2017 IL App (2d) 150394-U
No. 2-15-0394
Order filed August 22, 2017

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1553
LUCCIEN HURT,	)	Honorable Mark L. Levitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Any error in the trial court's decision to exclude expert-witness testimony concerning eyewitness identifications was harmless. Further, the trial court conducted an adequate inquiry into juror bias and did not abuse its discretion in finding that the juror remained impartial. Affirmed.

¶ 2 In the direct appeal of his robbery conviction (720 ILCS 5/18-1(a) (West 2012)), defendant, Luccien Hurt, raises two issues. The first is whether the trial court erred in excluding expert-witness testimony concerning the possible fallibility of eyewitness identifications. The second issue is whether the trial court failed to conduct an adequate inquiry into potential juror

bias and erred in failing to excuse the juror, when both defendant and the State agreed that the juror should be dismissed. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 20, 2012, defendant and his co-defendants, Parnell Squire and Antoine Hotchkiss, were charged with armed robbery and aggravated robbery. The charges stemmed from an incident on May 30, 2012, where they allegedly took property, while armed with a firearm, from Brian Sugarman while he was getting into his vehicle outside of his store in Highland Park.

¶ 5 A. Expert Testimony

¶ 6 Defendant's theory was that, although he was arrested with Squire and Hotchkiss after their vehicle was pulled over no more than 10 minutes after the alleged offense, Sugarman and eyewitness Tony Savino, owner of the pizza place near Sugarman's business, had misidentified him in a "show up" and line up as one of the two people who physically approached and robbed Sugarman. Rather, defendant asserted, the two perpetrators were Squire and Hotchkiss. Defendant noted that all three co-defendants were African-American, and that he and Hotchkiss were approximately the same height. Further, defendant argued, it was Hotchkiss, not defendant, who was identified as being outside the pizza restaurant moments before the robbery was committed by two men. According to defendant, because no fingerprint or DNA evidence implicated defendant, the eyewitness identification was crucial to the case. As such, defendant moved *in limine* to admit expert testimony on the reliability of eyewitness identifications. Specifically, Dr. Shari Berkowitz, an expert in forensic psychology, would testify as to how eyewitnesses acquire, retain, retrieve, and remember information, as well as to how various factors (such as cross-racial identification, stress, post-event information, and the "forgetting

curve") affect memory, how honest people can be mistaken about their identifications, and how police line-up procedures can affect the retrieval of memory.

¶ 7 The State, in turn, moved *in limine* to bar the testimony. It noted that, within eight minutes of the robbery, the three defendants were apprehended in a vehicle matching the description of the get-away car, only two miles from the scene. Sugarman's missing keys were found in the direction of travel of the defendants' vehicle, and witnesses identified the three defendants within 30 minutes of the robbery. According to the State, all three co-defendants made statements to the police acknowledging their presence outside of Savino's pizza place, where the robbery occurred. The State asserted that the only practical challenge to the eyewitness's identifications would be that either defendant or Squire were mistaken for Hotchkiss and, therefore, that, under such circumstances, the identification issues were well within the purview of the jury and expert testimony on eyewitness identification would have held little value.

¶ 8 On December 19, 2014, after a hearing, the trial court granted the State's motion to bar the expert evidence. Before announcing its ruling, the court stated that it had reviewed the court file, exhibits, articles and studies, its own notes on Dr. Berkowitz's testimony, had carefully considered the arguments and that it had "done quite a bit of research on my own regarding this issue." The court stated that it had carefully considered the necessity and relevance of the expert testimony in light of the particular facts of the case, as well as its broad discretion in ensuring that misleading or confusing testimony not be admitted. After balancing the probative value of the proposed testimony against the prejudicial effect, it determined that the expert testimony would not be admitted. It reviewed that testimony and noted that:

> "In addition to the cases that the various parties have submitted and the arguments advanced, I looked specifically at cases that discuss these references, *People v. Aguillar*, *People v. Allen*, *People v. Lerma*, obviously advanced by both sides, a discussion in *In re Keith C.*, and various other cases that have citations that deal with this issue, such as *People v. Taylor*, *People v. Starks*, *People v. Ross*, *People v. Rodriguez*, *[People v.] Donahue*, *People v. McGee* in particular, *People v. Dent*, and a number of other cases that merely mention this type of testimony."

¶ 9 The court further specified that it had the benefit of having heard a great deal of testimony about the facts of the incident at issue and the expert testimony's relevance to his particular case, "and I should point out that I don't think that this type of evidence should never be admitted, but I think it has to be very carefully explored as the cases indicate with regards to facts of each particular case." The court determined that the areas that defendant wished to explore "have been[,] can be[,] and have been challenged by defense motions in the past," and that it expected that defendant would vigorously challenge the accuracy of the eyewitness identifications, even without Dr. Berkowitz's testimony. Finally:

> "The proposed areas of expert testimony are in my view not at all beyond the ken of the average juror. Certainly any testimony in this case, I believe, would unnecessarily invade what I believe is the proper province of the jury. I believe that admission of the type of evidence that has been proffered here has a very limited value given the prejudicial effect that this evidence may pose, and again this is not to say that there is never in my view an appropriate case for the type of evidence, quite the contrary.
>
> I find that it was the particular facts of these proceedings, particular facts concerning the witnesses and the type of testimony that is proffered by each of them that

renders the opinion by Dr. Berkowitz in this case not appropriate to be heard by the fact finder, and for those reasons the State's motion *in limine* to bar Dr. Berkowitz is granted in its entirety."

¶ 10 B. Juror Bias

¶ 11 On January 5, 2015, trial commenced with jury selection. A jury was selected and asked to return the next day. The next morning, the court called the case, noting that defendant was not yet present. The trial judge then informed the attorneys that one of the deputies had approached and handed him a note. The note said:

"Juror 88 overheard Juror 278 comment that she was afraid of the defendant because he was staring at her. Further, that Juror 278 may have said that – and there is a character that – she feared the defendant may seek her out to do harm. Apparently according to Juror 88, a prior juror was dismissed for similar fears." [1]

¶ 12 The court explained that the deputy had heard this information and wrote it down. The court stated its intent to question the two jurors, but noted, "Juror 88 is a little difficult to understand because of a thick foreign accent; factually many of the statements are not accurate at all."[2] The court proposed that defense counsel inform defendant of the situation, discuss it with him, and then propose any questions that he wanted the court to ask the jurors. At that time, the

[1] The note, apparently written by the deputy, is not contained in the record, although the court represented that it read it aloud verbatim. Thus, the quoted language is based on the report of proceedings.

[2] During jury selection, Juror 88 explained that he lives in Libertyville with his parents. Further, he is a sophomore student at the University of Illinois studying aerospace engineering. He has a cousin who is a barrister in London.

court would rule on the questions. Defense counsel stated that, when defendant arrived, he would consult him. A short recess was taken.

¶ 13 The case returned to the record, but there is no indication of whether defendant was, by that time, present in court. Defense counsel did, however, have questions that he proposed be asked. Specifically, to Juror 88 (the reporting juror): (1) "What specifically did you hear Juror 278 say?"; (2) "Where was [Juror] 278 when she said this?"; (3) "Where were you when she said this?"; (4) "Who was [Juror] 278 talking to?"; (5) "Who was within earshot of [Juror] 278?"; (6) "Was there any facial reaction from anyone who may have overheard?"; and (7) "Was there any verbal reaction from anyone who may have overheard?" Defense counsel proposed the following questions be asked of Juror 278 (the allegedly-afraid juror): (1) "Have you reached any conclusions about [defendant]?" (2) "Did you state that you were afraid of [defendant], whether it was to yourself or to others?"; (3) Who did you make this statement to[][,] [i]f anyone?"; and (4) "if the statement was made to someone[,] did that person have any reaction?"

¶ 14 The State informed the court that it agreed with "pretty much all of the questions. [Defense counsel] actually repeated a number of the questions that [the assistant State's Attorney] had." In addition, the State asked the court to inquire about the juror's tone of voice, was the statement made more than once, and whether anyone was in earshot. The State further requested more information about the note's representation that another juror was dismissed for the same reasons. "What does Juror 278 mean by that? Was this something that somebody said to Juror 88, or was this something that Juror 88 said to somebody else? Are they able to be fair and impartial? It sounds like they are drawing conclusions in regards to other jurors without hearing any evidence on this case." Defense counsel agreed that it was unclear from the note, as

read by the court, whether the statement (about other jurors being dismissed for the same reasons) was one uttered by Juror 278 or Juror 88.

¶ 15 The court declined to ask any of the proposed questions. It explained that the standard at issue was whether the jurors had such fixed opinions that they could not judge impartially defendant's guilt, and that its role was to prevent any possible occurrences that might prejudice defendant. The court stated that it would not needlessly "unsettle" the jurors by placing them in a position to be "quizzed," noting that doing so "unduly highlights what I consider to be a rather vague and ambiguous note." The court did not believe that the issue merited a *voir dire* of all jurors, but stated that it might reconsider that position, as well as possibly seating the alternates in their stead, depending on what the jurors answered when questioned. Further:

> "COURT: I will say that my observations of Juror 88 [reporting juror] during the entire *voir dire* was that he was moving around in the jury box; he was making attempts to talk to me when there was a recess and, in fact, I believe this is why I got this note because I declined to speak to a juror off the record. That said[,] parties can be seated at the counsel table.
>
> DEFENSE COUNSEL: Can I say something?
>
> COURT: Of course.
>
> DEFENSE COUNSEL: I believe that your instructions at the beginning of this case were that if any one attempts to contact the jurors or anything inappropriate happens to tell you or your deputy. My observations of Juror 88, was that he approached you, and I correctly agree that he was then directed to your deputy. This is precisely what Juror 88 is supposed to do. I very respectfully disagree with the Court's observations of Juror 88.

COURT: [Counsel], do you think Juror 88 was correct, do you think the representation made in this note accurately conveys what happened in this courtroom at all? Do you recall any juror that was excused for having a fear of [defendant] yesterday? Was there one juror that was excused for that reason?

DEFENSE COUNSEL: He may have been repeating what Juror 278 said, it is unclear to me.

COURT: Okay I appreciate your position, [counsel], thank you. Have a seat."

¶ 16 The court then brought in Juror 88. The court asked the juror whether it would be hard for him to be a fair and impartial juror, and whether he had formed any opinions about defendant, defense counsel, or either of the assistant State's Attorneys. Juror 88 answered "no." The court asked whether Juror 88 could be fair, listen to all of the evidence as it was brought out at trial, and make a decision based only on the evidence, and the juror answered, "yes." The following exchange then ensued:

"COURT: You may have indicated that you heard another juror having some discussions, was that with another juror?

JUROR NO. 88: I believe so, yes.

COURT: Which other juror was that, do you know?

JUROR NO. 88: No.

COURT: Was it something that happened during the recess?

JUROR NO. 88: Yes.

COURT: In the jury box?

JUROR NO. 88: In the jury box, during a recess.

COURT: How many jurors were involved in that?

JUROR NO. 88: It was one lady making comments. She made comment, the way she was saying she had formed an opinion already. I just told her I don't think that is fair.

COURT: That was that one juror?

JUROR NO. 88: Yes.

COURT: Did you hear anybody else respond to her in any way?

JUROR NO. 88: No.

COURT: Any problems that you have about anything that we discussed so far?

JUROR NO. 88: No."

Juror 88 was excused to return to the jury room.

¶ 17 Next, the court called out Juror 278. First, the court apologized for the prior day having been a long one and noted that one of the concerns was making sure that all of the selected jurors would be completely fair and impartial. The court asked Juror 278:

"COURT: I want to make sure, do you have any type of concerns that you can be a fair juror and [an] impartial juror to either the People of the State or to [defendant]?

JUROR NO. 278: I can be fair, yes.

COURT: Have you formed any type of opinions about any type of *evidence*?

JUROR NO. 278: No.

COURT: And in – during the course of the jury selection, did you make and, if you did, it is okay to tell me, was there *any type of comment that you may have made concerning [defendant]*, [defense counsel], [assistant State's Attorney Humke], [assistant State's Attorney DeRue], anything at all concerning any of the *evidence* in this case?

JUROR NO. 278: No, not at all.

COURT: Any type of concerns you have at all about serving as a juror in this case?

JUROR NO. 278: None." (Emphases added.)

Juror 278 was excused to return to the jury room.

¶ 18 Defense counsel immediately informed the court that he believed that additional questioning of Juror 278 was necessary. The court responded that it would not have a mini-trial for Juror 278 and that it had asked her questions concerning the fundamental issue, *i.e.*, whether or not she could be a fair and impartial juror. Defense counsel disagreed:

"COUNSEL: I propose that you ask her whether she said [ ] what the other juror said [that] she said. The Court in its questioning, some of which I agree with[,] only asked whether or not the juror made any conclusions regarding the evidence. Almost all of the Court's questions ended with the phrase 'the evidence.' The question is did she state to any other juror or within the earshot of other jurors that she was afraid of [defendant]? Did she state to other jurors or within the earshot of other jurors that she saw [defendant] staring at her? I think the staring comment is a little less concerning[,] but the idea that she would be afraid of the defendant who is presumed innocent is very concerning so I think additional questions need to be asked."

¶ 19 The court re-called Juror 278 to the courtroom. Upon her return, the court asked her, "did you *express out loud* to anyone that you had some *concerns about anything* of or pertaining to anything about this case?" (Emphases added.) She replied, "No, not at all."

¶ 20 Thereafter, defense counsel moved to exclude Juror 278. The State responded that it moved to exclude Juror 88. The court asked the State whether it wished to exclude *both* jurors. Defense counsel interjected and asked the State whether it agreed that Juror 278 should be

excluded. The State responded that it had "concerns about both of these jurors working together in regards to what transpired with this note; both jurors being brought here in open court. *It is the State's position that both jurors should be excluded at this point.*" (Emphasis added.)

¶ 21 Defense counsel disagreed that Juror 88 should be excused for reporting something that he heard and for doing exactly what he was supposed to do. Counsel proposed seating one alternate. The court noted that both jurors said that they could be fair, and that Juror 278 denied making any type of comment about anything. It questioned any prejudice to defendant, given that both jurors came into court and stated, independently, that they had not formed any opinions about the case: "I asked them about you, I asked them about the State, and I asked them about [defendant], specifically, and each one of them said they had formed no opinion, they were able to fair and impartial, and they were able to proceed and it seems to me that the jurors at least in open court under oath as I expect them to do answered my questions and I would say that there is a certain degree of influence that the Court has in questioning prospective jurors, and so I am not like you, I am not willing to assume that they lied to me."

¶ 22 Defense counsel explained that he was not assuming that the jurors had lied, but that the environment of the courtroom itself, including the presence of four deputies, could be potentially coercive. The court replied:

> "COURT: The cases talk about this at length, I view quizzing jurors as a potentially very unsettling process. I reluctantly did it out of abundance of caution, I wanted the record to be clear. My role is to prevent any prejudicial occurrences where possible and if there is a potential for some prejudice to occur to [defendant], I want to make sure that it is explored. I explored it. I don't find that this is a situation that is akin

to some extraneous material being brought into the jury room. I don't see this as where there has been some undue influence being placed on some or all of the jurors.

I have to take the jurors at their word under oath. I don't find given these circumstances that there was anything necessarily, actually anything at all, in what they said here in open court which gives me the slightest bit of pause. *** Both of your motions are denied."

¶ 23 C. Trial

¶ 24 At trial, evidence was presented that, on May 30, 2012, at around 9 p.m., Sugarman went to his shop in Highland Park, which is next door to Piero's Pizza. As he left the store and walked to his car, a man approached and asked if there was another pizza place nearby, as Piero's was closed. Sugarman told him "no," and went to enter his car. After Sugarman opened his car door and sat down, the same man who had approached him pulled open the door and said, "Give me your wallet." Sugarman later identified defendant as this man. In addition, defendant asked for Sugarman's phone and anything else in his pockets, and Sugarman refused. Defendant put his hand on Sugarman's neck and started going through Sugarman's pockets. A second man also tried to get into Sugarman's pockets, but then walked around the car and took a camera bag from the floor on the passenger side of the vehicle. The second man then returned to the driver's side of the vehicle and tried to take Sugarman's wallet.

¶ 25 Sugarman started honking his car horn during the attack. The men took the keys from the ignition and defendant said, "Give me your wallet. It's not worth getting shot over." As defendant said that, the second man reached into a bag, and Sugarman heard a noise that sounded like a gun "click." Sugarman agreed that he never saw a third person involved in the robbery because he (Sugarman) was inside of his car the entire time.

¶ 26 Savino, the manager of Piero's, came outside when he heard the car horn honking. Sugarman was yelling at Savino that the men were trying to kill him. Savino slammed the car door into defendant, who dropped the items he had taken and ran away. According to Savino, he watched the two men run towards a silver car, "*the car started moving* and they jumped in the car and they took off." (Emphasis added.) Savino confirmed that the car started moving forward "a little bit" *before* the two assailants go into it. He noticed that one of the assailants climbed in the driver's back door, behind the driver, and the other entered through the front passenger door. Savino did not observe a third person, other than a shadow. However, that shadow, "plus the car moving, I assumed there was a third person." He reiterated at trial that there had to be a third person "because the car moved before they jumped in" and noted that "the car is not going to move by itself." A third witness, Brian MacFarlane, a Piero's employee, called 911.

¶ 27 As previously mentioned, a silver car was stopped shortly after the police were called. The co-defendants were in the car; defendant was sitting in the back seat and Squire was driving. At a show-up at a gas station that night, Sugarman identified defendant and Squire as the robbers. At a line-up that night in the police station, Savino also identified defendant and Squire as the robbers. MacFarlane identified only Hotchkiss as a person he had seen outside of the pizza restaurant prior to the attack. Again, defendant's theory at trial was that the eyewitnesses misidentified him as one of the two robbers and that, in fact, those two assailants were his co-defendants. Most specifically, defendant challenged the validity of the identification procedures and argued that he had been mistaken for Hotchkiss, based in part on MacFarlane's testimony that he saw Hotchkiss outside shortly before the robbery and based upon what the co-defendants were wearing that evening. The jury also learned that, during the show-up and line-up identification procedures, the police did not comply with certain internal procedures.

¶ 28 One of the arresting officers testified that she had an opportunity to speak with defendant at the booking facility and "he said he had been inside the car with Mr. Hotchkiss the entire time of the event in question, but that perhaps Parnell Squire had gotten involved in some sort of altercation." The trial court noted that the evidence established that there were two people involved in the incident outside of the vehicle, with a third person in the vehicle. It further noted that Hotchkiss was found in the front passenger seat with a gun located in the glove compartment in front of him. Thus, the question concerning the appropriateness of providing the jury with an accountability instruction arose. Defense counsel objected that the State had never pursued a theory other than that defendant was one of the two robbers and that it should not be permitted to switch tactics mid-trial and argue that all three codefendants were equally responsible, with defendant acting, for example, as a get-away driver. Ultimately, the court allowed the instruction, over defendant's objection.

¶ 29 The jury was instructed that it was charged with determining whether defendant, or one for whose conduct he was legally responsible, was guilty of armed robbery or robbery. The State further argued accountability in closing, emphasizing that all three co-defendants were responsible.

¶ 30 The jury found defendant not guilty of armed robbery. However, it found him guilty of robbery. Defendant's posttrial motions were denied. The court sentenced defendant to 10 years' imprisonment, to be served at 50%, with credit for time served in custody. Defendant appeals.

¶ 31 II. ANALYSIS

¶ 32 A. Expert Testimony

¶ 33 Defendant argues first that the trial court abused its discretion in excluding expert testimony that addressed misconceptions commonly involved in evaluating identification

testimony. He argues that his conviction stems from factors underlying those misconceptions because the jury lacked the necessary tools to evaluate the eyewitnesses' ability to perceive and identify the robbers. Defendant further argues that the trial court improperly relied upon its own personal perception, which was contradicted by the expert witness's report, where it did its own research and found that the areas upon which the witness would opine could be, and have been, challenged by defense motions "in the past" and could be vigorously challenged through cross-examination. Defendant asserts that, although the court commented that it did its own research, it never identified that research.[3] Further, contrary to the court's perception, defendant argues, the expert testified that the issues she would address were not within the knowledge of the average juror.

[3] We note that, although defendant repeatedly asserts that the trial court made a decision based upon its own opinion and unidentified research, we quoted at length above the trial court's ruling, which included numerous case citations. Although not permitted to conduct private investigations that produce evidence not presented by the parties, the court was free to take judicial notice of published judicial decisions. See, *e.g.*, *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977) (private investigations that produce evidence from outside the hearing improper); *People v. Henderson*, 171 Ill. 2d 124, 134 (1996) (judicial notice of readily verifiable documents, such as published decisions, permitted). Thus, although defendant speculates that trial court might have conducted additional, unidentified personal research, unless it is affirmatively rebutted by the record, which, here, it is not, we presume the court knows the law. See *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41.

¶ 34 In its response to defendant's argument on appeal, the State asserts that there was no error but, if there was error, it was harmless because the jury was instructed that defendant could be convicted on an accountability theory. We agree that, even if the exclusion of the expert witness testimony constituted error, the error was harmless here.

¶ 35 When a court makes an evidentiary error (again, here, we presume error for the sake of argument), such an error will not be prejudicial if it is harmless beyond a reasonable doubt. See *People v. Boston*, 2016 IL App (1st) 133497, ¶ 57. There are three approaches to determining whether an error is harmless: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in the case overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence would have been duplicative or cumulative. *People v. Lerma*, 2016 IL 118496, ¶ 33.

¶ 36 Here, the error was harmless because it did not contribute to defendant's conviction. Defendant was identified by Sugarman and Savino as one of the two robbers that appeared at Sugarman's vehicle. Defense counsel thoroughly attacked the credibility of those identifications. However, evidence was presented that a third person was inside the get-away car, driving it away when the two robbers jumped inside. Although defendant argued below that it was improper for the State to shift theories mid-trial, the propriety of the court's decision to instruct the jury on accountability is not challenged on appeal. Thus, the evidence presented allowed for the jury to accept defendant's argument that he was misidentified as one of the two robbers at Sugarman's car and *still* convict him under an accountability theory as the third person in the get-away car. Interestingly, defendant was *not* convicted of armed robbery, only robbery, which might suggest that the jury either credited that defendant was the robber outside the vehicle who did not possess the gun, as testified to by Sugarman, *or* it believed defendant's mis-identification theory but still

found him accountable as the third person in the vehicle. As such, under the circumstances of this case, if the jury believed that all three codefendants were legally responsible for the robbery, the exclusion of expert witness testimony on the fallibility of eyewitness identifications was harmless.

¶ 37 We note that, in his reply brief, defendant does not directly respond to the State's assertion of harmless error based on accountability. He does argue that mere presence at the scene is not enough to establish that he participated in the offense or was accountable for the actions of others. However, as described above, the jury was presented with more evidence than simply defendant's presence, including the testimony that the car was moving before the two robbers entered it. Further, one of the officers testified that defendant *admitted* to being present at the scene, allegedly in the car with Hotchkiss, while conceding that Squire was the person who might have caused an altercation. This testimony was not contradicted. That statement both put defendant at the scene of the crime and undermined his credibility, as his theory at trial was that Hotchkiss was one of the two robbers. We again note that the propriety of the accountability instruction is not challenged on appeal, nor is the sufficiency of the evidence to sustain an accountability conviction.

¶ 38 In sum, as the jury could have convicted defendant based on its receipt of the accountability instruction, which is not challenged on appeal, any error here in excluding the expert-witness testimony concerning eyewitness identification did not contribute to defendant's conviction and was harmless.

¶ 39 B. Juror Bias

¶ 40 Defendant argues next that the trial court failed to conduct an adequate inquiry into potential juror bias and erred in failing to excuse Juror 278, particularly where both defendant

and the State agreed that the juror should be dismissed. Defendant asserts that the court did not adequately question either Juror 278 or Juror 88 because it never directly asked whether Juror 278 said that she feared defendant; instead, the court asked only ambiguous questions. Further, defendant argues that the court's inquiry failed because it never questioned any other jurors that might have overheard Juror 278's comments, particularly the one to whom Juror 278 was allegedly speaking. "More bothersome," defendant argues, is that the court denied the requests of both the defense and the State to excuse at least Juror 278. "At least one of the jurors must have been untruthful in response to the court's questions. That, alone, should have raised alarms for the court as to the ability to properly fulfill the role of juror." As the two jurors, under oath, contradicted each other, and where the court never determined whether the comments were made in other jurors' presence, defendant argues that the court abused its discretion.

¶ 41 The due process clause of the fourteenth amendment entitles a state criminal defendant to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726 (1992). The standard for juror impartiality is whether the juror had such a fixed opinion such that he or she could not judge impartially the defendant's guilt. *People v. Runge*, 234 Ill. 2d 68, 103 (2009). Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The trial judge, if he or she becomes aware of a potential bias, must "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." *Remner v. United States*, 347 U.S. 227, 230 (1954). (The duty of inquiry is "equally engaged" regardless of whether the prosecution is in a federal or state tribunal. *Oswald v. Bertrand*, 374 F.3d 475, 478 (2004)). When there is an indication of juror bias, the question becomes whether the judge's inquiry was

adequate. "[A]dequacy is a function of the probability of bias: the greater that probability, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled." *Oswald*, 374 F.3d at 480. The investigation must be "reasonably calculated to resolve the doubts raised about the juror's impartiality *** To repeat, the greater the doubts, the more probing the inquiry that is required." *Id.* at 481. A defendant may be deprived of a fair trial if even one juror's "peace of mind" was affected. See *United States v. Blitch*, 622 F.3d 658, 665 (2010).

¶ 42 Nevertheless, not all allegations of juror bias even require an individualized *voir dire* (see *Blitch*, 622 F.3d at 665), nor is inquiry required when the trial judge has observed the jurors carefully and concludes that the likelihood of influence is too slight to warrant examination (*Runge*, 234 Ill. 2d at 104). The question of whether a juror has been affected to an extent such that he or she cannot be fair and impartial involves a determination that "must rest in sound judicial discretion." *Runge*, 234 Ill. 2d at 104. The trial court, in exercising its "investigatory discretion," must assess carefully the particular circumstances before it to determine whether questioning jurors might unsettle the jury and compound the problem by drawing attention to it, and we recognize that, in fact, "sometimes less is more." *Id.* Further:

> "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of other factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling v. United States*, 561U.S. 358, 386 (2010).

¶ 43 In sum, each case must be determined on its own facts and circumstances, and a trial court has wide discretion in deciding how to handle and respond to allegations of juror bias that arise during trial. *Runge*, 234 Ill. 2d at 105. A court's decision is an abuse of discretion only

where it is arbitrary, fanciful, or where no reasonable person would take the same view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). After the trial judge has made an appropriate inquiry, "significant deference must be accorded the judgment of the trial judge on the question of bias because he or she can appraise the jurors face to face [citation] something a court of review obviously cannot do." *Id.*

¶ 44 Here, we cannot find that the court failed to conduct an adequate inquiry or abused its wide discretion in handling the situation. Certainly, more could have been done. Indeed, despite agreement by defendant and the State that certain questions should be asked, the court declined to ask them. The trial judge never directly asked Juror 278 whether she said that she was afraid of defendant. The trial judge was concerned that the note was factually inaccurate to the extent it represented that other jurors had been dismissed due to similar fears. Both sides agreed that the reference was confusing. However, the judge never asked clarification questions about who made that comment and, further, what he or she might have meant by it. Although it appears that the deputy is the person who wrote the note, based on what was told to him or her or what she or he observed, the deputy was not questioned to clarify its contents. Based on their conflicting testimony in response to the questioning, one of the jurors was necessarily either simply confused or lying to the court, yet no real effort was made to resolve their inconsistencies.

¶ 45 Still, the fact that this case is close and that more could have been done does not mean that the inquiry was constitutionally inadequate. Indeed, "[t]he whole point of discretion is that there is [a] range of options open, which means more than one choice is permissible. The broader the discretion, the greater the range of choice and the less room for reversal." *Id.* (quoting *United Stated v. Dominguez*, 226 F.3d 1235, 1247 (11th Cir. 2000)). Again, the adequacy of the inquiry depends on the probability of bias and the level of doubt that the juror

can be fair and impartial. *Oswald*, 374 F.3d at 480. Here, the court did not ignore the "rather vague" note or the possibility of bias; rather, it chose to conduct an inquiry and individually question the jurors. The court's questions, while not as direct or specific as defendant would have liked, did address the heart of the issue, *i.e.*, whether Juror 278 believed that she could give defendant a fair trial based solely on the evidence presented in the case. The judge reiterated the importance of being completely fair and impartial. Although it was buried in a longer question, the court asked Juror 278 whether she had made *any comments* about *defendant*. Moreover, in response to defendant's concerns, the court re-called Juror 278 and asked whether she had expressed "*out loud*" any concerns about "*anything*" pertaining to the case. In assessing the credibility of Juror 278's responses to his questions, the trial judge necessarily relied on the type of nuances described above in *Skilling*, such as demeanor, body language, inflection, etc., which we cannot do ourselves based on the record. What we do know based on the record is that the trial judge did have a slightly-less-than-glowing impression of Juror 88, based upon that juror's body language and actions. Again, whether that assessment was fair or whether we would have shared it is something we simply cannot ascertain and *should* not ascertain, as deference in these matters must be given to the trial judge. See *Skilling*, 561U.S. at 386. We think it worth mentioning that, prior to its inquiry of the jurors, the court expressed that it was open to a more fulsome inquiry of the entire jury and/or seating alternates, depending upon the jurors' answers to questions. However, after hearing those answers and necessarily assessing the jurors' credibility, the court concluded, in its discretion, that those actions were not required because the probability of bias was low. (Although defendant complains that the court did not question the remaining jurors, we note that he did not ever request that relief below).

¶ 46 Defendant's point that numerous questions that the judge asked ended with the phrase "the evidence" or "the case," rather than pointedly asking about fears of defendant himself, is well-taken. However, it is likely that the judge, in its discretion, chose to couch the questions softly so as to avoid making the juror feel intimidated or interrogated. As defense counsel noted, there were four deputies in the courtroom, and the juror was being questioned by a judge in front of at least three attorneys and possibly defendant. The judge expressed that he was concerned about unsettling the jurors and he was clearly trying to walk the fine line between conducting an adequate inquiry and compounding the problem. Again, the scope of inquiry depends on the facts and circumstances of each case, and the court's decision here to walk the line as it did was not unreasonable.

¶ 47 We note that we find slightly disingenuous the State's attempt to distance itself from its agreement below that Juror 278 should be excused. The State represented that *both* jurors should be excused, and *both* necessarily included Juror 278. Nevertheless, despite their agreement that Juror 278 be dismissed and the presence of alternates, the court declined to excuse her. Although it is puzzling that, despite their agreement, the court declined to do so, and indeed, it may have been prudent to do so, we have not been informed of any authority that this circumstance alone is sufficient to render the court's decision an abuse of discretion. In sum, the court's inquiry into potential bias was adequate, and its finding that the jurors could give defendant a fair trial was not an abuse of discretion.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this

appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 50 Affirmed.