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2018 IL App (4th) 160224-U

NO. 4-16-0224

FILED
November 5, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Macon County |
| RICKIE H. KENDRICKS, | ) | No. 13CF999 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Thomas E. Little, |
| | ) | Judge Presiding. |

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JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed defendant's conviction and sentence, finding the State proved him guilty beyond a reasonable doubt and the trial court did not err in denying his motion for a mistrial.

¶ 2 In January 2016, a jury found defendant, Rickie H. Kendricks, guilty of three counts of first degree murder in connection with the death of Isaiah Wiley. The trial court sentenced him to 35 years in prison plus an additional 25 years for personally discharging a firearm that proximately caused Wiley's death.

¶ 3 On appeal, defendant argues (1) the State failed to prove beyond a reasonable doubt he personally discharged the firearm that killed Wiley and (2) the trial court erred in denying his motion for a mistrial. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On April 7, 2012, Freedom and Central Cunningham were murdered. On July 7, 2012, Demarta Cunningham allegedly beat and robbed Wiley, who then gave a statement to police implicating Demarta in the battery and robbery as well as in the murders of Freedom and Central. Wiley was murdered on December 9, 2012.

¶ 6 In August 2013, the State charged defendant by information with three counts of first degree murder in connection with Wiley's death. In count I, the State alleged defendant committed the offense of first degree murder (720 ILCS 5/9-1(a)(1), (b)(8) (West 2012)) in that he, without lawful justification and with the intent to kill or do great bodily harm to Wiley, knowingly and personally discharged a firearm at Wiley that proximately caused Wiley's death, and defendant committed the murder because Wiley was a witness in a prosecution or gave material assistance to the State in the case against Demarta Cunningham. Counts II and III alleged similar offenses. 720 ILCS 5/9-1(a)(1), (a)(2), (b)(8) (West 2012). Defendant pleaded not guilty.

¶ 7 A. The State's Case

¶ 8 In January 2016, defendant's jury trial commenced. Tierius Oldham testified she and Wiley had an on-and-off-again relationship and Wiley fathered their child. On April 7, 2012, Oldham, Wiley, and her friend Rickia Allston were asleep when Oldham heard knocking at the door. Oldham went downstairs, opened the door, and saw Shalen Dozier and Demarta Cunningham. They asked where Wiley was and, after being told he was upstairs in bed, they went upstairs. They left approximately five minutes later. Before Oldham was able to go upstairs, Allston told her to look out the window and lock the door. Once upstairs, she heard gunshots. Oldham ran downstairs, opened the door, and saw Freedom Cunningham with a "bullet in his head."

¶ 9 Decatur police officer Ed Cunningham testified he was dispatched to a fight in progress on July 16, 2012. He made contact with Wiley, who was shirtless, and noticed he had abrasions on his neck, a swollen nose, and a cut in his right ear. Cunningham conducted an interview with Wiley while on the scene. Decatur police detective Scott Hastings testified the information provided by Wiley during subsequent interviews supported Demarta Cunningham's arrest.

¶ 10 1. *Wiley's Murder*

¶ 11 William Robinson testified he lived at 405 East Waggoner Street in Decatur in December 2012. On December 9, 2012, at approximately 2:30 p.m., Robinson was in his house watching television when he heard a suspected gunshot. Looking out the window, he saw the victim running to the front of a house before falling to the ground. Robinson then saw a male with a gun shoot the victim on the ground "several times." Robinson also saw another person 8 to 10 feet away from the shooter.

¶ 12 Debra Pearson testified she lived on Warren Street in Decatur on December 9, 2012. At approximately 2:30 p.m., she "heard several gunshots." She looked out the window but saw nothing. She and her grandson ran out the back door, and she saw a male wearing a "dark-colored" hooded sweatshirt run between two houses. The man got into a "light[-]colored" car with "a spoiler on the back," and the car "took off."

¶ 13 Robbie Rawls testified she lived at 424 East Waggoner Street in Decatur in December 2012 with her husband, Jerry; her three daughters, including Tempestt Rawls; and her two grandchildren. Demarta Cunningham is Robbie's cousin and Freedom Cunningham was her nephew. Tempestt was Wiley's girlfriend. On December 9, 2012, Robbie was preparing food when she heard four "pops." After getting the grandchildren to the pantry, she "heard somebody

knocking on the window" between the houses. Robbie then ran to the front door because she "heard somebody beating on the door." She opened the door and saw Tempestt, who was "frantic" and said " 'they killed him.' " Robbie saw Wiley lying on the ground.

¶ 14 Tempestt Rawls testified she was dating Wiley in December 2012. She had dated defendant, known as "Tay" or "Cash," for a couple of months in 2008. Thereafter, she dated Lowell Turner for "a couple of months." She also knew Jon Whittle, who went by the name "Gotti." On July 15, 2012, Tempestt attended Demarta's birthday party, but Wiley was not there because he and Demarta were fighting. The next day, Tempestt was walking to the store with her sister while Wiley sat outside the house. Demarta and a man named Demetrius arrived in a car, got out, and walked to the house. Tempestt stated Wiley "tried to run," but Demarta and Demetrius started hitting and kicking him. When Tempestt tried to intervene, Demarta said " 'Bitch, you better stop or I am going to kill you.' " Eventually, Demarta and Demetrius left. Wiley talked to the police about Demarta, who was later arrested, and Wiley received phone calls from people about changing his story. Tempestt stated she and Wiley left town but came back.

¶ 15 On December 9, 2012, Tempestt and Wiley were at her mother's house. They went to an abandoned house next door to smoke marijuana. While they were smoking a "blunt," Wiley looked back and said " 'Oh, shit.' " Wiley tried "to take off running," and Tempestt saw him fall. She then saw "Rickie," identified as defendant, in front of her and he was "shooting the gun." Tempestt ran off the porch and hit her mother's window to get her attention. At the back of the house, Tempestt saw a two-door white car coming down the alley. She had seen that same car earlier passing by "constantly." Tempestt returned to the front of her mother's house,

knocked on the door, and told Robbie "they just killed him." Robbie told Tempestt to call the police, but she was too shaken to do so. Tempestt went upstairs and hid in a closet.

¶ 16 Tempestt testified she initially did not want to talk to the police because she had an outstanding warrant and was afraid of being killed. She eventually talked to the police later that day. At that time, she identified Lowell Turner as the shooter. She stated the shooter wore black pants, a black shirt, a black jacket, and a stocking cap. When the police showed her a photo array, she selected Turner as the shooter. Shortly after the shooting, Tempestt became unsure if Turner was the shooter, as she "kept on replaying it over and over in [her] head again" and was hearing rumors on the street. A couple days after the shooting, she saw defendant. She went to the police on December 11, 18, and 20, 2012. When the police showed her a photo array on January 28, 2013, she picked defendant as the one she had seen on December 9, 2012. She also told the police that the "word on the street" was defendant and Whittle were responsible for the shooting.

¶ 17 Tempestt stated she saw defendant at the Laundromat between the day of the shooting and January 28, 2013, and his face "matched the face that [she] kept seeing over and over again." The two made eye contact. Defendant grabbed her and asked her if she was okay. Tempestt said she was "cool" and told defendant to tell Demarta that she was "not coming to court" because she did not want anything to do with it. Defendant said she was " 'cool' " and told her to stay in contact with him.

¶ 18 On cross-examination, Tempestt testified she did not see anyone other than defendant running toward Wiley. She stated Turner did not have braids when she identified him in the photo array. She told a police detective on December 11, 2012, the shooter had braids. She also told the detective she heard rumors Jermine Hubbert could have been the shooter. She

stated she identified Turner as the shooter because she was scared and she "was not sure." When she saw defendant, whom she had not seen in "a couple of years," she became "certain" that he was the shooter.

¶ 19 Ebony Brady testified she knew defendant as "Cash" and Jon Whittle as "Gotti." She had been in a relationship with Demarta prior to his arrest in 2012. In December 2012, she frequently saw defendant at a house on Buena Vista Avenue in Decatur and would sometimes drop off Whittle at the residence. On December 9, 2012, defendant called her and asked for a ride. In her 2004 Mercury Mountaineer, Brady picked up defendant and she drove to an area near an apartment complex, about a block from the shooting, and also near the residence of defendant's ex-girlfriend, Stephanie Heise. During the ride, defendant appeared to be arguing with Heise on his phone and he told Brady not to pull up in front of Heise's house because he did not want to scare her. Brady pulled to a stop near the apartment complex, and a silver car pulled up behind her. Defendant got out of her vehicle and entered the silver car. Brady parked her vehicle, and a white car pulled up beside her. A female exited, asked Brady for a ride, and Brady agreed to take her. When she returned home, Brady heard from a neighbor that Wiley had been shot. Brady later drove to defendant's residence, and defendant came outside with a man, who might have been Whittle.

¶ 20 Miranda Maulding testified she was dating defendant in November 2012. They lived in a house on Buena Vista Avenue, along with defendant's brother and a "person named Gotti." In December 2012, Maulding drove a two-door Dodge Stratus. She stated the car was initially painted silver, but it was painted white during the summer of 2012. On December 9, 2012, she was at the house on Buena Vista Avenue when "Cash and Gotti" had her car. After defendant and Gotti returned, they left without the car approximately 30 minutes later.

Defendant, however, forgot to leave the keys. Within a week or two after December 9, 2012, defendant paid to have Maulding's car painted black.

¶ 21 Decatur police officer George Kestner testified he arrived on the scene and observed Wiley with multiple gunshot wounds. Decatur police detective Troy Kretsinger testified he processed the crime scene, and he and other officers recovered multiple shell casings, all of which were .40-caliber Smith & Wesson.

¶ 22 Dr. Scott Denton, a forensic pathologist, testified he performed the autopsy on Wiley. He stated Wiley had 13 gunshot wounds, including two to the head and others to his back, shoulder, chest, buttocks, forearm, and hand. He opined Wiley died from multiple gunshot wounds, with the two wounds to the back of the head likely causing "instant brain death."

¶ 23 2. *The Wiley Murder Investigation*

¶ 24 a. The Murder Weapon

¶ 25 Toby Pister testified he lived in Clinton, Illinois, on November 25, 2012, when his home was burglarized. Among the items stolen were five guns, including a Glock handgun. He stated he was acquainted with a man named David Rivera. Rivera testified he regularly purchased heroin from Whittle, who prior to November 25, 2012, had asked Rivera if he could obtain guns for him. Rivera chose Pister because Pister had showed him "all his new guns."

¶ 26 Decatur police officer Michael Claypool testified he was on the lookout for a vehicle on April 1, 2013, in connection with a weapons investigation. After locating the vehicle and attempting to make contact with it, a high-speed chase ensued. Eventually, police officers were able to stop the vehicle and remove the occupants, including Whittle, Isaiah Kendricks, and Gabrielle Simoneaux. Claypool stated Simoneaux had a purse over her shoulder.

¶ 27 Simoneaux testified she was in a car on April 1, 2013, with Whittle and his friend, who Simoneaux knew as "Freak." After a police officer pulled in behind their car, Whittle sped away. While trying to elude the police, Whittle asked Freak if he could " 'take this,' " but Simoneaux did not know what he meant. Freak declined. Whittle then grabbed a gun from under the seat and asked Simoneaux to throw it out the window. She declined but agreed to take it for him. Whittle pulled out another gun from the armrest. Simoneaux put the guns in her purse, which was eventually searched by the police.

¶ 28 Decatur police officer Cory Barrows testified Simoneaux's purse contained two loaded handguns, including a Glock .40-caliber handgun and a Lasserre .357 revolver. He stated the Glock's magazine could hold 13 rounds of ammunition.

¶ 29 Carolyn Kersting, a firearms and toolmark examiner with the Illinois State Police, testified she conducted tests on a Glock handgun and compared the ejected casings to the fired .40-caliber cartridge casings found at the scene. It was her opinion the casings at the scene of Wiley's murder had been fired from the recovered gun.

¶ 30 b. The Cell Phones

¶ 31 Decatur police detective Barry Hitchens testified he conducted an interview with defendant on March 26, 2013. Defendant stated his cell phone number on December 9, 2012, was (313) 587-0491. A phone with the number (217) 358-6158 was listed in the name of Margaret Walker, Whittle's mother.

¶ 32 Decatur police detective David Dailey testified he analyzed calls placed and received by certain phones and how those calls traveled to various cell towers in the Decatur area. Between December 1, 2012, and December 15, 2012, the 0491 number communicated with the 6158 number 51 times. During that same time period, defendant's phone communicated

52 times with Amy Meyer's phone number ((217) 520-1876) and 232 times with Miranda Maulding's phone number ((217) 620-1960).

¶ 33 Dailey examined records for defendant's phone (0491) on December 9, 2012, the date of Wiley's murder. The records showed the 0491 phone was at or near the Buena Vista Avenue house from 7:28 a.m. to 1:59 p.m., in an area including the International House of Pancakes (IHOP) restaurant from 12:15 p.m. to 1:14 p.m., in an area including 416 East Waggoner Street from 2:13 p.m. to 2:37 p.m., and then back in the area of the Buena Vista Avenue house at 2:51 p.m. to 3:18 p.m.

¶ 34 On December 9, 2012, the number associated with Whittle (6158) was near the Buena Vista Avenue house at 9:43 a.m. and 1:46 p.m., near IHOP from 12:23 p.m. to 1:30 p.m., near 416 East Waggoner Street from 2:13 p.m. to 2:26 p.m., and near the Buena Vista Avenue house from 2:41 p.m. to 3:18 p.m. In the late afternoon, the 0491 and 6158 phones left Decatur, and calls were later made in Mahomet and Champaign-Urbana.

¶ 35 c. The Jailhouse Calls

¶ 36 Rodney Broaddus, a field service technician for Securus Technologies, testified the company provides and maintains phone services for inmates at the Macon County jail. Each inmate receives a personal identification number that they input when making a call. The system records the number called, as well as the date and content of the call.

¶ 37 Dailey testified regarding jailhouse phone calls between defendant and the incarcerated Demarta. The State provided copies of the call transcripts to the jury. During the calls, defendant and Demarta occasionally referred to a house that defendant was purportedly remodeling for Demarta. The State suggested defendant and Demarta were actually engaging in coded discussions about killing Wiley.

¶ 38 In a call on November 11, 2012, at 1:16 p.m., defendant and Cunningham discussed the house defendant was to work on. Defendant stated he "got a visual on the house yesterday," and Demarta stated he was "just worried bout [*sic*] you fixin [*sic*] that house up." Demarta also stated "that house shit is the most important shit man," to which defendant agreed. Defendant also said he would "get right to it."

¶ 39 In a call on November 19, 2012, at 5:30 p.m., Demarta remarked that individuals were not working on the house. Defendant stated they were working on it but were slowed by cold weather. At the conclusion of a call on November 19, 2012, at 5:48 p.m., Demarta told defendant to "get on the house too for me man, right away bro." In a call on November 27, 2012, at 9:27 p.m., Demarta asked about the house, and defendant told him he knew an individual who worked at the hospital who said a certain person had been "real sick" with "blood clogs [*sic*]."

¶ 40 Amy Meyer testified she once worked at Decatur Memorial Hospital as a certified nursing assistant. She had a relationship with defendant in December 2012 at the same time she worked at the hospital. She recalled Wiley being a patient in November 2012, but she denied telling defendant that Wiley was a patient in the hospital.

¶ 41 Erica Bobbitt, a "clinical informatics educator" at Decatur Memorial Hospital, testified Wiley was hospitalized between November 23 and November 29, 2012, and found to have a blood clot in his lung. During his stay, Wiley was cared for, in part, by Meyer.

¶ 42 In a call on November 29, 2012, at 5:49 p.m., Demarta again asked defendant if any work had been done on the house. Defendant stated he "hollered at dog twice" but the man was in the hospital with "them clogs [*sic*]." Demarta reminded defendant he was going to court in March.

¶ 43 During a call on November 29, 2012, at 7:19 p.m., defendant brought up his "source," a woman that worked at the "spital [*sic*]" named Amy, and said she "is a resource right now." In a call on November 29, 2012, at 7:28 p.m., Demarta said he would be getting out of jail in 90 days. Defendant said he was trying "to get this house together" before "the snow touched down." Demarta stated "we need that investment property."

¶ 44 During a call on December 9, 2012, at 12:56 p.m., defendant stated he would have some "good news" for Demarta, as he was "almost finished" and just had to "put the siding up." Defendant stated "it was supposed to be done yesterday" but one of his workers left early. In the call on December 9, 2012, at 1:17 p.m., Demarta told defendant to "finish that house up. *** I'm waiting on that new paint." Defendant stated it was "supposed to be done yesterday." In the call on December 17, 2012, at 9:30 a.m., Demarta told defendant to keep working on the house so it would be finished when Demarta got out. Defendant stated "the roof is good and it's a three dimensional." During a call on December 20, 2012, at 8:09 p.m., defendant said he was almost finished with the house and mentioned how everything was "all black" and "smoked out."

¶ 45 d. Defendant's Statements

¶ 46 Decatur police detective Barry Hitchens testified he interviewed defendant on March 26, 2013, and July 29, 2013. In the July 29 interview, defendant stated he ate at IHOP on December 9, 2012, and then he went shopping in Champaign. He denied knowing anyone named Jon Whittle or associating with a man nicknamed "Gotti." When shown a picture of Whittle, defendant stated he did not recognize the man.

¶ 47 Anthony Whitfield testified he was serving a seven-year sentence for armed robbery. When asked if he received a deal because he gave information to the police about defendant, Whitfield denied it. He stated he did not see defendant in the courtroom and did not

recall meeting with Detective Hitchens in July and August 2014 to give him information provided by defendant. When shown portions of a videotaped interview, Whitfield did not know if he was shown on the screen.

¶ 48 Detective Hitchens testified he interviewed Whitfield on two occasions. In a videotaped statement, Whitfield said defendant told him in jail that defendant had taken out someone who was going to testify against Demarta. Whitfield also stated defendant said he gave a .40-caliber handgun to Whittle.

¶ 49 B. The Defense Case

¶ 50 Various witnesses testified on behalf of defendant. Christina Blankenship testified defendant is her ex-boyfriend. Blankenship stated she was working at a Laundromat in January 2013 when defendant came in with lunch. Tempestt also came in with her sister. Blankenship stated defendant and Tempestt embraced and then talked for 10 to 15 minutes. Blankenship also testified she owned rental properties in Decatur and defendant would help with repairs.

¶ 51 C. Defendant's Motion for a Mistrial

¶ 52 During the trial, defense counsel made an oral and then written motion for a mistrial, claiming the State had violated defendant's constitutional right to an open and fair trial. The trial court denied the motion. We will more fully address this matter later in the order.

¶ 53 D. The Jury's Verdict and the Trial Court's Sentence

¶ 54 Following closing arguments, the jury found defendant guilty on all three counts. The jury also found defendant personally discharged the firearm that proximately caused Wiley's death and he committed the murder because Wiley gave material assistance to the State in an investigation or prosecution.

¶ 55 In February 2016, defendant filed a motion for a new trial, arguing, *inter alia*, the trial court erred in denying his motion for a mistrial based on the State's violation of his right to an open and public trial. In March 2016, the court denied the motion. Thereafter, the court sentenced defendant to 35 years in prison on count I, plus an additional 25-year firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)). This appeal followed.

¶ 56 II. ANALYSIS

¶ 57 A. Sufficiency of the Evidence

¶ 58 Defendant argues the State failed to prove beyond a reasonable doubt that he personally discharged the firearm that killed Wiley, where Tempestt's identification of defendant as the shooter was unreliable and the circumstantial evidence tending to show defendant was involved in the planning and execution of the murder actually suggested Whittle shot Wiley. We disagree.

¶ 59 " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "Circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged." *People v. Hall*, 194 Ill. 2d 305, 330, 743 N.E.2d 521, 536 (2000). "A conviction will be reversed

only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *People v. Belknap*, 2014 IL 117094, ¶ 67, 23 N.E.3d 325.

¶ 60 On appeal, defendant concedes the State produced sufficient evidence to permit a reasonable fact finder to conclude he, along with Whittle, planned and participated in Wiley's murder to punish him for aiding in the investigation of Freedom Cunningham's death or prevent him from testifying in Demarta Cunningham's murder trial. However, defendant argues the State's evidence that he personally discharged the firearm that killed Wiley was "far less reliable" and, instead, more closely tied Whittle to the gun and to the role of shooter. Specifically, defendant argues Tempestt's identification of defendant as the shooter was not sufficiently reliable because she initially fingered Turner as the shooter, she later offered inconsistent descriptions, and she was exposed to rumors that defendant was the shooter.

¶ 61 While a single witness's identification that is vague or doubtful is insufficient to sustain a conviction, a single witness's identification will be "sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Lewis*, 165 Ill. 2d 305, 356, 651 N.E.2d 72, 96 (1995). In assessing the reliability of identification testimony, Illinois courts have relied on the factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Lewis*, 165 Ill. 2d at 356, 651 N.E.2d at 96. "Those factors include (1) the opportunity of the witness 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 witness at the confrontation, and (5) the length of time between the crime and the confrontation." *People v. Piatkowski*, 225 Ill. 2d 551, 567, 870 N.E.2d 403, 412 (2007).

¶ 62 In the case *sub judice*, defendant states the first two factors "do not critically undermine the reliability of [Tempestt's] identification on their own." Defendant acknowledges Tempestt's brief view of the shooter and her likely marijuana intoxication do not foreclose the possibility she could have witnessed the shooter well enough to reliably identify him. However, he contends the remaining three factors indicate Tempestt's view of the shooter did not result in a reliable identification. We find the jury could conclude Tempestt positively identified defendant as the shooter.

¶ 63 At trial, Tempestt testified she saw defendant shooting the gun. The jury also heard her testimony about the statements she made to the police. When she talked to the police on the day of the shooting, she said she was "distraught," "scared," and felt like she was having "an out-of-body experience." She initially identified Turner as the shooter and picked him out of a photo array. However, she later became unsure, as she "kept on replaying it over and over in [her] head again." On December 11, 2012, she told a detective she heard rumors that Hubbert could have been the shooter. She also mentioned the shooter had braids. To her knowledge, defendant never wore braids. When asked why she told Detective Hitchens that the "word on the street" was "Cash" shot Wiley, Tempestt said she "didn't want to come to this point to where [she] had to be in court" and have to identify him because she felt it would put her "in more danger." Her lack of cooperation with the police early on was based on her fear that she could not be protected as a witness if she came forward.

¶ 64 Between the day of the shooting and January 28, 2013, when she talked to the police, Tempestt saw defendant at the Laundromat and realized his face "matched the face that [she] kept seeing over and over again." She identified defendant in a photo array on January 28, 2013, and said she realized that was who she had seen on the day of Wiley's murder. When

asked why she did not go to the police and say defendant was the shooter, she again stated she was scared and knew "they wanted me and Isaiah to be killed."

¶ 65 "[A] reviewing court will not substitute its judgment for the fact finder on questions involving the weight of the evidence or the credibility of the witnesses." *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. Here, the jury was well aware of Tempestt's statements to the police and the identification of other individuals prior to identifying defendant as the one who shot Wiley. They were also in the best position to weigh both her credibility and reliability in light of the many issues raised during cross-examination. In spite of those issues raised by defendant, the jury still found her both credible and reliable. She also gave reasons why she was reluctant to initially identify defendant as the trigger man. We do not find Tempestt's identification so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt as to defendant's guilt in discharging the firearm that killed Wiley.

¶ 66 B. Motion for a Mistrial

¶ 67 Defendant argues the trial court erred in denying his motion for mistrial based on the denial of his right to an open and public trial, where the State served trial subpoenas on four spectators that it claimed, but could not prove, made threats to a witness and had them excluded from the courtroom under a previously granted motion to exclude witnesses. We disagree.

¶ 68 The sixth amendment to the United States Constitution guarantees a criminal defendant the right to a public trial. U.S. Const., amend. VI. "This guarantee is for the benefit of the accused and 'is a safeguard against any attempt to employ the courts as instruments of persecution.' " *People v. Cooper*, 365 Ill. App. 3d 278, 281, 849 N.E.2d 142, 145 (2006) (quoting *People v. Seyler*, 144 Ill. App. 3d 250, 252, 494 N.E.2d 267, 268-69 (1986)); see also *Waller v. Georgia*, 467 U.S. 39, 46 (1984). A public trial "enhances both the basic fairness of

the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984). "It is well recognized, however, that the interest of a defendant in having ordinary spectators present during trial is not an absolute right but must be balanced against other interests that might justify excluding them." *Seyler*, 144 Ill. App. 3d at 252, 494 N.E.2d at 269.

¶ 69 "A mistrial should be granted where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *People v. Nelson*, 235 Ill. 2d 386, 435, 922 N.E.2d 1056, 1083 (2009). Whether to grant a mistrial is a matter left to the discretion of the trial court. *People v. Nieves*, 193 Ill. 2d 513, 525, 739 N.E.2d 1277, 1283 (2000). Thus, a court's decision denying a defendant's motion for a mistrial will not be overturned absent a clear abuse of that discretion. *People v. Bishop*, 218 Ill. 2d 232, 251, 843 N.E.2d 365, 376 (2006). "A trial court abuses its discretion when its decision is 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Kladis*, 2011 IL 110920, ¶ 23, 960 N.E.2d 1104 (quoting *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004)).

¶ 70 Prior to the start of *voir dire*, the trial court granted the State's motion to exclude witnesses. During a break in *voir dire* on January 19, 2016, the prosecutor told the court and defense counsel that Tempestt, Simoneaux, and Brady had been put up in hotels at State expense and noted there had been "an incident" involving Brady that raised concerns about her safety.

¶ 71 On the first day of trial (January 20, 2016), Robbie Rawls' testimony was delayed shortly after she took the witness stand, and the trial court had a conversation in chambers with the prosecutor, defense counsel, and defendant. The prosecutor stated there had been "some threats of witnesses already this morning" and there had been "some issues" with a male in the

courtroom that caused Robbie to become upset. The prosecutor indicated her office was "still looking whether there is [*sic*] any direct threats involving" the man but wanted the court to be aware of the situation.

¶ 72 Defense counsel stated the trial court is the one to decide whether to "preclude a person from being in the gallery[,] not the State's Attorney." The prosecutor responded, "Not unless they are under subpoena." After further discussion, defense counsel stated defendant "wants to exercise his right to an open and public trial." The court stated, if it was determined that someone threatened or attempted to intimidate a witness, it would "land on them with both feet." With the court's position clear, the trial resumed with Robbie on the stand, followed by Tempestt.

¶ 73 At the beginning of the third day of testimony (January 22, 2016), defense counsel made an oral motion for a mistrial, claiming the State had violated defendant's constitutional right to an open and fair trial. Prior to the testimony of Robbie Rawls, three or four family members of defendant were present in the courtroom to support him, and the State subpoenaed three of them to testify on January 20, 21, and 22, 2016, thereby precluding their attendance at the trial. Counsel argued the witnesses were excluded from the courtroom without the knowledge of the trial court and defendant. Moreover, counsel claimed the prosecutor had not notified him about any additional witnesses being called.

¶ 74 The prosecutor stated "they had made threats and have been making ongoing threa[t]s to Tempestt Rawls," which "put them in the position of being potential witnesses and potential rebuttal witnesses, depending on how Tempestt Rawls testified, and if she was asked specifically about threats made to her." The prosecutor noted she had not served every spectator supporting defendant with a subpoena. The trial court took the matter under advisement.

¶ 75 On January 25, 2016, defense counsel filed a written motion for a mistrial, per the trial court's order. Counsel alleged Tiffany Cunningham, Michelle Cunningham, Ebony Fonville, and a female named Chanelle were in the courtroom prior to Robbie Rawls' testimony. After the meeting in chambers and when Robbie took the stand, the four named women were no longer present in the courtroom. Just prior to Robbie's testimony, defense counsel asked the prosecutor where the females were, and the prosecutor said " 'don't worry about it, I took care of it.' " It was later discovered the four females had each been served with a subpoena and denied reentry to the courtroom.

¶ 76 The prosecutor filed a response to defendant's motion. She noted she received information during testimony on January 20, 2016, that Tempestt had been threatened and harassed by Michelle Cunningham, Tiffany Cunningham, Ebony Fonville, and Chanelle Currie. Information was provided to the State's chief investigator that there had been in-person and social media conversations or threats and a physical altercation. However, the prosecutor stated Tempestt's safety had no bearing on the decision to subpoena the four females. Instead, the prosecutor stated, in part, as follows:

> "The decision to [subpoena the four females] was because there were very real concerns about how the testimony of Ms. Rawls regarding the threats and conversations she has had with family members would actually come out in court. Should she offer or give specifics, on direct or cross-examination, about the persons that were in the courtroom threatening her, that may create an issue of whether they would be allowed to testify since a Motion to Exclude was already heard and granted. Had Ms. Rawls been

> cross-examined on the identity of the persons threatening her, they would have been barred as witnesses which would have deprived the defendant of a fair trial. Ms. Rawls did in fact take the stand on the morning of Wednesday, January 20th. The People elicited testimony from Ms. Rawls about being harassed and threatened by her own family during direct examination. Ms. Rawls ha[d] previously *** testified on January 20th that she did not immediately identify this defendant as the shooter because she 'didn't want it to be' the defendant. Ms. Rawls testified part of the reason for that is because of the consequences she would and did suffer from her family. Therefore, any family member that harassed or threatened her has the potential to be called as a witness. Prior to the morning of January 20th, the People had not been provided any names of those family members."

The prosecutor also noted that on Sunday, January 17, 2012, she was informed another State's witness, Ebony Brady, had been the victim of a home invasion. While Brady did not think the home invasion was related to this case, she was fearful, and the State placed her in a hotel because the timing was "suspicious and concerning." While there was no evidence of any present threat to either Brady or Tempestt, the prosecutor stated she was not attempting to circumvent the trial court or the court's authority. Moreover, she contended there had been "no attempt to be vindictive or deprive the defendant of an open and fair trial." Instead, she argued she "made a good faith decision in a fluid situation" that the four females were potential witnesses who might need to be called to testify depending on Tempestt's testimony.

¶ 77 The trial court noted a motion to exclude witnesses had been granted. The court found it "troublesome" that the witnesses had been subpoenaed and it "wasn't given an opportunity to participate *** when it bec[ame] necessary to consider possible closure of the courtroom." The court noted the limitation of the subpoenas to January 20 to 22, 2016, did "tend to undercut" the State's argument but found it was not "unusual to draft subpoenas in that fashion." Considering the prosecutor's statements as an officer of the court, the court concluded the State had "a basis upon which to issue the subpoenas." The court denied the motion for a mistrial.

¶ 78 In this case, defendant does not take issue with the trial court granting the motion to exclude witnesses, which has been found to be "a long-standing trial right in criminal cases." *People v. Taylor*, 244 Ill. App. 3d 460, 467, 612 N.E.2d 543, 548 (1993). Moreover, defendant does not contend the court specifically ordered the exclusion of the four female witnesses. Instead, defendant argues the prosecutor, without the knowledge of the court, engaged in "subterfuge" by her use of "pretextual subpoenas" to exclude spectators with no plausible explanation. In support of his argument, defendant relies on *Addy v. State*, 849 S.W.2d 425 (Tex. Crim. App. 1993), and *State v. Sams*, 802 S.W.2d 635 (Tenn. Crim. App. 1990).

¶ 79 In *Addy*, 849 S.W.2d at 426, the prosecutor requested six spectators be designated as potential witnesses and excluded from the courtroom on the second day of testimony. Citing the defendant's right to a public trial, defense counsel objected, stating the spectators were friends of the defendant and were not going to testify. *Addy*, 849 S.W.2d at 426-27. The prosecutor indicated she was going to call the individuals to testify. *Addy*, 849 S.W.2d at 426. The court asked the prosecutor if she intended to call the individuals as witnesses, and she indicated there was "a great possibility" they would be called. *Addy*, 849 S.W.2d at 427. The

court told the individuals to step out of the courtroom. *Addy*, 849 S.W.2d at 427. Later during the defense case, defense counsel again complained about the removal of the individuals. *Addy*, 849 S.W.2d at 427. The prosecutor claimed "a grave security issue" involving an informant had arisen and necessitated removing the individuals as possible witnesses. *Addy*, 849 S.W.2d at 428.

¶ 80 On appeal, the Court of Appeals of Texas considered whether the exclusion of the defendant's friends from the courtroom deprived him of his right to a public trial. *Addy*, 849 S.W.2d at 428. The court noted the trial judge "never made findings to justify removing [the defendant's] friends from the courtroom" and there was "no compelling reason" to exclude them. *Addy*, 849 S.W.2d at 429. The court noted the prosecutor's reason for removing the individuals was for security but she failed to so inform the judge and give him the opportunity to conduct a hearing as to whether arrangements could be made to accommodate the prosecutor's need to protect her informant and the defendant's right to have his friends in the courtroom. *Addy*, 849 S.W.2d at 429-30.

¶ 81 In *Sams*, 802 S.W.2d at 636, the State called the defendant's son to testify. Prior to the conclusion of his testimony, the trial judge recessed the proceedings for lunch. During the recess, the prosecutor issued subpoenas for the defendant's grandmother, aunt, and brother, all of whom had attended the morning session. When the defendant's stepmother and second aunt arrived for the afternoon session, the prosecutor issued subpoenas for them. Once the proceedings reconvened, the prosecutor stated there had been "loud talking" between the defendant's grandmother and others during the testimony of the defendant's son. *Sams*, 802 S.W.2d at 636. Defense counsel objected to the State issuing subpoenas simply to exclude people from the courtroom. *Sams*, 802 S.W.2d at 637. The judge asked the prosecutor if he

intended to call the individuals as witnesses, and he said he "very well may." *Sams*, 802 S.W.2d at 637. The defendant's relatives were removed from the courtroom.

¶ 82 On appeal, the Court of Criminal Appeals of Tennessee found the prosecutor "used the subpoena power of the trial court as a subterfuge for excluding the [defendant's] relatives from the courtroom[,]" he had no intention of calling them, and they were never interviewed by the prosecutor or his staff. *Sams*, 802 S.W.2d at 637. Moreover, the appeals court found the trial judge failed to inquire into the prosecutor's motives for issuing the subpoenas. *Sams*, 802 S.W.2d at 637. The court concluded the prosecutor's "blatant abuse of the trial court's subpoena power for the exclusive purpose of removing the relatives from the courtroom constituted egregious prosecutorial misconduct" and violated the defendant's right to a public trial. *Sams*, 802 S.W.2d at 637.

¶ 83 We find these cases distinguishable. In *Addy*, the prosecutor failed to offer anything to show the individuals removed constituted a security threat. In *Sams*, the prosecutor used the subpoena power as subterfuge to remove the individuals from the courtroom and the trial court never inquired into the prosecutor's motive for doing so. Here, however, the prosecutor informed the trial court of possible threats made against witnesses on the first day of trial. The decision was then made to subpoena the four females, as they could have been potential witnesses who could be called to testify depending on Tempestt's testimony.

¶ 84 In every criminal trial, there are at least three important interests at play—the trial court has the authority to control its courtroom, the defendant is entitled to a public trial, and the State has a right to put on its case. Here, the prosecutor had concerns the four females in the courtroom could have had an impact on Tempestt's testimony and may have been required to testify later on at trial. The prosecutor offered a legitimate reason for issuing the subpoenas and

the decision reflected a "good-faith decision in a fluid situation" involving, no doubt, an emotionally charged trial. The trial court gave thoughtful consideration to the stated reason. Just as the jury determines the credibility of witnesses, so too does the court determine the credibility of the officers of the court who appear before it. The court considered defense counsel's objections and defendant's right to a public trial, and it concluded the prosecutor had supported her reason for subpoenaing the witnesses. Under an abuse of discretion standard, it is not our job to decide whether we might have proceeded differently but to determine whether, under the facts before the court at the time, the court abused its discretion. See *Bishop*, 218 Ill. 2d at 252, 843 N.E.2d at 377.

¶ 85 Here, there was no question the trial court was well aware of the highly charged atmosphere present throughout the trial. The State's indication of threats having been made was not unreasonable—this was a murder case involving efforts to prevent someone from testifying in a murder, after all. The fact persons in the courtroom included several who had been specifically identified as having threatened the only eyewitness was clearly of concern to the court and the State. The State's concern for a possible need to call them regarding the threats was not unreasonable in light of the witness' history since first identifying the shooter and there was no way for the State to know exactly how she was going to testify once called to the stand. Under all these circumstances, although a better practice would have been to notify the court as the court pointed out, it was not unreasonable to conclude the need for exclusion was not a subterfuge and did in fact serve the overriding purpose of preserving a fair trial for both defendant and the State. Had the individuals been allowed to remain seated behind defendant and obviously supportive of him and then been identified by the witness in open court in front of the jury as the ones threatening her, defendant would be contending the failure to remove them

beforehand was prejudicial to him, since the alleged misconduct of his friends and family could have undoubtedly been imputed to him. We find the court did not abuse its discretion in denying defendant's motion for a mistrial.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 88 Affirmed.