)] is providing assistance, Mr. Wortham had other things on his mind, other concerns. And there is no reason that he would have been staring down the driver with all of the things that he had to deal with." Defendant's attorney directed the jury's attention to instruction 3.15 (the *Biggers* factors) then argued Wortham Sr. had only seconds to view the driver in the dark; and his attention was focused on the individuals with the guns and his son. Counsel then added: "The length of time [between the offense and the identification] when you really didn't see the person is irrelevant. And your certainty is irrelevant when you really didn't see the person, you didn't have an opportunity to see them." Defense counsel argued the situation affected Wortham Sr.'s ability to perceive the situation such that "[h]e wasn't a police officer that day. He was a man concerned about his family." Counsel argued Wortham Sr. failed to provide more detail in his description of the driver because "he couldn't see who the driver was. He didn't see who the driver was."

¶ 28 We cannot say counsel's performance was so deficient that she did not function as the counsel guaranteed by the sixth amendment. Although expert testimony on eyewitness identification may have been relevant and it is possible expert testimony may have aided defendant, "even if defense counsel makes a mistake in trial strategy or tactics or an error in judgment, this will not render representation constitutionally defective. [Citation.] Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found. [Citation.]" *People v. Perry*, 224 Ill. 2d 312, 355-56 (2007). This is not such a case. *Id.* "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.

[Citation.]" *People v. Blue*, 205 Ill. 2d 1, 12 (2001) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Defendant's attorney subjected the State's case to meaningful adversarial testing through cross-examination and argument on the issue of identification, as well as on the issues of whether the passenger of the car discharged a firearm or was accountable for the Floyds' acts. *Lerma* simply held that expert testimony on eyewitness identification is "settled and widely accepted," and thus "a perfectly proper subject for expert testimony" in appropriate cases. *Lerma*, 2016 IL 118496, ¶ 24. It did not hold expert testimony is *required* in every case where the "factors *** identified as potentially contributing to the unreliability of eyewitness testimony" are present. *Id.* ¶ 26. We note this case is distinguishable from the situation presented in *Lerma* because, despite defendant's protests, Wortham Sr.'s eyewitness identifications are not the "only evidence of defendant's guilt." *Id.* We find defendant has failed to establish the first prong of the *Strickland* test, that counsel's performance fell below an objective standard of reasonableness. Because defendant failed to demonstrate that his attorney's performance fell below an objective standard of reasonableness, his claim of ineffective assistance of counsel fails. *Williams*, 2017 IL App (1st) 152021, ¶ 36 (defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland*). We note, that because defendant has not proved deficient performance, we do not reach the question of whether defendant was prejudiced by not being able to give the eyewitness identification instructions his attorney proffered.

¶ 29 (3) Evidence of an Attempt (Armed Robbery)

¶ 30 Defendant argues the State failed to present any evidence any of the co-offenders intended to commit an armed robbery. Defendant argues the State's conclusion the four individuals intended to steal Wortham Jr.'s motorcycle "is no more than mere speculation" where there was no evidence as to what was said to Wortham Jr. by the Floyds and there was no

evidence the Floyds demanded money or property or otherwise attempted to take anything from Wortham Jr. The State argues the evidence demonstrated that "the co-conspirators were acting in concert to take Officer Wortham's property by virtue of the fact that at least B. Floyd was armed with a firearm and took a substantial step to deprive Officer Wortham of his property by threat and use of force. The State asserts "[a] specific demand [for property] by defendant is not required if the circumstances are sufficient to establish an intent to commit a robbery," and the circumstances here establish that the co-offender's actions were done in an attempt to forcibly remove property from Officer Wortham.

¶ 31 "Where a defendant is charged with attempted armed robbery, the prosecution can obtain a conviction despite the fact that no evidence of a specific demand for money is made, if surrounding circumstances are sufficient to establish the requisite intent. [Citation.]" *People v. Murray*, 194 Ill. App. 3d 653, 657 (1990). "It is well established that, to obtain a conviction for attempt, the State must prove that the defendant intended to commit a specific offense." *People v. Terrell*, 99 Ill. 2d 427, 431 (1984). In *Terrell*, the defendant was hiding behind a service station while armed with a gun and in possession of a stocking with a knot tied in the end. *Terrell*, 99 Ill. 2d at 429. Police, responding to a tip, went to the area and the defendant fled. *Id.* at 430. The defendant argued the evidence was insufficient to prove he had the intent to commit the offense of armed robbery. *Id.* at 431. Our supreme court disagreed, holding that the intent to commit a criminal offense may be inferred from the conduct of the defendant and the surrounding circumstances. *Id.* at 431-32. The court found that given the evidence presented to the trier of fact—the defendant concealed behind the gas station which was about to open, while in possession of the stocking and gun—it is "incredulous that [the] defendant had any intent other than the armed robbery of the service station." *Id.* In *People v. Kuhn*, 291 Ill. 154 (1919), two men, who had smeared shoe polish on their faces, entered a grocery store and yelled at the

proprietor "Hands up!" *Kuhn*, 291 Ill. at 155. The proprietor fought the men, and they fled, but were later apprehended. *Id.* at 156. The defendants argued the evidence did not show an intent to rob. Our supreme court wrote as follows:

> "The method employed and the order given were those usually employed and given in an assault with intent to rob, and the fact that there was no robbery was evidently due to the failure of [the proprietor] to obey the order. The fact that he defended himself and prevented the robbery has no tendency to disprove the alleged intent." *Id.* at 158.

In *People v. Turner*, 108 Ill. App. 2d 132, 137 (1969), the defendants entered a cab and directed it to a particular address. *Turner*, 108 Ill. App. 2d at 134. One of the passengers told the driver to stop at a different location. *Id.* The driver testified the defendant said "This is it," whereupon the driver looked back and saw the defendant had a gun which was partially in his pocket. *Id.* On appeal, the defendant argued the State failed to prove a specific intent to rob. *Id.* at 137. The defendant pointed out that "there was no demand for money, nor was there an attempt to take any property." *Id.* at 138. The court held that "[e]ven if the sudden request to stop the taxi together with [the defendant's] statement, 'This is it,' were made in the most innocent manner, the production of a gun by [the] defendant is sufficient circumstantial evidence of an intent to commit a crime." *Id.* at 138. The defendant argued that even if there was evidence of an intent to commit a crime, there was no evidence of an intent to rob. The court, relying on *Kuhn*, held the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt of attempt robbery. *Id.*

¶ 32 In this case, the circumstantial evidence was sufficient to prove the Floyds had an intent to rob Wortham Jr. They approached Wortham Jr. from a concealed location after he started his motorcycle. Wortham Sr. testified to seeing them approach from around the corner of his home.

They pointed a gun or guns at Wortham Jr. Moreover, the jury could infer they had an escape plan, with defendant and McGee waiting nearby in the red car. The circumstantial evidence is sufficient to prove an intent to commit an armed robbery of Wortham Jr. Although defendant argued "the State points to no facts that prove an intent to commit a robbery," the actions employed were those usually employed in a robbery. That, combined with the fact the assailants were armed, is sufficient circumstantial evidence to prove an intent to rob. Therefore, defendant's argument his felony murder conviction cannot stand must fail.

¶ 33 (4) Bolstering of Witness Credibility

¶ 34 We next address defendant's argument the State improperly bolstered Wortham Sr.'s identification "by essentially arguing that a retired police officer's identification testimony should be given more weight that another's." Defendant also argues the State "attempted to inflame the jury by exalting the victim *** as a hero committed to serving his country and his community." Prosecutors must refrain from improper prejudicial arguments or comments. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 33. "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue [that] this court reviews *de novo*. [Citation.]" *People v. Harris*, 2017 IL App (1st) 140777, ¶ 60. "We must ask whether the jury could have reached a contrary verdict had the remarks not been made. [Citation.]" *Daniel*, 2014 IL App (1st) 121171, ¶ 33. "[A] prosecutor may not argue that a witness is more credible because of his status as a police officer." *People v. Fields*, 258 Ill. App. 3d 912, 921 (1994).

> "It is well established that prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant. [Citations.] During closing argument, the prosecutor may properly comment on the evidence presented or reasonable

> inferences drawn from that evidence *** and comment on the credibility of witnesses. [Citations.] However, it is improper for a prosecutor to argue inferences or facts not based upon the evidence in the record. [Citation.] *** In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context. [Citation.]" *People v. Anthony McGee*, 2015 IL App (1st) 130367, ¶ 56.

¶ 35 Defendant's argument he was prejudiced by the State's attempt to bolster Wortham Sr.'s testimony by characterizing him as an expert in making identifications under duress arises from the following statements during the State's closing argument:

> "[I]s it Toyious Taylor that was out there? *** You bet it was. Paris McGee and Toyious Taylor were identified by Mr. Wortham III hours after this murder, attempt armed robbery of his son. Hours.
>
> The police put their pictures in photo arrays. Do you think Mr. Wortham is mistaken? Mr. Wortham saw both these defendants' faces. He saw Toyious Taylor's face. He saw Marcus Floyd's face.
>
> Mr. Wortham is a trained observer. He has 32 years in the Chicago Police Department—
>
> MS. PARRIS [Defendant Taylor's attorney]: Objection.
>
> THE COURT: Overruled.
>
> MS. MURTAUGH [Assistant State's Attorney]: —Department. The Chicago police run in when people run out. They calm chaotic situations. That's how they're trained. You can't separate the training from the man. He's a trained observer. He saw what he saw. And he saw what he saw. *** He's within feet.

> It's right underneath a street light, illuminating. That's where the car pulled up. He's got lighting, and he's, they are forensically connected to that car."

¶ 36 Defendant argues it was improper for the State to tell the jury that a retired police officer's testimony is inherently reliable based on evidence never presented, specifically, "any training Wortham Sr. may have received during his career with the Chicago Police Department." "[W]hile a prosecutor may not make arguments or assumptions that have no basis in evidence, even improper comments or remarks are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused. [Citation.]" *Harris*, 2017 IL App (1st) 140777, ¶ 61. To determine whether the prosecutor's comments caused substantial prejudice to the defendant,

> "this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. [Citation.] Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. [Citation.] If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. [Citations.]" *Id.* ¶ 60.

¶ 37 We find the comments referring to Wortham Sr. as a police officer and trained observer did not constitute a material factor in defendant's conviction. Viewing the State's closing argument in its entirety, the reference to Wortham Sr. as a trained observer was fleeting. See *People v. Byron*, 164 Ill. 2d 279, 296 (1995) ("The prosecutor's remarks were brief, isolated, and came after the jury had already heard an abundance of evidence regarding the defendant's

guilt."). Further, the State argued other factors that went to Wortham Sr.'s credibility as an eyewitness that had nothing to do with his status as a police officer in both its closing and rebuttal argument. The State argued that Wortham's attention (unrelated to being a trained observer), the timing of his identification of defendant in the photo array and physical lineup, and the importance of identifying his son's killer all demonstrate the reliability of his identification. Notably the State gave an extensive rebuttal argument in which it addressed the strength of Wortham Sr.'s identification without returning to its earlier reference to him as a trained observer. The State also argued that the identification was corroborated by physical evidence; and, as noted above, the jury was not required to accept defendant's innocent explanation for the physical evidence. *Supra* ¶ 23. We do not believe the jury could have reached a contrary verdict had the remarks not been made. Accordingly, defendant's argument fails.

¶ 38 Next, defendant argues "the State's repeated attempts to extol the decedent, police officer Thomas Wortham, Jr., and focus the jury's attention on the impact his death had on his family, his fellow police officers, his fellow reservists, and the community was prejudicial." The State's closing argument included the following statements:

> "Ladies and Gentlemen, Thomas Wortham IV was a Chicago police officer. Toyious Taylor, Paris McGee, and his partners in crime, Brian Floyd and Marcus Floyd took Officer Wortham away. Together they attempted to rob Officer Wortham of that motorcycle at gunpoint in furtherance of that attempt armed robbery. Officer Wortham was killed. ***
>
> But they're all responsible for it. Toyious Taylor took Thomas Wortham IV away from his family. Toyious Taylor took Officer Wortham away from his fellow Chicago police officers. Toyious Taylor took Officer Wortham away from

his fellow reservists. Toyious Taylor took Officer Wortham away from his community.

* * *

Officer Wortham is never coming back. You cannot give Officer Wortham his life back.

But what you can do is you can give Thomas Wortham IV justice. And justice would be in the form of your verdict, Ladies and Gentlemen.

* * *

The form of your verdict, Ladies and Gentlemen, will give justice. Justice to Thomas Wortham IV."

¶ 39 In support of his argument, defendant cites *People v. Blue*, 189 Ill. 2d 99 (2000), in which our supreme court found that "[p]roof that the victim of a crime is survived by a family is irrelevant to the guilt or innocence of a criminal defendant. [Citation.] It can only serve to prejudice a defendant in the eyes of the jury. [Citation.] Therefore, the court continued, evidence or argument dwelling on the victim's family, or relating defendant's punishment to the existence of a family, is 'inflammatory and improper' and constitutes reversible error." *Blue*, 189 Ill. 2d at 129. The court also recognized, however, that "incidental evidence of a victim's family is not only permissible, but in most trials, unavoidable, since '[c]ommon sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members.' [Citation.]" *Id.* at 131. "Whether the remarks and/or evidence constitute error depends, in each case, on the nature and extent of the statements and whether they are probative of defendant's guilt." *Id.* at 132. Viewed in context, we find the nature and extent of the prosecutor's remarks did not deny defendant a fair trial. Wortham Jr.'s parents were the State's primary witnesses, and information about Wortham Jr.'s status as a police officer was relevant

and material to the issues in the case. Therefore, that the jury would hear that Wortham Jr. was a police officer and left behind a family was unavoidable. The prosecutor did not dwell on Wortham Jr.'s military service or service to the Chicago Police Department, or on his family's loss. The jury was instructed that the attorney's arguments were not evidence. Given the nature of the complained-of comments in the context of the case, we hold any error resulting from the State's improper comments was cured. See *People v. Peeples*, 155 Ill. 2d 422, 482 (1993).

¶ 40 (5) Unduly Prejudicial Evidence

¶ 41 Next, defendant argues the trial court committed reversible error when it allowed the State to admit recordings of Mrs. Wortham's call to 9-1-1 and when it allowed Wortham Sr. to testify that when he went to Wortham Jr. lying in the street Wortham Jr. said "It hurts," to which Wortham Sr. replied it would be alright. Defendant argues this evidence only served to inflame the jury and the cumulative error in admitting the evidence warrants a new trial because the evidence was "far from overwhelming [and] there is a reasonable probability that absent the erroneous admission of the 9-1-1 calls and Wortham Jr.'s 'last words,' the outcome *** would have been different." Defendant concedes the 9-1-1 call would be admissible under *People v. Williams*, 181 Ill. 2d 297, 315 (1998) (holding trial court did not abuse its discretion in allowing jury to hear 9-1-1 tape because "evidence may properly be admitted even if cumulative to oral testimony covering the same issue"). Defendant argues the 9-1-1 call was prejudicial because "any reasonable person would sympathize with Mrs. Wortham" and the prejudicial effect of the calls outweighed its probative value. Defendant also argues Wortham Jr.'s "last words" were not relevant to any fact of consequence, and were highly prejudicial because they would cast a negative light on defendant for reasons having nothing to do with the case. See *People v. Lynn*, 388 Ill. App. 3d 272, 278 (2009) (defining the prejudicial effect of evidence, including to decide on an improper basis such as sympathy or hatred).

¶ 42 "Admissibility of evidence is within the discretion of the trial court, and its ruling will not be reversed unless there has been an abuse of discretion. [Citations.]" *People v. Ochoa*, 2017 IL App (1st) 140204, ¶ 39. "An evidentiary ruling constitutes an abuse of discretion when it is arbitrary, fanciful, or unreasonable." *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 27. It is within the discretion of the trial court to decide whether evidence is relevant and its decision will not be reversed absent a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 73. "Thus, we will not overturn a court's decision to admit evidence unless the decision is 'arbitrary, fanciful or unreasonable.' [Citations.]" *Id.*

¶ 43 The trial court did not abuse its discretion in admitting the 9-1-1 calls. The trial court found the 9-1-1 evidence was relevant because it "shows the circumstances with respect to what happened. It tends to confirm the testimony of [Wortham Sr.]" The court's ruling is not arbitrary, fanciful, or unreasonable. Any prejudicial effect of admitting the 9-1-1 calls did not substantially outweigh any probative value. *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010) ("The question is not whether relevant evidence is more prejudicial than probative; instead, relevant evidence is inadmissible only if the prejudicial effect of admitting that evidence *substantially outweighs* any probative value." (Emphasis in original.)). First, the calls pertained to the events leading to the charges against defendant. Therefore the evidence does not cast a negative light "for reasons that have nothing to do with the case on trial." See *id.* Second, the admission of the evidence did not create "an *undue* tendency to suggest decision on an improper basis *** such as sympathy, hatred, contempt, or horror. [Citations.]" (Emphasis added and internal quotation marks omitted.) *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). In this case, Wortham Sr. and Mrs. Wortham both testified about the loss of their son, and the jury received

graphic evidence, including photographs, about his death. We do not believe Mrs. Wortham's demeanor on the 9-1-1 call could itself sway the jury to decide the case based on sympathy.[1]

¶ 44 Defendant litigated a motion to exclude Wortham Jr.'s last words before the trial court. In denying defendant's motion, the trial court found the evidence was relevant to the cause of death and to show that Wortham Jr. was alive when the vehicle struck him. The court also found, in part, that "I frankly see little, if any, improper prejudicial effect. So it's almost like it's not—the probative value is not outweighed by any prejudicial effect. I don't see any prejudicial effect. It is a sad circumstance that may tug on the heartstrings of the jurors, but it may well be that the facts of the case are such that they will tug on the heartstrings of the jurors. That's just the nature of the case." We hold that any prejudicial effect from the admission of Wortham Jr.'s last words did not substantially outweigh the probative value of the evidence. As the trial court found, the painful injuries Wortham Jr. suffered are part of the nature of this case, thus the evidence does not suggest a decision on a basis that "has nothing to do with the case" and does not create "an *undue* tendency to suggest decision on an improper basis."

¶ 45 Moreover, any error in the admission of Wortham Jr.'s last words was harmless beyond a reasonable doubt. "Error in the admission of evidence is harmless when the competent evidence in the record establishes a defendant's guilt beyond a reasonable doubt and it can be concluded that a retrial without the erroneous evidence would produce the same result. [Citation.]" (Internal quotation marks omitted.) *People v. Campbell*, 2015 IL App (1st) 131196, ¶ 28.

---

[1] The State reported that the compact disk containing the recording of the 9-1-1 calls was cracked when it received it from defendant and that the State would attempt to find another recording. We did not locate any such replacement disk in the record. However we accept, for purposes of his argument, defendant's description of the recording and we do not feel that we need to listen to the recording ourselves to render a decision.

> "When determining whether an error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. [Citations.]" (Internal quotation marks omitted.) *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 26.

The other properly admitted evidence overwhelmingly supports the conviction. Despite defendant's argument to the contrary, as stated above, we have found that Wortham Sr.'s identification of defendant was reliable and sufficient to sustain his conviction and that physical evidence corroborated his testimony. Although defendant argues the physical evidence is "not particularly inculpatory," it, combined with the identification, can lead to a reasonable inference of defendant's involvement in the crime, and "the reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The jury heard that Wortham Jr. was shot and dragged by a car before hearing that he told his father "It hurts." In light of the totality of the evidence, we cannot conclude that a retrial without the last words, or the 9-1-1 calls, would produce a different result.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 48 Affirmed.