

No. 1-12-3273

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 16464
)	
SPARKY JACKSON,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Dismissal of post-conviction petition was proper because defendant was not prejudiced by erroneous jury instruction at trial where trial evidence was not closely balanced.

¶ 2 Following a jury trial, defendant Sparky Jackson was convicted of first degree murder and sentenced to 60 years' imprisonment. We affirmed on direct appeal, where defendant challenged only his sentence. *People v. Jackson*, No. 1-00-3821 (2002) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the 2012 dismissal, on the State's motion,

of his 2002 post-conviction petition as amended by counsel. He contends that his petition states a meritorious claim that trial and appellate counsel were ineffective for not challenging an erroneous jury instruction.

¶ 3 Defendant and codefendant Donald Adams were charged with first degree murder for the shooting death of Charo Triplett on May 19, 1998. Defendant's 2000 jury trial was simultaneous with codefendant's bench trial.

¶ 4 Fallon Milton testified that, after 10 p.m. on the night in question, shortly after a Bulls basketball game had ended, she was on the front porch of her home along with her sister Melissa Milton, her cousins Charo and Rulenska Triplett who also lived in the home, her cousin Samantha Lewis, and neighbors Eric Williams, Austin Robertson, and Marvin Lancaster. Fallon saw neighbor Angela Rush, two houses to the south, on her own porch with others. The area was well-lit with a streetlamp and two porch lights. The Milton/Triplett home had a vacant lot on either side, and as Fallon was looking north she saw three men in white shirts approaching from the northern vacant lot. Fallon identified defendant and codefendant as two of those men; she knew defendant for several years as Tito. The three men stopped at a bush about 10 feet away and defendant – the middle of the three men and the only one wearing a hat – drew a silver gun from his pants pocket and fired several times. Fallon ran into the house, along with Rulenska and Robertson, but heard the shots continuing. After about a minute, Fallon went outside again and saw Charo lying wounded on the porch.

¶ 5 At the scene shortly afterwards, Fallon described the shooter to a detective as about 20 years old, 5'5" tall, light-complexion, muscular, with a small mustache. While she did not name him as Tito "because I was scared," she led officers to the area where she had seen defendant

before. She had focused on defendant because he had a gun, so she did not describe the other two men. Later, at the police station, Fallon named Tito as the shooter, identified defendant and codefendant from a photographic array, and indicated that defendant was Tito. Fallon returned to the police station the day after the shooting and identified defendant in a lineup. About a week later, Fallon viewed another lineup and identified codefendant. On cross-examination, Fallon was shown the photographic array that was shown to neighbor Rush and identified a man she knew as Casper as the third man that night. Fallon did not identify Casper by name or photograph before trial but maintained that she was not shown Casper's photograph before trial.

¶ 6 Police officer Adrian Velez testified that he arrived at the scene at about 10:30 p.m. Fallon described the three men involved in the shooting; she did not name the shooter but described him as dark-complected, 5'3" tall, and the only one wearing a hat. Officer Velez's report stated the shooter and the other two men were strangers to Fallon. However, he explained that he did not interview Fallon individually but instead "a lot of people [were] yelling out a lot of things" at the scene. Detective Steven Konow testified that, when he interviewed Fallon hours after the shooting, she said that one of the three men was wearing a black shirt.

¶ 7 Melissa Milton testified that she also saw the three men approaching from the northern vacant lot but all three were wearing hats. She recognized Tito, who was walking between and slightly ahead of the others, from the neighborhood. Tito drew a gun from his pants pocket and fired several shots, without saying a word. Charo pulled Melissa and Lewis down, and Melissa stayed down until the firing stopped. When she stood again, the three men were gone and Charo was wounded. Melissa identified defendant in court as Tito. She described the three men to a detective but did not name Tito as the shooter because "at the time, I was scared, I wasn't

thinking right." On the day after the shooting, Melissa went to the police station where she identified defendant in a lineup and told an officer that she knew him as Tito. Melissa viewed the lineup separately from Fallon and had not discussed the incident with Fallon between the incident and lineup. Melissa also viewed the second lineup but was unable to identify anyone. Melissa denied that she or Charo was in a gang.

¶ 8 Rulenska Triplett testified that she was on the porch facing northward and saw the shooting. She identified defendant as the shooter at trial, and did not recall seeing him before the night of the shooting. She recalled discussing the incident with detectives at the police station but denied telling them that she was facing south when she heard the gunshots and saw only three men fleeing. She recognized defendant in a lineup within a day or two of the shooting, but could not "positively" identify him. She viewed another lineup over a year later in June 1999 and identified him as the shooter. When she discussed the case with police and State's Attorney's personnel, she was not shown photographs of defendant. However, several days after the first lineup, she saw defendant in the corridor at the courthouse and recognized him as the shooter.

¶ 9 Detective Tom Kelly testified that he conducted the 1998 lineup viewed by Rulenska and his report did not reflect that she made any identification, either certain or tentative. Detective Konow testified that he interviewed Rulenska hours after the shooting and she said that she was facing south when she heard the shots, took cover, and saw only three men fleeing.

¶ 10 Angela Rush testified that, when she was on her porch early in the evening on May 18, 1998, she saw in the next block a group of people that she knew to be members of the Gangster Disciples gang. A car drove past the group, who fired several shots at the car. The driver lost control and crashed into a tree in front of the Milton/Triplett home. Rush knew two of the three

men who exited the car: William, the driver, and "Casper" or Kim, the front passenger, both of whom were members of the Black Disciples gang. Casper exclaimed that he would "be back and someone's going to die." Rush ran inside her home and heard several more gunshots.

¶ 11 The next day at about 10 p.m., shortly after the Bulls game ended, Rush was on her porch and various neighbors were on the porch of the Milton/Triplett home. The area was lit with a streetlamp and the lights from both porches. Rush saw four men approach from the vacant lot north of the Milton/Triplett home and stop near that house. She recognized in the group Casper, "Tito" or Sparky, and Donald (all of whom were wearing hats) and identified defendant and codefendant at trial. She knew defendant and codefendant from the neighborhood and knew defendant to be in the Black Disciples. Defendant stood ahead of the others, drew a gun from "below waist level" and fired, and then codefendant and Casper also fired. Rush fled inside her home when a bullet struck her porch. After the shooting stopped and Rush was sure nobody in her home was injured, she went outside and saw that Charo was lying wounded. Rush left the neighborhood, staying three nights with a relative and then moving elsewhere, and she did not discuss the incident with anyone from the Triplett family or the police until over two months later when investigators came to her home. She then identified defendant and codefendant from photographs of their lineups and Casper from a photographic array. Rush asked to be relocated if she testified, and State's Attorney's personnel told her that she would receive some money for moving expenses.

¶ 12 Detective Richard Paladino testified that he interviewed people at the scene shortly after the shooting. One of his reports reflected that Rush told him that there were four "offenders" and three had guns. However, he denied speaking with Rush, as nobody answered the door at her

home, and he attributed this information to "people that were on the scene." Assistant State's Attorney (ASA) Jack Wilk testified that he interviewed Rush over two months after the shooting and she viewed a photographic array from which she identified Ken Williamson as one of the shooters. ASA Wilk did not seek a warrant for Williamson's arrest based on that identification.

¶ 13 Marvin Lancaster testified that he was lying down on a bench on the Milton/Triplett porch when he heard several shots. He rolled to the floor and entered the house without seeing who was firing. When he looked outside after some time, he saw Charo was fatally wounded. He knew defendant and codefendant from seeing them in the neighborhood. Lancaster denied that he was ever in a gang.

¶ 14 Police found a fired bullet on the Milton/Triplett porch, a bullet fragment embedded in the same porch, another bullet on the porch of the Rush home, and seven shell casings on the vacant lot. The shell casings showed that at least two guns were fired, and no useable fingerprints were found on the casings. Another bullet was recovered from Charo's body, and the autopsy found that she died of a single gunshot to the head from more than 20 inches away. The parties stipulated that defendant's booking photograph shows that he has a "Tito" tattoo, and that codefendant admitted at booking to being in the Black Disciples. A police detective testified that the Black Disciples and Gangster Disciples "had a little war going on" in May 1998 and that defendant admitted after his arrest that he was known as Tito and was in the Black Disciples.

¶ 15 Chandra Campbell testified that she was defendant's girlfriend and mother of his child. On the night in question in May 1998, she went to bed with her infant child at about 5 p.m. and slept until defendant's arrival some time after sunset. Defendant joined her and his child in bed, she went back to sleep, and he was in bed with her when she awoke at about 6 a.m. She admitted

that defendant was a member of the Black Disciples "at some time." Charles Bryant, Campbell's stepfather, resided in the same home and was watching a Bulls game on television from about 7:30 p.m. onward on the night at issue. Defendant came to the home while that game was in progress and went to Campbell's bedroom. Bryant continued watching television after the Bulls game ended until the "wee hours" and did not see defendant leave the bedroom that night.

¶ 16 The jury instructions included Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) ("IPI 3.15"), describing the factors for weighing identification testimony, with the court using "or" between each of the factors. The jury convicted defendant of first degree murder, and the court sentenced him to 60 years' imprisonment. The court convicted codefendant – finding that the two witnesses who identified him were "neutral" as to gangs and "strong" when considering identification factors including "the quality of lighting conditions, opportunity to observe, [and] familiarity with the individuals" – and sentenced him to 55 years' imprisonment.

¶ 17 On direct appeal, defendant contended only that his maximum non-extended sentence was erroneous, with no challenge to the sufficiency of the evidence or the jury instructions.

¶ 18 Defendant filed his *pro se* petition in July 2002, alleging in relevant part that the court erred in giving the jury IPI 3.15 with "or" between each factor and that counsel was ineffective for not challenging the erroneous instruction when the instructions were prepared, in the post-trial motion, or on direct appeal.

¶ 19 Counsel was appointed for defendant in September 2002 and filed in December 2011 a certificate (Ill. S. Ct. R. 651(c)(eff. Feb. 6, 2013)) that she consulted defendant by mail and telephone to ascertain his claims, read the trial record, and amended his petition to adequately present his claims. The amended petition, also filed in December 2011, refined the initial

petition's claims regarding the IPI 3.15 instruction and particularly argued that the trial evidence was closely balanced and defendant was prejudiced by the erroneous instruction.

¶ 20 The State filed a motion to dismiss the amended petition, arguing that defendant was not prejudiced by the erroneous identification instruction because the testifying eyewitnesses knew defendant and were not identifying a stranger.

¶ 21 On October 23, 2012, the court granted the motion to dismiss after argument by the parties. The court found that this was not a case of identification because the witnesses knew defendant, so that the erroneous instruction did not prejudice him. This appeal followed.

¶ 22 On appeal, defendant contends that his petition was erroneously dismissed as it states a meritorious claim that trial and appellate counsel were ineffective for not challenging that the jury was instructed in an erroneous version of IPI 3.15.

¶ 23 When a post-conviction petition is not summarily dismissed, counsel is appointed for an indigent defendant and the petition may be dismissed on the State's motion if, taking as true all well-pled facts not positively rebutted by the record, the petition and supporting documentation do not make a substantial showing of a constitutional violation. *People v. Minniefield*, 2014 IL App (1st) 130535, ¶¶ 54-58. We review such a dismissal *de novo*. *Id.*, ¶ 58. To prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient and that this deficient performance prejudiced defendant. *Id.*, ¶ 70.

¶ 24 IPI 3.15 is titled "Circumstances Of Identification" and provides:

"When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following: The opportunity the witness had to view the offender at the time of the

offense. The witness's degree of attention at the time of the offense. The witness's earlier description of the offender. The level of certainty shown by the witness when confronting the defendant. The length of time between the offense and the identification confrontation."

Before 2003, IPI 3.15 included "or" between each of the elements, but was amended that year to eliminate them and to include a note instructing that neither "and" nor "or" be used between the factors. *People v. Herron*, 215 Ill. 2d 167, 191-92 (2005). Our supreme court has held that giving IPI 3.15 with "or" between the factors is plain error if the defendant can show prejudice from closely balanced trial evidence. *Herron*, 215 Ill. 2d at 193-94.

¶ 25 Before the supreme court ruled in *Herron*, this court similarly held in *People v. Gonzalez*, 326 Ill. App. 3d 629 (2001), that use of "or"s between the IPI 3.15 factors is erroneous because it implies that identification testimony may be considered reliable if even only one factor weighs in favor of reliability. However, we have also held that new rules are generally not applied retroactively to cases on collateral review, nor can counsel be ineffective for failing to invoke a ruling before it existed, so that the use of "or"s between the IPI 3.15 factors before November 26, 2001, when *Gonzalez* was issued, may not be raised in a post-conviction or other collateral petition. *People v. Oliver*, 2013 IL App (1st) 120793, ¶ 24.

¶ 26 Here, while defendant's entire trial was held and direct appeal commenced in 2000, well before *Gonzalez* and thus before trial counsel could invoke *Gonzalez*, his direct appeal was still pending when we issued *Gonzalez*. Therefore, we can consider his claim of ineffective assistance of appellate counsel and, pursuant to *Herron*, must find plain error if we find that the trial evidence was closely balanced.

¶ 27 However, we do not find the trial evidence was closely balanced. Four witnesses identified defendant as the shooter, having seen defendant and his companions approaching before defendant drew his gun and fired. Three of them knew defendant from the neighborhood – that is, they did not see him for the first time that night – and two also identified codefendant and knew him earlier. While three of the eyewitnesses were related to the victim, Rush was not, and she had both a different vantage point of the scene and plausibly denied discussing the incident with the victim's family before she made her identifications as she left home that night without returning. Rush also provided valuable evidence in the form of motive, witnessing a shooting the day before the murder of Charo Triplett and recognizing members of rival gangs in the incidents; other evidence corroborated the "war" between those gangs and Rush's identification of defendant and codefendant as members of one of the gangs. Against this evidence, defendant presented the inconclusive alibi of his girlfriend and her stepfather that he came to their home while the Bulls game was in progress and was not seen to leave that night by the sleeping girlfriend or television-watching stepfather. Lastly, though it is not decisive as codefendant presented different alibi evidence (to wit, his sister), it is notable that the court – not laboring under the disjunctive misconception of IPI 3.15 with "or"s recognized in *Gonzalez* – found codefendant guilty with only two of the four eyewitnesses identifying him.

¶ 28 Accordingly, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.