THIRD DIVISION
June 28, 2019

No. 1-16-0406

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 (01)
	)	
MARCUS FLOYD,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County finding defendant fit to stand trial is reversed; the trial court's erroneous jury instruction on the factors to be considered to determine a defendant's fitness for trial combined with improper testimony to which defense counsel failed to object resulted in prejudice to defendant in the fitness trial; the cause is remanded for a retrospective new trial on fitness. We retain jurisdiction to consider defendant's remaining contentions on appeal from the judgment of the circuit court of Cook County convicting defendant of first degree murder based on accountability, first degree felony murder, and attempt (first degree murder).

¶ 2 Following a jury trial the circuit court of Cook County convicted defendant, Marcus Floyd, of first degree murder for the death of Chicago Police Department Officer Thomas Wortham IV (hereinafter, "Officer Wortham") and the felony murder of the co-offender in the crime that led to Officer Wortham's death, defendant's cousin, Brian Floyd. Brian was killed by

Officer Wortham's father, Thomas Wortham III (hereinafter, "Mr. Wortham"), a retired Chicago Police Department officer who was trying to stop the crime, which occurred in front of his home. The jury also convicted defendant of attempt (first degree murder) of Mr. Wortham. Mr. Wortham also shot defendant several times while attempting to stop the crime. As a result of his injuries defendant developed amnesia of the crime. Before the trial of the charges against defendant the trial court held a trial before a jury of six to determine defendant's fitness for trial. The fitness jury found defendant fit for trial, the trial jury found defendant guilty of the crimes charged, and the court sentenced defendant to two consecutive terms of imprisonment of natural life.

¶ 3 Defendant appeals both the judgment finding him fit to stand trial and his convictions. As to the former, defendant argues the State misinformed the fitness jury as to the consequences of its judgment, diminished its burden of proof which was exacerbated by an erroneous jury instruction, and improperly attacked defendant's expert for following proper procedure during the defense expert's examination of defendant; and, the trial court erroneously excluded expert testimony as to the effect of defendant's amnesia on defendant's ability to assist his trial counsel and failed to properly instruct the jury regarding the procedures for a fitness evaluation which was the basis of the State's attack against defendant's expert. For the following reasons, we reverse the judgment finding defendant fit for trial, remand for a retrospective fitness hearing, and retain jurisdiction of this appeal to consider defendant's further contentions should it be found he was fit for trial.

¶ 4 BACKGROUND

¶ 5 This court previously recounted the events of Officer Wortham's death in the appeals of Toyious Taylor (*People v. Taylor*, 2017 IL App (1st) 150726-U) and Paris McGee (*People v. McGee*, 2017 IL App (1st) 150838-U). Because we find defendant was denied a fair trial to

determine his fitness to stand trial for the substantive offense we focus our discussion of the proceedings below on the fitness trial. We will briefly recount the circumstances of the offense here only to the extent necessary to lend context to the fitness trial. Any other testimony or discussion regarding the proceedings below will be discussed as necessary to facilitate understanding of our resolution of issues raised in this appeal.

¶ 6 On the night of the occurrence, Officer Wortham left his parents' home in Chicago after visiting them. Mr. Wortham watched from his front porch as his son got on his motorcycle. Mr. Wortham saw defendant and Brian Floyd in the middle of the street. Officer Wortham rode his motorcycle to where they were in the street, stopped, and spoke to them. Mr. Wortham saw Brian put a gun to Officer Wortham's head. Mr. Wortham yelled for the men to get away from Officer Wortham and Brian turned and pointed his gun at Mr. Wortham. Brian yelled at Mr. Wortham to get back into the house. Officer Wortham then shouted "Police," and Mr. Wortham instantly heard gunfire. Mr. Wortham ran into the house to retrieve his gun and told his wife to dial 9-1-1. After Mr. Wortham 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 passenger was outside the car yelling "Get in." Mr. Wortham told the passenger to "get away from there." The passenger got back into the car and the driver backed the car away. Mr. Wortham testified he thought the passenger fired a gun at him before the car reached the intersection. Mr. Wortham hid behind his daughter's car, saw Officer Wortham's gun on the ground and picked it up so that he then had a gun in each hand. Defendant and Brian were facing Mr. Wortham. Mr. Wortham saw a gun in Brian's hand. Mr. Wortham opened fire and saw both men go down. Mr. Wortham saw Officer Wortham on the ground approximately 20 yards away. The State elicited testimony that in addition to being shot multiple times Officer Wortham's injuries were consistent with being hit by a car and dragged.

¶ 7 The State charged defendant with first degree murder for the deaths of Officer Wortham and Brian Floyd, attempt (armed robbery), aggravated discharge of a firearm, aggravated unlawful use of a weapon, and unlawful use of a weapon.

¶ 8 Before the matter proceeded to trial on the charges, the trial court conducted a trial of defendant's fitness to stand trial before a panel of six jurors. Before the fitness trial began, the trial court heard argument on the State's motion *in limine* to bar defense witness Daniel Coyne. Coyne is an attorney and professor of law. The defense argued Professor Coyne would testify to what would be necessary to explore possible defenses "and why a defendant's ability to recollect and recount the incident is relevant to his ability then to assist in his defense," which defendant's attorney argued was relevant to the question of defendant's fitness relative to defendant's ability to assist in his defense. The State argued that what Professor Coyne would testify to, specifically "what he needs to try a murder case, what he needs the defendant to tell him [about] his state of mind," is not the issue in a fitness trial. The State argued that "fitness speaks only to a person's ability to function within the context of the trial."

¶ 9 Following the parties' arguments the trial court first noted that in *People v. Stahl*, a then-recent decision by our supreme court, the defendant "presented the testimony of an attorney who testified, presumably, much in the manner in which [defense counsel] *** hopes for [Professor Coyne] to testify," but the decision "does not dictate that such evidence is admissible or not admissible" because that question was not an issue in *Stahl*. After finding *Stahl* "not particularly instructive," the court found that "the fact that the defendant might not, because of his physical condition, be able to tell certain things to a lawyer does not necessarily mean that the lawyer's ability to defend is impacted or lessened." The court noted that the defense an attorney might want to present and the many possible defenses that may be available are irrelevant and creates the potential need for the State to present evidence on the strength of those defenses and could

result in prejudice to both sides. The court granted the State's motion to bar Professor Coyne's testimony. The court also rejected a request by the defense to give the jury a non-pattern jury instruction that the jury may consider the failure to videotape a forensic interview in assessing the weight given to the testimony of the persons who conducted the interview. The State's experts from the Forensic Clinical Services (FCS) division in the circuit court did not videotape their interviews of defendant. The State argued FCS is not subject to the videotaping requirement in the statute. The State also asked that the defense be barred from raising the issue of videotaping interviews at all. The trial court found that had the legislature intended to include fitness examinations by FCS in the videotaping requirement it would have done so expressly and that FCS is not a "person" under the statute. The court refused the defense instruction but held the defense could cross-examine on the failure to videotape the interviews of defendant. However, the trial court barred the defense from suggesting or arguing that the FCS doctors should have videotaped the interviews under the law.

¶ 10 After opening statements the State called Dr. Matthew Markos as its first witness. Dr. Markos examined defendant on November 5, 2013. Before conducting his forensic psychiatric examination Dr. Markos examined and relied upon reports pertaining to the offense, defendant's medical and psychiatric records, and forensic evaluation reports prepared by Drs. Christofer Cooper and Robert Hanlon. Dr. Markos learned defendant suffered anoxic global encephalopathy which means an absence of oxygen in the brain. The purpose of the forensic psychiatric evaluation was to determine the presence or absence of any specific mental illness or defect or any psychiatric diagnosis. As a result of the examination Dr. Markos observed defendant to show good focus and concentration and Dr. Markos did not identify any evidence of depression or any thought disorder or any psychiatric diagnosis. However, defendant did report "circumscribed or very clear-cut amnesia or loss of memory for the incident itself." Dr. Markos

testified defendant reported that he could not remember the offense itself but that he had a good memory for events prior to that and once he was in the hospital. Dr. Markos gave defendant a test for any intellectual or cognitive deficits and the test revealed no intellectual or cognitive defects. Dr. Markos' tests established that defendant "had good memory, if not excellent memory, for past events." Defendant's responses indicated defendant had learned new information and retained new information from extrinsic sources, he did not seem to have any memory deficit for short-term events, and he had the capacity to learn and retain new information and cooperate and communicate.

¶ 11 Dr. Markos formulated his recommendation to the trial court based on his examination. Dr. Markos took defendant's amnesia into account. Dr. Markos asked defendant if he understood the charge against him, whether it was a felony of misdemeanor, what the roles of various participants were, and if defendant understood the possible outcome of his case. Defendant's answers indicated defendant had a good understanding of those matters. Dr. Markos testified he also asked questions to determine if defendant had any knowledge of the crime itself and details pertaining to the crime, what the source of defendant's information was, and whether defendant had the capacity to learn and retain new information. Dr. Markos asked defendant questions based on the fact defendant was claiming amnesia. Based on Dr. Markos' questions defendant informed Dr. Markos who his defense attorney was, how many times they had spoken, and that defendant last remembers being with his girlfriend and daughter before waking up in the hospital. Defendant told Dr. Markos he learned his information from his defense attorney. Defendant learned the circumstances of the crime he was charged with and his injuries and treatment. Dr. Markos testified defendant has reported amnesia and "in order to be able to assist his counsel, it was important for me to determine if he has the capacity to learn and retain new information." Dr. Markos testified that the significance of defendant's statements

was that defendant clearly demonstrates the capacity to learn new information from extrinsic sources and retain them and remember them; defendant has the capacity to communicate with his attorney and cooperate with his attorney to obtain information; defendant does not have ongoing amnesia for day-to-day events and recent information but the amnesia is "just for the arrest incident circumscribed and capsulated." Dr. Markos testified that his clinical forensic psychiatric opinion to a reasonable degree of medical and psychiatric certainty following his examination was that defendant was "presently mentally fit to stand trial."

¶ 12 Dr. Markos testified that in May 2015 he received a second court order to conduct an examination of defendant for the purpose of determining defendant's fitness to stand trial. Defendant's presentation in the second examination was "essentially the same" as the previous examination. Defendant had good concentration and focus and there was no evidence of any active mental illness, anxiety, mood disorder, or thought disorder. During the 2015 examination defendant did not show any evidence of intellectual or cognitive deficits but he had the "circumscribed memory loss just for the arrest incident with good memory before and after." Defendant gave appropriate and accurate answers to questions concerning whether defendant was aware of the charge, regarding evidence and witnesses, the roles of courtroom personnel, and whether defendant understood a plea bargain. The State asked Dr. Markos whether he again asked defendant any additional questions "as a result of the defendant claiming he had amnesia only with regard to the events of the crime that he is charged with." Dr. Markos responded as follows:

> "Yes.
>
> Again his memory was—pertained only to the arrest incident, and I did ask him additional questions again in order to determine a very important clinical issue, which is does he have the capacity today as we sit as it relates to his current

> fitness, the ability or the capacity to learn and retain new information and if he has the capacity to follow day-to-day events in his life at Cook County jail."

¶ 13 Dr. Markos testified that in response to his questions defendant relayed what he had been told about the crime and again stated that the last thing he remembered was being with his girlfriend and daughter before waking up in the hospital. Dr. Markos then testified he asked defendant about his day-to-day life at Cook County Jail because it was "important *** to know how he was functioning *** and also if he remembered day-to-day events." Dr. Markos testified defendant was able to describe his daily activities in "great detail" and added this "was important clinical information because these were examples of [defendant's] capacity to remember *** and it comes into play when the issue of being able to learn new information is involved." Dr. Markos opined that during the 2015 examination defendant showed "very good capacity to learn and retain new information." Dr. Markos stated his opinion to a reasonable degree of medical and psychiatric certainty was that based on the 2015 clinical evaluation defendant was "presently mentally fit to stand trial."

¶ 14 The State asked Dr. Markos what factors he takes into consideration when determining fitness for a person who has reported amnesia. Dr. Markos testified there are special factors and added "amnesia, *per se*, does not equal unfitness. Amnesia, *per se*, does not deem someone unfit." Defendant's attorney objected but the trial court overruled the objection. Dr. Markos testified that if a person has ongoing memory loss for day-to-day events then "that person would certainly be unfit because that person simply cannot learn new information or retain new information in order to be able to assist counsel." Dr. Markos continued:

> "[I]t is important to determine if the person has the capacity to communicate and cooperate with counsel in his defense. That also becomes a factor when it comes to the issue of assisting counsel in someone's defense.

> Now, amnesia, *per se*, does not mean that a person is unfit. The person may have permanent amnesia for an incident or incidents but does not have ongoing permanent amnesia, is able to learn and retain new information, including matters related to the alleged offense, from extrinsic sources, can reconstruct information based on extrinsic sources, in this case [defendant's attorneys.] Then it is my opinion, my forensic psychiatric opinion, that that person is not unfit but fit, especially if he meets the fitness criteria and understands the fitness criteria."

¶ 15 Defendant's attorney did not object to the specific foregoing testimony by Dr. Markos before the jury. The State did not have any further questions for Dr. Markos. After the trial court excused the jury for lunch the court addressed defendant's attorney. The court noted that defense counsel had made an objection regarding some of Dr. Markos' testimony and asked if counsel wanted to expand upon that objection. Defendant's attorney responded, "As to going into improper legal standard with regard to amnesia," to which the court replied as follows:

> "It is necessary when a forensic expert testifies to necessarily testify regarding the melding, if you will, of law and psychiatry. It is absolutely necessary in sanity instances or a claim of insanity. It is necessary in fitness because it is necessary that the expert witness opining on fitness matters have some understanding of what he or she believes to be the law that is applicable with respect to the particular issue.
>
> When the doctor was testifying, I just happened to have my copy of *Stahl* open, which I believe states quite accurately the state of the law in the state of Illinois. That's a reference to *People versus Stahl*, S-t-a-h-l, 2014 IL 115804, an Illinois Supreme Court case decided later than I thought, nine or ten months ago,

> May 22, 2014, but certainly still good law, and the doctor's recitation—his statement regarding the application of amnesia to the issue of fitness is virtually verbatim as what was stated by our Supreme Court in *Stahl*.
>
> That's why I sustained [*sic*] your very well-stated and well-timed objection. Nonetheless, for those reasons I believed then and I believe now it was properly overruled."

¶ 16 Defense counsel then informed the trial court, based on a prior off-the-record sidebar, that the defense would object to the trial court instructing the jury that FCS is not required to video record forensic interviews. Defense counsel informed the court counsel would like to have that issue resolved before Dr. Markos' cross-examination. The court restated its view of the law that the statute does not require FCS to record interviews it conducts but "the law does require persons retained or appointed by the State or Defense to videotape those examinations." The court stated it was considering an instruction "to explain to the jury the seeming dichotomy" between the fact defendant's expert videotaped his interview but the psychiatrists from FCS did not," but the court did not require the parties to respond immediately. The court stated the parties could consider their response and the matter would be revisited after the break. When court resumed, the trial court informed the parties that if the defense wished to argue the fact the FCS psychiatrists did not record their examinations in closing argument, then the court would instruct the jury that FCS does not have to record those examinations but a retained or appointed expert does.

¶ 17 On cross-examination by defendant's attorney Dr. Markos testified that malingering is "defined as a clinical situation where an individual—a patient would either fabricate or exaggerate physical or mental symptoms with a clearly identifiable goal." Dr. Markos testified that Dr. Cooper administered a test for memory malingering and defendant performed well with

no evidence of malingering. Defendant's attorney asked Dr. Markos if he evaluated defendant's fitness to stand trial and Dr. Markos answered that was correct. Defense counsel then asked: "Fitness to stand trial is the ability to understand the nature of the charges and proceedings and to assist in one's defense, correct?" and Dr. Markos agreed those "are the criteria for a fitness evaluation." Dr. Markos testified defendant answered questions about the nature of the charges and proceedings. Defense counsel asked Dr. Markos if he asked questions about defendant's ability to assist counsel and Dr. Markos agreed that would include defendant's ability to recall events and to decide whether he can meaningfully testify or not in his own defense. Dr. Markos testified that anoxic encephalopathy could result in amnesia. Dr. Markos also testified on cross-examination that fitness is a legal determination to be made by the jury, but "forensic experts make a recommendation, a clinical recommendation, as to someone's mental fitness or unfitness." He stated, "my recommendation to the trier of fact is that [defendant] is mentally fit based on a forensic psychiatric evaluation." He agreed that is "applying a legal standard onto *** the evaluation."

¶ 18 Dr. Markos testified defendant's amnesia could prevent defendant from reporting his version of events; but he would not agree that defendant's amnesia prevents defendant from meaningfully testifying because he cannot remember the events at issue. Rather, Dr. Markos testified that "if [defendant] can learn and retain information from extrinsic sources he is fit and he is capable of testifying." Nonetheless Dr. Markos testified that, assuming defendant does not have memory for the event he would not be able to provide his version. When asked if amnesia would prevent defendant from intelligently deciding on how to plead Dr. Markos testified that if defendant is able to learn whether he committed any acts from extrinsic sources then he would be fit. Dr. Markos admitted he "cannot testify with a reasonable degree of certainty to the accuracy or veracity of the information that may be provided to [defendant.]" He added, without

objection, that this situation "is not unique to this case" and "would apply to any case in the preparation." Dr. Markos agreed with defense counsel's explanation that defendant's ability to learn would be from exposure to new information he could then relate back to someone; and Dr. Markos added "[a]nd be able to work with that information with his counsel."

¶ 19 The State next called Dr. Christofer Cooper to testify. Dr. Cooper testified he is the chief of psychology and the clinic coordinator for FCS. Dr. Cooper examined defendant with regard to defendant's fitness to stand trial in September 2013 and again in April 2015. In addition to his clinical examination Dr. Cooper reviewed the police and medical reports as well as a report by Dr. Robert Hanlon. Dr. Cooper testified that based on his review of the records defendant was "psychologically stable" on June 15, 2010 and June 30, 2010. Dr. Cooper interviewed defendant on two dates in September and testified that he found it noteworthy that during the second interview defendant "spontaneously and correctly and logically engaged in follow-up discussion." In the three years between the offense and when Dr. Cooper examined him defendant "learned an understood, processed and was sensitive to the severity of his physical injuries." Dr. Cooper testified defendant had "a very good factual understanding of the injuries he sustained." Dr. Cooper testified he asked defendant questions related to defendant's fitness to stand trial. The State asked Dr. Cooper what two main questions he is looking to answer in his fitness examination and Dr. Cooper responded that "you look at whether the individual has an adequate factual understanding of [the] legal proceedings" and about "his ability to adequately assist counsel in his defense." Dr. Cooper testified that based on defendant's answers to Dr. Cooper's questions defendant's understanding of the nature and purpose of the proceedings against him was "more than adequate as it relates to his fitness to stand trial. He [(defendant)] has a very good factual understanding of the legal proceedings relevant to his case."

¶ 20 Dr. Cooper went on to ask defendant questions related to defendant's reported amnesia and whether or not defendant could assist counsel with his defense. Dr. Cooper testified "[a]mnesia, *per se*, is not a bar to competency or fitness. If someone has amnesia, it does not automatically equate to them being unfit or it is not tantamount to a finding of unfitness. It is a case-by-case analysis." Dr. Cooper testified he asked defendant to explain the allegations against him. Defendant gave Dr. Cooper information about who was involved and stated he (defendant) has no recollection of the offense. Defendant told Dr. Cooper he remembered being with his girlfriend and daughter and the next thing he remembers is waking up in the hospital. Defendant stated his memory is intact following waking up in the hospital. Dr. Cooper asked defendant what defendant had been told about the offense. Defendant told Dr. Cooper what defendant's attorney had told defendant about the crime including defendant's alleged involvement. Dr. Cooper added:

> "I asked him if he—at that time if he was able to remember what [his attorney] tells him about the allegation, so information that's provided to him, and he replied, 'yeah, most of it.'
>
> I asked him then if [his attorney] speaks to him or provides the information in a manner and language which he understands, and he responded, 'yes.' He further stated he is willing to listen carefully and process the information he is told about the alleged incident. So he is willing to listen and eager to listen. I know that in fact that he was eager to—he stated or indicated that he was eager to communicate with [his attorney] and proceed on with his case.

> Again, this is three years after his arrest, three years in detainment in Cook County Jail, and he indicated that he was motivated and eager to move on with the case."

Dr. Cooper testified that defendant's answers to his questions indicated defendant was consistent in reporting he has amnesia for the offense but "he is not reporting or claiming amnesia or memory problems *** [or] reporting ongoing memory problems after the alleged offense." Dr. Cooper testified defendant "was well aware and understood what his attorney had informed him about what happened." Dr. Cooper characterized that fact as "very much relevant" because that was "the issue at hand." Dr. Cooper testified defendant had learned information presented to him by his attorney and "had it extrinsically reconstructed from an external source, that being his attorney." The State asked Dr. Cooper if the fact defendant can process and retain information that is extrinsically reconstructed was a factor that is commonly accepted in the field of forensic psychology in determining an individual's fitness to stand trial. Dr. Cooper responded, "To me that's the ultimate or fundamental issue on that question here." Dr. Cooper recounted his observations during his examination of defendant in 2013 and testified that his opinion at that time within a reasonable degree of psychological and scientific certainty was that defendant was fit to stand trial.

¶ 21 Dr. Cooper then testified concerning his 2015 evaluation of defendant. For that evaluation Dr. Cooper additionally reviewed his prior report, Dr. Markos' report, and Dr. Hanlon's reports and video recording of Dr. Hanlon's examination of defendant. Defendant's presentation was consistent with Dr. Cooper's 2013 evaluation. Dr. Cooper again asked questions related to defendant's fitness to stand trial and specifically whether or not defendant understood the proceedings and was able to assist counsel in his defense. The State asked Dr.

Cooper what defendant's responses indicated about defendant's ability to assist counsel in his defense despite having amnesia. Dr. Cooper responded as follows:

> "Again, consistent with 2013, I believe—my clinical impression is that Mr. Floyd can learn, retain, process, logically evaluate anything that's presented to him, and because of that, he is capable of rationally assisting counsel in his own defense.
>
> Fitness is a very low standard. You don't have to have an attorney's understanding of the legal system. In fact, most people of course don't. You have to have a basic factual understanding.
>
> In this case involving amnesia, you have to have the capacity to learn and retain information that's presented to you. In this case, of course, it is my opinion that he is clearly able and capable of doing that."

¶ 22 Dr. Cooper testified defendant is able to learn, remember, and make sense and process any information that is presented to him. Defendant is capable of having meaningful conversations with his attorney, following along with day-to-day trial proceedings, and retaining information he learned during trial. Dr. Cooper testified that his current opinion within a reasonable degree of scientific and psychological certainty was that defendant "is presently fit to stand trial."

¶ 23 On cross-examination Dr. Cooper agreed that defendant cannot tell a defense attorney what he was doing on the day of the offense or what his state of mind was. When asked if defendant could tell a defense attorney why he was where he was when he was shot Dr. Cooper responded defendant is capable of learning information that is extrinsically reconstructed. Dr. Cooper agreed that would be information that was told to defendant. Defense counsel asked if "it is a memory of what someone said [to defendant]" and Dr. Cooper responded as follows:

> "Well, it is whether he can learn information that's extrinsically reconstructed. That's the issue at hand in any fitness case involving a claim of amnesia.
>
> That's not unique to [defendant.] That's not unique to this case. That issue is at play in any case in which there is purported amnesia, whether they can extrinsically reconstruct or whether they can learn information from external sources, in other words their attorney."

Shortly thereafter on cross-examination, defendant's attorney asked Dr. Cooper whether it was true that defendant could not testify at his trial because he does not know what happened independently. Dr. Cooper responded by stating:

> "I don't know that that's a bar to him testifying. You [(referring to defendant's attorney)] can answer that question better than I can. I don't know if he can testify.
>
> Again, he has been consistent in his claim to not remember the alleged offense and only that, but he is clearly capable of learning information that's presented to him.
>
> I will repeat this. That's the issue at play in any case of purported amnesia. Whether someone can or cannot testify, whether they have partial recall or zero recall, that's at play in any case.
>
> As I previously testified on direct, amnesia, *per se*, is not a bar to fitness. Amnesia, *per se*, is not tantamount to somebody being unfit or fit."

Dr. Cooper stated that when he testifies, he gives his opinion to a reasonable degree of psychological certainty but it is not a legal determination. He testified he provides a "clinical opinion as to the psycho-legal issue" and the jury makes the legal determination.

¶ 24 Dr. Cooper testified that if there is adequate information to extrinsically reconstruct the information that is purported to be lost by way of amnesia the defendant can be found fit to stand trial. He agreed the information would be someone else's version of events and described possible sources of that information. Dr. Cooper then continued:

> "Someone—there may be a wealth of evidence, of legal evidence in a case or police reports, but if the individual is unwilling to talk to their attorney or because of a psychological problem like schizophrenia incapable of understanding or mental retardation, they might still be unfit.
>
> In cases where there are no such problems, which as I previously gave my impression that that's what we have with [defendant,] they can be fit to stand trial. So it is at play in any amnesia case. Nothing unique here."

¶ 25 Dr. Cooper's testimony ended and, after the trial court dismissed the jury, defendant's attorney asked the court to reconsider its ruling barring Professor Coyne from testifying. Defendant's attorney argued the jury had no context for what assisting his attorney means and how defendant's state of mind is relevant to that. The defense asserted Professor Coyne could provide a context for the jury to understand why defendant's lack of memory as to his state of mind at the time of the offense is relevant to the issue of fitness. The State argued the question of defendant's state of mind was an issue for trial and that the defense was trying to get to an ineffective assistance of counsel issue. The trial court ruled that its prior ruling barring Professor Coyne's testimony would stand. The trial court stated: "I don't see it as an ineffective assistance of counsel issue. I see it as an issue of being able to assist in his defense. Those are two different things in my estimation."

¶ 26 Defendant called Dr. Robert Hanlon to testify. Dr. Hanlon is a board certified clinical neuropsychologist who was asked to evaluate defendant with regard to his fitness to stand trial.

When asked "When is a person unfit to stand trial?" Dr. Hanlon responded the person is unfit "if he or she is mentally unable or incapable of understanding the charges against him or her" or when "he or she is unable to assist the defense attorneys in his or her defense." Dr. Hanlon saw defendant in 2011, 2013, and 2015. Dr. Hanlon testified defendant's retrograde amnesia was a legitimate condition because retrograde amnesia is a typical and common manifestation following anoxic brain damage. Dr. Hanlon made a video recording of his interview of defendant in 2015. The 2015 interview was a supplemental evaluation of defendant's fitness to stand trial. The defense began to play the recording for the jury. At one point the trial court instructed defendant's attorney to stop the recording and dismissed the jury for its lunch break. Once outside the presence and hearing of the jury, the trial court asked defense counsel about the relevance of what was being discussed in the recording. The subject matter was what happens if defendant is found unfit for trial. The trial court, still outside the presence and hearing of the jury, watched the recording from the point it ordered the defense to stop before the jury was dismissed. After viewing additional portions of the recording from that point the trial court ruled that those portions would not be played for the jury because it would instruct the jury as to what happens should there be a finding of unfitness and "[t]here are so many variables, that that is beyond confusing to the Jury, prejudicial. It's not going in." The defense then withdrew the remainder of the video.

¶ 27 Dr. Hanlon testified that after his evaluation of defendant in January 2015 he did not reach a conclusive opinion on defendant's fitness. He found factors both in favor of fitness and factors in favor of unfitness. Dr. Hanlon testified defendant understood the charges against him, the court proceedings, who the court personnel are, and the legal terminology, which demonstrated that defendant "is fit with regard to that domain of fitness." Dr. Hanlon testified the factors he found as to defendant's unfitness to stand trial were that defendant "does not have

independent memory, his own independent recollection of the events that transpired at the time of the crime that he is charged with, due to the fact that he sustained anoxic brain injury and has retrograde amnesia." Dr. Hanlon testified he found factors indicating defendant could not assist in his defense. Specifically, Dr. Hanlon testified as follows:

> "Again, consistent with the retrograde amnesia that he manifests, I think he is—he's really—he's not capable of—of telling his attorney his account or his version of what happened at the time, before and at the time of the crime that he's charged with, because he has no memory of it.
>
> I also think that that lack of memory, also, disables him in terms of his ability to testify on his own—in his own behalf, because he doesn't recall the events that happened; and I think it also limits his ability to intelligently plead, because he does not remember what happened."

Dr. Hanlon testified extrinsic reconstruction of events is not a substitute for true memory. If defendant had true memory of the events he would be able to discuss his state of mind.

¶ 28 On cross-examination Dr. Hanlon testified defendant scored in the average range on a test of learning and recalling new information and defendant performed better on that test in 2015 than he did in 2011. Dr. Hanlon testified a third person was present operating the camera when he recorded his 2015 interview of defendant. Dr. Hanlon believed that person was an investigator for the Public Defender's Office but could not recall her name. He testified it is possible a person would be influenced by a camera during an interview and it is possible the interviewee could be playing to the camera. The State asked Dr. Hanlon about the fact that he video recorded his interview of defendant. The trial court interrupted the State's cross-examination and called the parties to a sidebar outside the presence and hearing of the jury. The court told the State "You can't castigate him for videotaping the interview, when the law requires

that it be videotaped." The court ordered the State to cease that line of questioning. Upon further cross-examination Dr. Hanlon testified defendant can learn and retain new information from extrinsic sources including his lawyer, police reports, and other documents that involve the case. Dr. Hanlon testified defendant can retain some of that information and reliably recall it. He did not believe defendant would recover from his retrograde amnesia, and defendant's amnesia "is exactly consistent with the classic clinical profile of retrograde amnesia that occurs with anoxic brain damage."

¶ 29 The State called Dr. Cooper in rebuttal. The State played a portion of the video recording of Dr. Hanlon's interview of defendant for Dr. Cooper and asked Dr. Cooper about his observations. Dr. Cooper testified there was "a marked delayed response time to most questions." Dr. Cooper testified that was not how defendant responded to his questions in 2013. He stated defendant "did not present in any way *** as he did throughout most of the DVD footage that I viewed of Doctor Hanlon, during my meetings both in 2013, as well as 2015." Dr. Cooper testified the presence of a third person or a camera would "[w]ithout a doubt" affect how a person performs during an interview. Dr. Cooper called the mere presence of the video recording equipment "a potential compromising or confounding factor" that "contaminates any data or information that's presented in that videotaped interview." Dr. Cooper testified defendant's presentation as observed in the video was "markedly, drastically, significantly different than his clinical presentation across [his] three examinations."

¶ 30 After both parties rested the trial court proceeded with the jury instruction conference. In pertinent part, the court declined to instruct the jury that if it found defendant unfit to stand trial it should go on to determine whether there is a substantial probability that defendant, if provided with a course of treatment, would obtain fitness within one year. The court declined to so instruct the jury because there had been no evidence on that question. The court noted that the

applicable statute provides that if the jury is unable to determine "by virtue of the evidence presented" whether substantial probability exists the court shall order the defendant to undergo treatment for the purposes of rendering him fit. In light of the lack of evidence on whether defendant could obtain fitness within one year the court ruled as a practical matter that if the jury found defendant unfit it would direct a verdict that the jury is unable to make the determination and proceed consistently with that portion of the statute. The defense placed on the record its requested instruction based on section 104-16(b) of the Code of Criminal Procedure of 2012, which provides in part:

> "(b) Subject to the rules of evidence, matters admissible on the issue of the defendant's fitness include, but are not limited to, the following:
>
> (1) The defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;
>
> (2) The defendant's ability to observe, recollect and relate occurrences, *especially those concerning the incidents alleged*, and to communicate with counsel." (Emphasis added.) 725 ILCS 5/104-16(b) (West 2016).

¶ 31 The defense argued the proffered instruction "tracks the language of the statute as far as matters that—that are to be considered with regard to fitness" and argued it is appropriate for the jury "to have some sort of framework with regard to the—the legal—legal standard as far as fitness." The trial court stated the proffered instruction "does track exactly, the language quoted in Section 104-16 b, which itself is quoted verbatim in *People versus Stahl*" but it declined to give the instruction. The court stated that the matters "admissible on the issue of the Defendant's fitness" that are listed in the statute and the instruction "were communicated to the Jury by virtue of direct and cross-examination of all of the witnesses who have testified. They are obviously to

be argued." The court further reasoned that the use of the word "especially" in the statute with regard to one factor "seems to communicate that [factor] is the most important factor that the Jury must consider" but the court did not believe that it is because "this is a totality of the circumstances analysis." The court stated that "to use an adverb, such as the word especially, to highlight particular evidence, relative to other evidence, is precisely what any Court ought not to do." The court further noted that the statute does not speak to how the jury should be instructed but to what types of evidence is admissible.

¶ 32 Defendant's attorney asked the trial court to strike the word "especially" from the clause at issue or, in the alternative, to strike the clause containing the word "especially" in its entirety. The court refused but stated it would read the Stahl decision again and defendant's attorney could revisit the matter the following day.

¶ 33 The defense also requested an instruction regarding consideration of the video recording of a forensic interview in assessing the weight to be given the testimony of the person conducting the interview. Defendant's attorney argued the State's questioning in rebuttal of Dr. Cooper, who did not video record his interview, was an attack on Dr. Hanlon's video recording of his interview of defendant which he was required by law to do. The State responded they were not attacking Dr. Hanlon's credibility but were highlighting defendant's disparate performance when he was being recorded versus when he was not. The trial court agreed with the State that "the manner in which this issue is now out there *** doesn't attack Doctor Hanlon's credibility." The court did rule that it may reconsider based on the State's closing argument. When the parties returned to court the following day the trial court ruled that it would give the defense's proffered instruction concerning the factors to be considered in determining whether the defendant is fit to stand trial "taking out the [entire] clause related to especially."

¶ 34 During rebuttal closing argument, the State argued as follows regarding Dr. Hanlon's testimony:

> "You know what he starts talking about? That the defendant can't testify in his defense. He [(Dr. Hanlon)] is not a lawyer. What is he talking about? Defendant can't tell his lawyer [his] version of events. What is he talking about? He is not no [*sic*] lawyer, no legal knowledge. Stay in your backyard, Doctor.
>
> * * *
>
> And then they argue to you that his lawyer would somehow be in some kind of disadvantage if the defendant doesn't know what happened, doesn't remember. What is that? That has nothing to do with it.
>
> [Defendant's objection was overruled.]
>
> Dr. Hanlon knows nothing about the law. You should discount everything he said about the defendant can't testify in his own defense. He doesn't know that.
>
> [Defendant's objection was overruled.]
>
> This defendant can learn and retain new information. He can have a conversation. He can cooperate with his lawyer. He can discuss the evidence in the case, discuss the witness testimony with his lawyer. That's the lawyer's job. He has the ability to do that, the ability to the [*sic*] assist in his own defense. There is nothing preventing him from doing that.
>
> [Defendant's objection was overruled.]"

¶ 35 The State concluded its rebuttal argument as follows:

> "So what he can't remember. He can learn and recall new information that's been recreated for him. And that's what it's all about. That's all that it is about.
>
> Again, ladies and gentlemen, this defendant is fit to stand trial. The evidence is before you. There is no evidence of unfit, no opinion that he is unfit to stand trial. The evidence in the case supports just one conclusion; that he is fit to stand trial and we ask that you find he is fit to stand trial. Thank you."

The trial court then proceeded to instruct the jury. In pertinent part, the trial court instructed the jury as follows:

> "Matters on the issue of the defendant's fitness that you may consider include but are not limited to the following: Defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence and the functions of the participants in the trial process; *the defendant's ability to observe, recollect and relate occurrences* and to communicate with counsel; the defendant's social behavior and abilities; orientation as to time and place; recognition of persons, places and things and performance of motor processes.
>
> Amnesia does not *per se* make a person unfit. A person is unfit to stand trial if, because of a mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or he is unable to assist in his defense." (Emphasis added.)

¶ 36 Following closing arguments the jury found defendant fit to stand trial. The case proceeded to a trial of the charges against defendant.

¶ 37 At defendant's trial, defendant testified he remembered waking up in the hospital but he had no recollection of how he got there. His last memory before waking up in the hospital was being at home with his girlfriend and daughter. The defense elicited testimony from a Chicago Fire Department paramedic that he responded to the scene of the shooting and found defendant with multiple gunshot wounds. Dr. Robert Hanlon testified for the defense that he examined defendant for the effects of brain trauma. Defendant's injuries and the results of his evaluation were consistent with a lack of memory due to anoxic brain injury involving high volume blood loss and lack of oxygen to the brain. Dr. Hanlon testified hospital records documented a lack of memory from the beginning of defendant's hospitalization and that defendant's amnesia was consistent with defendant's injuries.

¶ 38 The jury found defendant guilty of the first degree murder of Officer Wortham and Brian Floyd, attempt (first degree murder) of Mr. Wortham, and not guilty of aggravated discharge of a firearm. The trial court sentenced defendant to two terms of natural life imprisonment for each first degree murder conviction and to a consecutive term of six years imprisonment for attempt (first degree murder).

¶ 39 This appeal followed.

¶ 40 ANALYSIS

¶ 41 Defendant raises several arguments on appeal attacking the proceedings in the fitness trial and the trial on the substantive charges. As to the fitness trial defendant argues the verdict should be reversed because (1) the State erroneously informed the jury defendant could not be prosecuted for murder if it found him unfit to stand trial, (2) he received ineffective assistance of counsel where his attorney at the fitness trial failed to object to the State's witnesses stating an erroneous standard for fitness that diminished the State's burden of proof, (3) the trial court gave the jury an instruction that bolstered the State's witnesses' erroneous testimony and misled the

jury as to the standard for fitness to stand trial, (4) the trial court erroneously barred the defense from calling an expert witness to testify as to how defendant's amnesia affects defendant's ability to assist in his defense, and (5) the trial court failed to properly instruct the jury regarding the requirement to video record fitness evaluations. As to the trial of the charges, defendant argues (1) the State failed to prove defendant or someone for whom he was accountable planned to commit an armed robbery or took a substantial step toward the commission of an armed robbery, (2) defendant was denied a fair trial by the State's improper closing argument, and (3) the sentence of two consecutive terms of life without consideration of his youth and rehabilitative potential is unconstitutional. For the reasons that follow, we hold the trial court erroneously instructed the jury as to the factors to be considered in determining whether a defendant is fit to stand trial and thus denied defendant a fair fitness trial. We remand for a new trial consistent with this order and retain jurisdiction over the remainder of defendant's appeal should defendant be found to have been fit to stand trial.

¶ 42 In Illinois a defendant is presumed fit to stand trial. 725 ICS 5/104-10 (West 2014). The defendant bears the initial burden of proving there is a *bona fide* doubt of his fitness. *People v. Weeks*, 393 Ill. App. 3d 1004, 1009 (2009). "A defendant is unfit if, because of his mental or physical conditions, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ICS 5/104-10 (West 2014). "If a *bona fide* doubt is raised regarding a defendant's ability to understand the nature and purpose of the proceedings against him or assist in his own defense, a trial court must order a fitness hearing to determine the issue before proceeding." *Weeks*, 393 Ill. App. 3d at 1009; 725 ILCS 5/104-11(a) (West 2014). "The issue of the defendant's fitness may be determined in the first instance by the court or by a jury." 725 ILCS 5/104-12 (West 2014). When the determination is made by a jury a trial of the issue of the defendant's fitness to stand trial is conducted "as any ordinary trial before a jury in a civil

case." *People v. Preston*, 345 Ill. (1931). At the fitness hearing, the State bears the burden to prove by a preponderance of the evidence that the defendant is fit. *People v. Meyers*, 352 Ill. App. 3d 790, 797 (2004) ("Once a *bona fide* doubt exists, the State must prove the defendant fit by a preponderance of the evidence before a trial may take place.").

> "Subject to the rules of evidence, matters admissible on the issue of the defendant's fitness include, but are not limited to, the following:
>
> (1) The defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;
>
> (2) The defendant's ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel;
>
> (3) The defendant's social behavior and abilities; orientation as to time and place; recognition of persons, places and things; and performance of motor processes." 725 ILCS 5/104-16 (West 2014).

"The trial court's determination of fitness will be reversed only if it is against the manifest weight of the evidence." *People v. Lucas*, 388 Ill. App. 3d 721, 726 (2009).

¶ 43 "Generally, a trial court's decision to grant or deny an instruction is reviewed for abuse of discretion. [Citation.] The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law. [Citation] When the question is whether the applicable law was conveyed accurately, however, the issue is a question of law, and our standard of review is *de novo*. [Citation.]" (Internal quotation marks omitted.) *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13. "Under Supreme Court Rule 239(a) (177 Ill. 2d R. 239(a)), a nonpattern instruction is permissible if it is simple, brief, impartial, and nonargumentative. Where a unique

factual situation, or a point of law, is presented, a nonpattern instruction may be given if it is accurate and will have no improper effect on the jury." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505-06 (2002). "A faulty jury instruction does not require reversal unless the error results in serious prejudice to the party's right to a fair trial. [Citation.] In determining whether a party has been prejudiced, we consider whether the instructions, taken as a whole, were sufficiently clear so as not to mislead the jury. [Citation.] *** [T]here must be a reasonable basis supporting the conclusion that, but for the error, the verdict might have been different. [Citation.]" *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 87.

¶ 44 In *Stahl*, 2014 IL 115804, the primary issue was "whether, under article 104 of the Code [of Criminal Procedure, the] defendant's amnesia as to the events surrounding the crime alone renders him *per se* unfit to stand trial." *Stahl*, 2014 IL 115804, ¶ 25. In that case, the trial court found the defendant unfit to stand trial. *Id*. ¶ 15. The defendant's mother had hired a psychiatrist to evaluate the defendant's risk of suicide and that psychiatrist, Dr. Gilbert, provided an opinion as to the defendant's fitness for trial. *Id*. ¶ 13. Dr. Gilbert opined the defendant could not recall the events at issue and that the defendant's ability to form new short-term memories was severely impaired. *Id*. Dr. Gilbert found the defendant could not cooperate with his attorney to assist in his own defense because the defendant's short-term memory impairment made it impossible for the defendant to track what happened in court from one day to the next. *Id*. Dr. Gilbert also expressed a conclusion "that there was no probability that [the] defendant would recover his memories of the events at issue or the 48 hours leading up to those events, which would, in and of itself, render [the] defendant unfit to stand trial." *Id*. The State also retained a psychiatrist, Dr. Rabun, to evaluate the defendant. *Id*. ¶ 14. Dr. Rabun found that the defendant lacked the capacity to understand the nature of the proceedings or to assist in his defense. *Id*. However, "Dr. Rabun noted that if [the] defendant's amnesia as to the day of the

events charged were his only impairment, it would be Dr. Rabun's opinion that [the] defendant was fit to stand trial." *Id*.

¶ 45 Approximately 10 months after the trial court found the defendant unfit the court held a fitness restoration hearing. *Id*. ¶ 17. At the fitness restoration hearing Dr. Montani, a psychiatrist treating the defendant, testified the defendant was fit to stand trial if the court made accommodations for any short-term memory deficits. *Id*. Dr. Montani concluded the defendant was able to understand the nature and purpose of the proceedings against him and that the defendant was able to assist in his defense because the defendant was able to retain information from an earlier discharge hearing, verbally articulate those memories, and draw conclusions from the retained information. *Id*. Dr. Montani "believed that [the] defendant's amnesia as to the events that led to the charges against him, by itself, was insufficient to find him unfit." *Id*. ¶ 18.

¶ 46 In *Stahl*, a criminal defense attorney also testified as an expert witness for the defendant. *Id*. ¶ 19. The defense attorney "described how [the] defendant's amnesia as to the relevant events could negatively impact his ability to assist defense counsel." *Id*. The attorney-expert testified:

> "(1) defendant could not tell counsel his version of the events or what his state of mind was at the time, information that is critical to understanding what defenses might be available; (2) he could not meaningfully testify in his own defense because he could not remember the events at issue; and (3) he could not even intelligently decide how to plead because he did not know whether he committed any of the acts charged." *Id*.

¶ 47 Following the fitness restoration hearing the trial court found the defendant unfit to stand trial. After the court denied the State's motion to reconsider, the State appealed and the appellate court affirmed. *Id*. ¶¶ 20-21. The appellate court, for purposes of the appeal, assumed the

defendant's short-term memory impairment could be accommodated and focused its discussion on "whether [the defendant's] inability to recall the events at issue makes him unfit to stand trial." *Stahl*, 2013 IL App (5th) 110385, ¶ 21. The appellate court based its decision that the defendant's amnesia made him unfit to stand trial in that case on two primary factors.[1] First, "the statute expressly provides that the court should consider the defendant's ability to recall the events involved in the charges against him and relate those to defense counsel. Indeed, the statute emphasizes the defendant's ability to relate these events." *Id.* ¶ 26 (citing 725 ILCS 5/104-16(b)(2) (West 2010)). On that point the *Stahl* court wrote that "the applicable statute expressly emphasizes the defendant's ability to recall and relate to counsel the events at issue in the charges against him. Here, the defendant has no such ability. To hold that this issue is not a question of fitness would be at odds with the very purpose of our provisions related to fitness to stand trial." *Id.* ¶ 28.

¶ 48 Second, the court noted that in *People v. Schwartz*, 135 Ill. App. 3d 629 (1985), relied upon by the State and which the *Stahl* court declined to follow, the court "held that complete amnesia of the events surrounding the charged behavior does not automatically support a finding of unfitness" but that court "did *not* hold that a defendant who lacks memory of the events at issue may *never* be found unfit on this basis alone." (Emphases in original.) *Id.* ¶ 27. Rather, in *Schwartz*, "the defendant was able to provide his attorney with information about the events leading up to the charged incident that helped him present his insanity defense," whereas in *Stahl*, "the defendant [was] unable to recall anything that occurred in the 48 hours leading up to the events at issue, and there is no indication that *** the defendant can provide his attorney with

[1] We believe an examination of the appellate court's holding is useful to illuminate where our supreme court diverged from its holding, if at all.

any information that will help him to present any *** defense." *Id*. Regarding this point the court stated:

> "The State further argues that the defendant in fact can assist in his own defense because he is able to review police reports and discuss witness testimony with this attorney. We are not persuaded. The defendant here is unable to provide counsel with any information at all concerning the events at issue. This is far more critical aid to a defense attorney than the ability to read police reports and assess witness testimony. The defendant's recollection of the events at issue is information the attorney has no other means of obtaining. Thus, the fact that the defendant may be able to discuss aspects of the trial with his attorney does not override the fact that he is unable to provide his attorney with any information concerning the crimes charged." *Id*. ¶ 29.

¶ 49 Our supreme court affirmed the appellate court in *Stahl* (*Stahl*, 2014 IL 115804, ¶ 42) but found the above-quoted language "seems to suggest that *** amnesia as to the events surrounding the crime will always render a defendant unfit to stand trial because he or she will be unable to provide defense counsel with any information concerning the crimes charged." *Stahl*, 2014 IL 115804, ¶ 34. Our supreme court disagreed, holding that "fitness must be judged based on the totality of the circumstances." *Id*. ¶ 35. We believe the lower court's holding in *Stahl*, rather than implying amnesia of the events surrounding the offense will always render a defendant unfit for trial, only found that in the facts and circumstances of that case the defendant could not assist in his defense because the defendant's memory was the only possible source of a defense to the charges. See *Stahl*, 2013 IL App (5th) 110385, ¶ 27 ("Here, *** there is no indication that an insanity defense would be appropriate [(the defense the defendant in Schwartz

was able to assist in presenting)] or that the defendant can provide his attorney with any information that will help him to present *any other defense*." (Emphasis added.)).

¶ 50 Regardless, our supreme court directs that amnesia of the alleged offense will not *always* render a defendant unfit to stand trial. *Stahl*, 2014 IL 115804, ¶ 34, 39. We note that our supreme court did not hold that amnesia, alone, will never render a defendant unfit for trial. Instead, our supreme court recognized the relevance of amnesia of the alleged events to a defendant's ability to assist in his or her own defense. *Id*. ¶ 38 (recounting testimony by attorney-expert describing how the defendant's amnesia as to the relevant events could negatively impact his ability to assist defense counsel). Our supreme court concluded there were "a number of factors *** that should be considered on the issue of fitness" including the defendant's "inability to communicate with counsel because he cannot recollect his actions and *mens rea* surrounding the incident." *Id*. ¶ 39. Thus, "under article 104 of the Code, amnesia as to the events surrounding the crime does not *per se* render a defendant unfit to stand trial. Rather, the fact that a defendant cannot recollect the incident at issue is just one of the circumstances that may be considered in determining a defendant's fitness." *Id*.

¶ 51 In this case, as stated above, the trial court instructed the jury as follows: "Matters on the issue of the defendant's fitness that you may consider include but are not limited to *** the defendant's ability to observe, recollect and relate occurrences and to communicate with counsel." This language is taken from section 104-16(b) of the Code of Criminal Procedure (725 ILCS 5/104-16(b) (West 2014)) but eliminates the clause "especially those concerning the incidents alleged" from the subsection permitting the admission of evidence on the defendant's ability to observe, recollect, and relate occurrences. See 725 ILCS 5/104-16(b)(2) (West 2014). In this case the trial court's rationale for removing that language from the jury instruction was initially that the use of the word "especially" improperly highlighted particular evidence relative

to other evidence in a determination that must be made on the totality of the circumstances. The court later acquiesced that some instruction should be given based on the court's belief that this situation is similar to that presented by the introduction of evidence concerning the reliability of eyewitness identification. The trial court noted that our supreme court has identified a nonexhaustive list of factors that can be considered in assessing an eyewitness identification and has found that the jury must be instructed on those factors when identification is an issue. See Illinois Pattern Jury Instructions, Criminal, No. 3.15. Nonetheless, rather than striking only the word "especially" from the factor identified by the legislature and approved by our supreme court (see *Stahl*, 2014 IL 115804, ¶ 39) the trial court removed any reference to a relevant factor: defendant's ability to "recollect and relate occurrences" *concerning the incident alleged.*[2] We hold the court's instruction, by failing to identify as a relevant factor the defendant's ability's to relate and recollect the incident alleged, misled the jury and failed to correctly state the applicable law. See *Stahl*, 2014 IL 115804, ¶ 39.

¶ 52 We further hold the erroneous instruction prejudiced defendant. *University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 87. The State's experts and the prosecutor repeatedly communicated to the jury that defendant's ability to recall anything about the day of the offense was irrelevant to the determination of fitness. Further, the trial court agreed to give the State's non-pattern instruction stating that amnesia does not *per se* make a person unfit. Defendant's attorney sought to temper the potential prejudice from the State's non-pattern instruction in light of the evidence presented during the hearing by again asking the court to instruct the jury that it could consider defendant's ability to recollect the occurrence alleged but

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[2] The Committee Comments to IPI 3.15, which the trial court found "very analogous" to the circumstances of this case, state: "The Committee believes this instruction [(listing the factors)] would serve the interests of justice by offering guidance in an area that contains complexities and pitfalls not readily apparent to some jurors." IPI-Criminal 3.15.

the court refused. The State's experts' testimony and the prosecutor's argument combined with the court's instructions to leave the jury with the firm impression that it should consider defendant's ability to recollect occurrences generally—and particularly the occurrence of having information communicated to him by his attorney—and that it need not (indeed should not) consider defendant's ability to recollect and relate the occurrences of the incident alleged.

¶ 53 In this case, there was no genuine dispute defendant understood the nature and purpose of the proceedings against him. Therefore the fitness hearing hinged on whether defendant could assist in his own defense. Absent consideration of the relevant factor of defendant's ability to recollect the offense the jury had no real basis upon which to even potentially decide defendant's fitness to stand trial making the outcome a virtually foregone conclusion. Therefore, we find there is "a reasonable basis supporting the conclusion that, but for the error, the verdict might have been different." *University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 87.

¶ 54 Relevant to this finding is defendant's argument the trial court erroneously excluded the testimony of his attorney-expert who would testify as to how defendant's lack of memory affected his ability to assist in his own defense. As the trial court noted, this precise species of testimony was received, and subsequently relied upon by our supreme court, in *Stahl*. *Stahl*, 2014 IL 115804, ¶ 38-39. Based on our discussion of *Stahl* above, we disagree with the State's characterization that our supreme court's reliance on the attorney-expert's testimony in *Stahl* was only to address Stahl's difficulties in forming new memories. The State argues in this case that the substance of the testimony the defense sought to admit was "more than adequately explained to the jury during closing argument." We disagree. "Counsel is entitled to vigorously argue his client's case and draw all reasonable inferences from the evidence. [Citation.] However, counsel may not misrepresent the evidence, argue facts not in evidence, nor 'create his own evidence.' [Citation.]" *Lecroy v. Miller*, 272 Ill. App. 3d 925, 933 (1995). "Expert testimony is

admissible if the expert is qualified by knowledge, skill, experience, training, or education, and the testimony would assist the jury in understanding the evidence." *Brannen v. Seifert*, 2013 IL App (1st) 122067, ¶ 45. "The decision of whether to admit expert testimony is within the trial court's sound discretion." *Id*. In this case we hold the trial court abused its discretion in barring defendant's proffered testimony. The testimony would have helped the jury understand how a criminal defendant assists his attorney in his own defense in a murder trial which is precisely the issue the jury was called upon to address. On remand, the trial court is instructed to allow defendant's expert's testimony.

¶ 55 Turning to defendant's argument the State erroneously conveyed to the jury that it would only be able to prosecute defendant for murder if the jurors found him fit to stand trial, we find this issue is not likely to recur on remand and therefore decline to address it. Defendant argues the State made reference to this point during opening and closing statements. For example, during the State's closing argument, the prosecutor argued as follows: "Just because Dr. Hanlon put a halt to his clinical evaluation [(with defendant's amnesia)] doesn't mean that's what you are supposed to do. He doesn't get a free pass out of being tried for first degree murder because he says he can't remember what happened during the crime." On appeal, defendant argues these statements misled the jury and denied him a fair trial. Defendant argues the prejudice was heightened because the trial court prevented him from eliciting "accurate" testimony about what would happen if defendant were found unfit. For that assertion defendant relies on the video recording of Dr. Hanlon's interview of defendant in 2015. The defense played the recording for the jury and at one point the trial court ordered the recording stopped. The video shows Dr. Hanlon discussing the possible consequences of a finding of unfitness. On appeal, defendant asserts that Dr. Hanlon "presumably explains that [defendant's] case could proceed in several different ways if the jury were to find him unfit, including being ordered to undergo treatment

for one year to attain fitness, proceeding to a discharge hearing, or civil commitment." See 725 ILCS 5/104-16(d) (West 2014); 725 ILCS 5/104-23 (West 2014).

¶ 56 Defendant's attorney did not object when the State made the statement referenced above during closing argument. Instead, before beginning the defense's closing argument, defendant's attorney asked for a side bar and asked the trial court to note the defense's objection to the State's comment about a "free pass" and to admonish the State not to make any statement similar to "a free pass out of the charge" in its rebuttal argument. The court noted that the time for making the objection had passed but nonetheless admonished the State "not to make any argument in rebuttal regarding the fact if they find him unfit, he somehow gets a free pass." The court further ordered the State "to stay away from arguments that suggest what may or may not happen should they find the defendant unfit." In light of the court's admonishments, defendant's concern about the State's comments about the consequences of a finding of unfitness is not likely to recur upon remand. Moreover, we note defendant does not argue the jury should be informed of the possible consequences of a finding of unfitness other than to cure any potential prejudice from the State misinforming the jury about those consequences. Accordingly, in light of our remand and the trial court's prior rulings on the subject, we find no need to address this issue at this time.

¶ 57 Defendant also argued trial counsel rendered ineffective assistance of counsel by failing to object to the State's witnesses' mischaracterization of the legal standard for determining fitness including by testifying that the determinant question is whether he can learn and retain information that is extrinsically reconstructed. We have held the trial court must instruct the jury on all of the factors listed in the statute that may be considered in determining a defendant's fitness for trial. Further, under *Stahl*, the determination is to be made based on the totality of the circumstances including, but not limited to, the factors enumerated in section 104-16(b) of the

Code of Criminal Procedure. On remand, if the State's witnesses restate an erroneous standard, defendant's attorney, based on this order, may object and the trial court should rule on the matter in the first instance.

¶ 58 Finally, defendant claims error in failing to instruct the jury that it could consider Drs. Markos' and Coopers' failure to video record their interviews of defendant in assessing what weight to give their testimony and in failing to instruct the jury that Dr. Hanlon was required to video record his interview. As to the latter, defendant argues such an instruction "was necessary to mitigate the damage caused by the improper arguments regarding Hanlon's recording method." However, the trial court sustained defendant's objection to the arguments at issue and instructed the State to "stay away from the video." In light of the trial court's order we find the offending situation is not likely to recur on remand. As for the former, the parties dispute whether section 104-15(d) of the Code of Criminal Procedure applies to FCS personnel. Section 104-15(d) reads as follows:

> "In addition to the report, a person retained or appointed by the State or the defense to conduct an examination shall, upon written request, make his or her notes, other evaluations reviewed or relied upon by the testifying witness, and any videotaped interviews available to another examiner of the defendant. All forensic interviews conducted by a person retained or appointed by the State or the defense shall be videotaped unless doing so would be impractical. In the event that the interview is not videotaped, the examiner may still testify as to the person's fitness and the court may only consider the lack of compliance in according the weight and not the admissibility of the expert testimony. An examiner may use these materials as part of his or her diagnosis and explanation but shall not otherwise disclose the contents, including at a hearing before the

> court, except as otherwise provided in Section 104-14 of this Code." 725 ILCS 5/104-15(d) (West 2014).

¶ 59 The State argues FCS personnel are not "retained or appointed by the State or the defense" and, therefore, section 104-15 does not apply to their interviews. Defendant argues Drs. Markos and Cooper were "people who conducted forensic interviews" therefore the statute applies.

> "The cardinal rule of statutory interpretation is to ascertain and give effect to the intent of the legislature. [Citations.] The best indication of this intent is the language of the statute, which must be given its plain and ordinary meaning. [Citation.] Where the language is unambiguous, the statute must be given effect without resort to other aids of construction. [Citation.] In examining a statute, a court must give effect to the entire statutory scheme. Thus, words and phrases should not be construed in isolation; rather, they must be interpreted in light of other relevant portions of the statute. [Citations.] Issues of statutory interpretation are questions of law which we review *de novo*. [Citation.]" *Krautsack v. Anderson*, 223 Ill. 2d 541, 552-53 (2006).

¶ 60 Based on the plain language of the statutory scheme as a whole, we agree with the State that section 104-15(d) does not apply to FCS personnel. Sections 104-11(b) and 104-13(e) permit a defendant to request the trial court to appoint an expert to examine him or her with regard to fitness to stand trial. Both sections require an expert so appointed to "make a report as provided in Section 104-15" and that upon the filing of a statement of services rendered "the court shall enter an order on the county board to pay such expert a reasonable fee stated in the order." 725 ILCS 5/104-11(b) (West 2014); 725 ILCS 5/104-13(e) (West 2014). Conversely, Circuit Court of Cook County General Order 1.5 states: "The Forensic Clinical Services

Department provides diagnostic and clinical services for adults, juveniles and families referred by the Court. Diagnostic impressions, opinions and recommendations are formulated in written reports submitted to the Court and expert court testimony is provided as mandated." IL R Cook County Cir. Order 1. "Like any other statute, ordinance, or rule, local court rules have the force of law." *Jones v. State Farm Mutual Automobile Insurance Co.*, 2018 IL App (1st) 170710, ¶ 21. Thus, as a matter of law FCS personnel are not required to be retained or appointed by the State or the defense, nor do they require a court order to be paid. Instead, they are part of a unit of the circuit court of Cook County required to provide diagnostic and clinical services and submit written reports as ordered by the court. Moreover, this court has recognized that "[e]vidence at a fitness hearing may include a report from forensic clinical services, *or* from private psychiatrists or psychologists retained by either side." (Emphasis added.) *People v. Garcia*, 2015 IL App (1st) 131180, ¶ 52.

¶ 61 While both FCS personnel and retained or appointed experts are required to submit written reports, section 104-15(d) states that *in addition to the report* a person retained or appointed by the State or defense shall make any videotaped interviews available to another examiner or the defendant and that "forensic interviews conducted by a person retained or appointed by the State or the defense shall be videotaped." The plain language of section 104-15(d) suggests it represents additional requirements imposed upon retained or appointed experts. To construe section 104-15(d) to refer to the same "persons or persons conducting an examination" referenced in section 104-15(a) would render the language in section 104-15(d) "a person retained or appointed by the State or the defense to conduct an examination" superfluous. Had the legislature intended the requirement in section 104-15(d) to apply to all persons conducting an examination of a defendant the specific identification of those "retained or appointed by the State or the defense" would not have been necessary. We must construe the

statute "so as to give effect to every word, clause, and sentence; we must not read a statute so as to render any part superfluous or meaningless." *Palm v. Holocker*, 2018 IL 123152, ¶ 21. Both the statute and this court recognize a distinction between FCS personnel and retained or appointed experts. Accordingly, the trial court properly held section 104-15(d) did not apply and declined defendant's proffered instruction.

¶ 62 Finally, we address the State's request that if we reverse the determination of fitness we remand for a "retrospective fitness hearing." Defendant cites *People v. Hancock*, 59 Ill. App. 3d 596, 602-03 (1978), in support of his argument a new fitness trial is warranted by the fact the reliability of the fitness jury's finding was undermined by the "fundamentally unfair nature of the proceedings." In *Hancock*, the court vacated the finding of fitness "and all subsequent proceedings" where the trial court improperly allocated the burden of proof and remanded for a new fitness hearing "during which the proper burden must be imposed." *Id*. at 602-03. The court held that if the court again found the defendant fit, the defendant must be afforded a new trial. *Id*. at 603. We decline to vacate "all subsequent proceedings" to defendant's fitness hearing. "While our supreme court previously disapproved of retroactive fitness hearings, that disapproval has since been overcome. [Citations.] '[I]t appears that retrospective fitness hearings are now the norm.' [Citations.]" *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 38. We believe, given the circumstances of this case, "defendant's fitness to stand trial [can] be 'fairly and accurately determined' upon remand for a retrospective fitness hearing." *People v. Payne*, 2018 IL App (3d) 160105, ¶ 14. We note, however, that our remand is for "a full retrospective fitness hearing on the record in accordance with our *** order." *Id*. ¶ 16. Following a full hearing conducted in accordance with this order, we retain jurisdiction of the appeal to consider any preserved claim of error arising from the retrospective fitness hearing and, if defendant is found fit, defendant's allegations of error at the trial of the charges against him.

¶ 63 CONCLUSION

¶ 64 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed in part and the cause remanded for proceedings consistent with this order; we retain jurisdiction over this appeal for all other issues properly raised.

¶ 65 Reversed in part and remanded with instructions, jurisdiction retained.