THIRD DIVISION
September 29, 2017

No. 1-15-0838

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 (02)
	)	
PARIS McGEE,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Defendant's convictions for first degree murder based on accountability and aggravated discharge of a firearm are affirmed; where the eyewitness testified to the circumstances surrounding his observation of defendant and defendant's attorney vigorously challenged the reliability of the identification based on those circumstances the testimony was sufficient to prove defendant guilty of first degree murder based on accountability and aggravated discharge of a firearm beyond a reasonable doubt and defendant was not denied the right to effective assistance of counsel; any error resulting from the State's description of the eyewitness as a "trained observer" was cured by the jury instructions; the trial court properly admitted recordings of 9-1-1 calls and the victim's last words.

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

¶ 3 Defendant appeals his convictions, arguing the State failed to prove him guilty beyond a reasonable doubt because Wortham Sr.'s identification is unreliable, he received ineffective assistance of counsel because his attorney failed to call an expert to testify about the factors that affect the reliability of eyewitness identifications, the trial court erroneously allowed the State to bolster Wortham Sr.'s credibility, and the court erroneously admitted evidence of Mrs. Wortham's calls to 9-1-1 and Wortham Jr.'s last words. For the following reasons, we affirm.

¶ 4 BACKGROUND

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

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

¶ 7 After Wortham Sr. ran back outside with his gun he saw a red car in front of his home facing the wrong direction on the one-way street. The passenger was outside the car yelling "Get in." Wortham Sr. saw the Floyds "pop up" behind his daughter's car, which was parked in front of his home. He ran toward the red car and told the driver and passenger to get away from the Floyds. The passenger got back into the car and it backed away. Wortham Sr. testified the passenger fired a gun at him as the car drove away. Wortham Sr. went back to the car the Floyds were crouching behind and circled around. He saw Wortham Jr.'s gun on the ground, picked it

up, and approached the Floyds. Brian pointed a gun at him and Wortham Sr. opened fire, striking both Brian and Marcus. After making sure the Floyds were no longer moving Wortham Sr. looked for his son. He saw Wortham Jr. on the ground approximately 25 to 30 yards west of his original location. Wortham Sr. went to him and Wortham Jr. said "It hurts." Wortham Sr. then ran back into the house and again told Mrs. Wortham to call 9-1-1. Mrs. Wortham then called 9-1-1 a second time.

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

¶ 9 A neighbor reported to police that her car had been struck the night of the shooting. Police recovered pieces of a broken taillight near the scene that were matched to Brian's car. An autopsy revealed that Wortham Jr. had injuries consistent with being dragged by a car. Fibers that could have originated from Wortham Jr.'s t-shirt were recovered from the undercarriage of

the car. Police recovered a motorcycle helmet from the scene that looked like it had been dragged across concrete. Forensic testing produced DNA matching McGee on two cups recovered from Brian's car. McGee could not be excluded as a contributor to DNA discovered on the car's steering wheel. Police found defendant's fingerprints on the outside mirror and driver's side front door frame of Brian's car, and on a plastic compact disc sleeve recovered from the interior of the car.

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

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

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 Defendant argues on appeal that: (1) Wortham Sr.'s identification of him is unreliable given the circumstances under which Wortham Sr. observed the man standing by the passenger side of the red car, (2) trial counsel was ineffective in failing to call an expert witness to testify about factors that affect the reliability of eyewitness identification where counsel's trial strategy was to attack Wortham Sr.'s identification, (3) the trial court erroneously allowed the State to bolster Wortham Sr.'s credibility by referring to him as a "trained observer," and (4) the trial

court erroneously introduced evidence of Wortham Jr.'s last words and his mother's 9-1-1 calls because that evidence was not probative and was unduly prejudicial.

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

We address each of defendant's arguments in turn.

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

¶ 16 Defendant argues the circumstances under which Wortham Sr. observed the man standing on the passenger side of the car, the fact only one other person in the photo array matched his initial description of that man, and that only one person was in both the photo array and physical lineup render Wortham Sr.'s identification of defendant unreliable and raise a reasonable doubt of his guilt. "The reviewing court is not permitted to substitute its judgment for that of the trier of fact on questions involving the weight to be assigned evidence or the credibility of witnesses.

[Citation.] Accordingly, a judgment of conviction will not be disturbed unless the evidence presented at trial is so 'unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt [citation].' [Citation.]" *People v. Pryor*, 282 Ill. App. 3d 92, 97-98 (1996). "A positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction. [Citation.]" *Piatkowski*, 225 Ill. 2d at 566.

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

Defendant argues that an application of these five factors (the *Biggers* factors) to this case demonstrates that Wortham Sr.'s identification of defendant is unreliable. Defendant argues Wortham Sr. had a limited opportunity to view the man standing by the car. Defendant also argues there is no evidence Wortham Sr. ever saw defendant before and there is a greater danger of misidentification when a witness identifies a stranger based on a brief observation.

¶ 17 Wortham Sr. testified he had been retired from CPD for 13 years, after having been a police officer for 32 years. Wortham stated as soon as he got outside from retrieving his gun, he

saw a parked car and an individual standing outside of the car saying "Get in, get in." Wortham Sr. testified there was an individual standing by the front door of the car and Wortham Sr. was going in that direction. He testified he was running in the direction of the car and said "get away from them." Wortham got within 10 feet of the car at the curb of the street. Wortham identified defendant in court as the man standing outside of the passenger side of the car that arrived after the first shots were fired. Wortham testified he said "Get away from them," and defendant "jumped back in the car." When he said that, the driver, who he identified as codefendant Taylor, backed the car up across the intersection at a high rate of speed. He testified that as Taylor drove the car backwards defendant shot at Wortham Sr. He also testified that at that point he was watching the red car.

¶ 18 On cross-examination Wortham Sr. testified that when he exited his home after retrieving his gun he did not see his son and his attention was drawn to the men and the red car. He did not see the Floyds at that time. Wortham testified everything happened in seconds. He testified that before he could get off his porch the Floyds "popped up" behind his daughter's car. He clarified that the red car had to have been at an angle and close to where his daughter's car was parked in front of his home. Wortham's daughter's car was between him and the red car when he came out of the house, so when the Floyds popped up in front of his daughter's car, the Floyds were also between Wortham and the red car. Wortham testified he told a detective he did not fire at the red car at that time because he did not know what their involvement was.

¶ 19 "The most important factor is whether the witness had an adequate opportunity to view the offender at the time of the crime. [Citations.] An identification may be positive even though the witness viewed the accused for a short period of time. [Citations.]" *People v. Wehrwein*, 190 Ill. App. 3d 35, 39-40 (1989). Based on Wortham Sr.'s testimony we cannot say that no rational trier of fact could have found Wortham Sr. had an adequate opportunity to observe the

passenger standing outside the red car when he exited his home. Wortham Sr. testified that the red car was the first thing he saw when he exited his home and that he initially moved in the direction of that vehicle. He also testified that at that time he did not know if the individuals with the vehicle were involved in the attack on his son. Therefore, a reasonable juror could infer that Wortham Sr.'s attention was on the men in and outside the car, albeit for a short time. "The sufficiency of the opportunity to observe is for the trier of fact to determine. [Citation.]" *Wehrwein*, 190 Ill. App. 3d at 39-40. Here, the trier of fact determined that Wortham Sr. had an adequate opportunity to observe defendant to make a reliable identification. We will not substitute our judgment for that of the trier of fact because the evidence surrounding Wortham Sr.'s identification is not so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Pryor*, 282 Ill. App. 3d at 97-98.

¶ 20 Defendant also argues the presence of a weapon negatively impacts a witness's ability to make a reliable identification, and Wortham's attention was more focused on the Floyds and particularly on Brian Floyd, who was armed. In *People v. Jones*, 148 Ill. App. 3d 133, 139 (1986), this court held that the witness's "understandable fear when he saw two guns pointed at him does not necessarily render his identification testimony unworthy of belief." *Jones*, 148 Ill. App. 3d at 139. This court also noted that the witness's identification was "strong and corroborated by his identification of [the] defendant's photograph." *Id.* In this case, the same is true of Wortham Sr.'s identification of defendant as the passenger in the red car. The trier of fact could find Wortham Sr.'s identification was not negatively affected by the presence of guns. Wortham Sr. identified defendant immediately from both a photo array and a physical lineup. Wortham Sr. testified his attention was drawn to the men at the red car. Although within a matter of seconds the Floyds popped up behind his daughter's car, the red car was close to his daughter's car. Wortham Sr. also testified that he was looking at the red car as it backed away

and the passenger fired at him. Therefore, even as Wortham Sr. was moving forward to where the Floyds were hiding and despite his admitted concern for them, a reasonable trier of fact could infer Wortham Sr. was briefly focused on the occupants of the red car. "The credibility of identification witnesses and the weight accorded their testimony is within the unique province of the trier of fact." *People v. Godinez*, 191 Ill. App. 3d 6, 10 (1989). In *Godinez*, the witness observed the defendant for only a few seconds. (Another witness who could not see the defendant's face testified it took the defendant 10 seconds to run 25 feet to a gangway. The eyewitness at issue observed the defendant in that gangway, which was only 10 feet long. *Godinez*, 191 Ill. App. 3d at 9, 11.) This court noted the witness "steadfastly maintained that she was able to observe [the] defendant" and that she "never faltered in her identification, from the time of the lineup through the trial." *Id.* at 12. This court held that "under the appropriate standard of review *** we must conclude that a rational jury could find the essential elements of a reliable identification which could support a conviction beyond a reasonable doubt." *Id.* Here, as in *Godinez*, it is reasonable to find Wortham Sr. credible and to find he had sufficient time to observe defendant at a reasonable distance. See *id.*

¶ 21 Defendant attacked the weight to be given Wortham Sr.'s identification by arguing courts have repeatedly noted that there is a low correlation between a witness's confidence in an identification and the accuracy of that identification." Defendant cites *People v. Allen*, 376 Ill. App. 3d 511 (2007), as well as federal and foreign authority, in support of this proposition. In *Allen*, the court addressed the trial court's refusal to allow the testimony of an expert in eyewitness identification. *Allen*, 376 Ill. App. 3d at 513. The defendant in that case made an offer of proof of the expert's proposed testimony in the form of a report by the expert. *Id.* at 524. The *Allen* court observed that the report stated that "studies show jurors tend to rely on a witness's confidence in her identification as a guide to accuracy, but that there are low

correlations between the witness's confidence and the accuracy of her identification." *Id.* at 524. The *Allen* court did not expressly accept that proposition but did note that the "[r]eliability of the studies rarely is questioned." *Id.* at 525. The court held the trial court erred in failing to "conduct a meaningful inquiry into [the expert's] proposed testimony" but expressed "no opinion on whether the trial court on remand should allow any part of [the] offer of proof to be heard by the jury." *Id.* at 526. "The trier of fact determines what weight to give identification testimony and that determination will not be subject to reversal on appeal 'unless [it is] so contrary to the evidence as to be unjustified. [Citation.]" *People v. Hunley*, 313 Ill. App. 3d 16, 32 (2000). "[O]ur supreme court has held that the five factors listed in [Illinois Pattern Jury Instruction 3.15, including '[t]he level of certainty shown by the witness when confronting the defendant'] are an accurate statement of the law 'for assessing the reliability of identification testimony.' [Citation.]" *People v. Rodriguez*, 387 Ill. App. 3d 812, 823 (2008). Absent a clear statement by our supreme court we may not depart from this law. In this case the trier of fact heard the circumstances of Wortham Sr.'s identification of defendant and observed his demeanor when identifying him in court and testifying as to his prior identifications. The weight to be given his testimony based on his level of certainty was for the trier of fact and we will not substitute our judgment for theirs where, as here, defendant has failed to show the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 22 Next, defendant argues the fact Wortham Sr. "could only provide a bare-bones description of the man he later identified as McGee" "casts doubt on the accuracy of his identification of McGee." We disagree.

> "An identification *** is usually not made by distinguishing separate physical features but by the total impression made upon the witness. [Citation.]

> Therefore, omissions in preliminary descriptions, where the witness had an adequate opportunity to observe the offender, do not affect the credibility of the witness' identification nor do they raise a reasonable doubt of the defendant's guilt." *People v. Hemphill*, 62 Ill. App. 3d 977, 982 (1978).

This court has also held that "precise accuracy in describing the facial characteristics and clothing of defendant is not necessary where the identification is otherwise positive. [Citation.] The lack of these details affects only the weight to be given the identification testimony." *People v. Harrison*, 57 Ill. App. 3d 9, 15 (1978). We will not substitute our judgment for that of the trier of fact on questions involving the weight to be assigned evidence. *Pryor*, 282 Ill. App. 3d at 97-98. Defendant also argues Wortham Sr.'s identification from the photo array does not ensure that his identification is reliable because defendant was the only person in the photo array who matched Wortham Sr.'s initial description of the passenger as a young black male with braids. Defendant further argues there was an increased chance Wortham Sr. would pick defendant from the lineup because defendant was the only person to appear in both the lineup and the photo array.

¶ 23 First, we reject defendant's argument the lineup was impermissibly suggestive. In *People v. Williams*, 2015 IL App (1st) 131103, ¶ 78, this court, relying on *People v. Daniel*, 2014 IL App (1st) 121171, found that Illinois courts have repeatedly rejected challenges to identifications on the basis that the defendant was the only person to appear in both the photo array and lineup and therefore the chance of the witness identifying the defendant increased rendering the identification unduly suggestive. *Williams*, 2015 IL App (1st) 131103, ¶ 78. "[L]ineups are not rendered inadequate *** merely because the defendant is the only individual in the lineup who was also in the photo array. [Citations.] [Citation.]" (Internal quotation marks omitted.) *Id.* (quoting *Daniel*, 2014 IL App (1st) 121171, ¶ 17). "Individuals selected for a photo array lineup

need not be physically identical. [Citation.] Differences in their appearance go to the weight of the identification, not to its admissibility. [Citation.]" (Internal quotation marks omitted.) *People v. Allen*, 376 Ill. App. 3d 511, 521 (2007). "It has been repeatedly held that any possible suggestibility in connection with the photographic identification *** is rendered irrelevant where the in-court identification of the defendant has an adequate origin independent of the photographic *** procedures. [Citations.]" *People v. Hancock*, 110 Ill. App. 3d 953, 959 (1982). "[T]o suppress an identification, a court must find both: (1) that the confrontation was unduly suggestive, and (2) that the identification was not independently reliable." *People v. Lacy*, 407 Ill. App. 3d 442, 459 (2011).

> "It is well settled in Illinois that even though an out-of-court identification procedure may have been unnecessarily suggestive, a subsequent in-court identification does not amount to a denial of due process and is admissible if it has an origin independent of the tainted pre-trial identification. [Citation.] *** In ascertaining whether an in-court identification is positive, the test employed is whether the witness was close enough for a sufficient length of time under conditions adequate for observation and thus had the opportunity to see, observe and later to be able to make the identification. [Citation.]" *People v. Ragan*, 33 Ill. App. 3d 151, 153 (1975).

In this case, "the record shows ample basis for a positive in-court identification independent of the photographic identification." *People v. Allender*, 69 Ill. 2d 38, 43 (1977).

¶ 24 Finally, we find defendant's argument that Wortham Sr.'s identification is questionable "given the lack of additional evidence that directly implicates McGee in the offense" unpersuasive. First, this court has consistently held "a single eyewitness identification can sustain a conviction." *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23. "[T]he absence of

physical evidence corroborating eyewitness identifications is not in itself a reason for reversal." *Id.* Second, physical evidence does corroborate defendant's participation in the crime. Wortham Sr. described the red car that tried to facilitate the Floyds' escape. A red car was located at Brian Floyd's mother's house, that car was connected to the crime scene by the broken taillight and paint transfer to the car it hit, and defendant's DNA and fingerprints were found in the car.

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

Although defendant argues there is an innocent explanation for his fingerprints and DNA being in the car, the trier of fact was not required to accept that explanation. The physical evidence combined with the identification can lead to a reasonable inference of defendant's involvement in the crime, and the reviewing court must allow all reasonable inferences from the record in favor of the prosecution. In light of Wortham Sr.'s identification and physical evidence corroborating defendant's presence in the automobile involved in the crime, the trier of fact could reasonably infer defendant's involvement in the crime from all of the evidence. We hold the State proved defendant guilty beyond a reasonable doubt where the evidence is not so unreasonable, improbable, or so unsatisfactory that no rational trier of fact could find the essential elements of a reliable identification.

¶ 25 (2) Ineffective Assistance of Counsel

¶ 26 Defendant argues he received ineffective assistance of counsel at trial because his attorney failed to call an expert to testify about the "factors that affect reliability of eyewitness identification."

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

¶ 27 In *People v. Lerma*, 2016 IL 118496, ¶ 24, our supreme court recognized that scientific research concerning the reliability of eyewitness identifications is "well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." In *Lerma*, the defendant filed a pretrial motion in limine to allow an expert to testify on the topic of memory and eyewitness identification. *Id.* ¶ 8. The defendant's motion stated the expert would identify and explain "several 'common misperceptions' that exist concerning the accuracy and reliability of eyewitness identifications." *Id.* The expert's testimony would include "the following scientifically documented findings, all of which are beyond the common knowledge of the average layperson: that the witness's level of confidence does not necessarily correlate to the accuracy of the identification; that numerous factors can undermine the accuracy of an

eyewitness's identification, including the stress of the event itself, the presence of a weapon, the passage of time, the 'forgetting curve,' the wearing of partial disguises such as hoods, exposure to postevent information, nighttime viewing, and suggestive police identification procedures; that eyewitnesses tend to overestimate time frames; and that cross-racial identifications tend to be less reliable than same-race identifications." *Id.* The trial court denied the defendant's motion. *Id.* ¶ 10. Our supreme court found the case before it was "the type of case for which expert eyewitness testimony is both relevant and appropriate" because the State's case rested "100% on the reliability of its eyewitness identifications" and "several of the factors [the expert] identified as potentially contributing to the unreliability of eyewitness testimony *** are either present or possibly present in this case." *Id.* ¶ 26. Our supreme court held the trial court abused its discretion because it denied the defendant's request "to present relevant and probative testimony from a qualified expert that speaks directly to the State's only evidence against him, and [did] so for reasons that are both expressly contradicted by the expert's report and inconsistent with the actual facts of the case." *Id.* ¶ 32.

¶ 28 Here, defendant argues counsel's failure to call and expert to testify "about the common misconceptions about eyewitness testimony" was objectively unreasonable because such testimony was relevant and "appropriate under the facts of the case." Defendant argues his attorney's failure to call an expert in eyewitness identification prejudiced him because that failure deprived him of a complete defense in that his attorney lacked evidence to support the defense of misidentification. Defendant also argues the testimony would have provided a foundation for his attorney's request for modified jury instructions on the issue of eyewitness identification. The factors impacting the reliability of eyewitness identification defendant argues are present in this case, making expert testimony "relevant and appropriate," are that (a) this was a high-stress situation, (b) Wortham Sr. was confronted with multiple weapons, (c) there was no

evidence Wortham Sr. had ever seen defendant before, and (d) the State relied on Wortham Sr.'s confidence in his identification.

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

We cannot say defendant has met this high burden.

¶ 29 In her closing argument defendant's attorney first attempted to demonstrate discrepancies in Wortham Sr.'s testimony and Mrs. Wortham's testimony, then argued "it's not they're untruthful, Ladies and Gentlemen. It says when people are in a highly stressful situation, probably the most stressful of their lives, they may be confused. It may become like one big blur, a nightmare which they probably re-lived." Defendant's attorney continued, later stating that Wortham Sr. had run down to the curb next to his daughter's car when the Floyds popped up on the street side of "the car he's standing next to on the curb." Defendant's attorney then argued:

> "For some reason, Mr. Wortham says after he hears what was said, supposedly, get in, get in, and he sees these two that have just shot his son, just had guns firing at his son, he says he doesn't know if this car is involved.
>
> He does not shoot at the car. He's within ten feet of this Pontiac [(the red car)], he says, which means that the two guys who popped up in between the red car and the Saturn [(his daughter's car)] are closer to him, he's closer to Brian and Marcus [Floyd.] Brian, the one who just shot his son. He [(Wortham Sr.)] knows they're armed.
>
> None of this the (*sic*) really makes sense, Ladies and Gentlemen, that Mr. Wortham would be paying more attention to identifying people in a car that he's never seen before and says he doesn't know if it's involved in what's going on than to Brian and Marcus that he knows are armed and who are a couple feet away, standing up and could shoot him."

Defendant's attorney proceeded to attack Wortham Sr.'s testimony he watched the red car back-up down the street and across the intersection, and argued "It doesn't make sense that he's watching a departing car instead of the people with guns. He's confused and mistaken, Ladies and Gentlemen." After defendant's attorney argued there was no physical evidence the passenger of the car discharged a gun in the direction of Wortham Sr., she turned her attention to the photo array police showed him. Defendant's attorney pointed out for the jury that "[t]he only description Mr. Wortham had been able to give of the passenger of the Pontiac was that he had braids. There was no clothing description, no height, weight, age, complexion, or whether that person had facial hair." Counsel argued the photo array (and subsequent lineup) was suggestive and added "This was a chaotic situation, where Mr. Wortham only got to see a face for a few

seconds next to the red car. It was a chaotic time. It was fast. He had never seen these people before."

¶ 30 As the State notes, defendant's attorney zealously advocated for her client on the issue of identification. We cannot say counsel's performance was so deficient that she did not function as the counsel guaranteed by the sixth amendment. Although it is possible expert testimony may have aided defendant, "even if defense counsel makes a mistake in trial strategy or tactics or an error in judgment, this will not render representation constitutionally defective. [Citation.] Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found. [Citation.] This is not such a case." *People v. Perry*, 224 Ill. 2d 312, 355-56 (2007). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. [Citation.]" *People v. Blue*, 205 Ill. 2d 1, 12 (2001) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Defendant's attorney subjected the State's case to meaningful adversarial testing through cross-examination and argument on the issue of identification, as well as on the issues of whether the passenger of the car discharged a firearm or was accountable for the Floyds' acts. *Lerma* simply held that expert testimony on eyewitness identification is "settled and widely accepted," and thus "a perfectly proper subject for expert testimony" in appropriate cases. *Lerma*, 2016 IL 118496, ¶ 24. It did not hold expert testimony is *required* in every case where the "factors *** identified as potentially contributing to the unreliability of eyewitness testimony" are present. *Id.* ¶ 26. We note this case is distinguishable from the situation presented in *Lerma* because, despite defendant's protests, Wortham Sr.'s eyewitness identifications are not the "only evidence of defendant's guilt." *Id.* We find defendant has failed to establish the first prong of the *Strickland* test, that counsel's performance fell below an objective standard of reasonableness. Because defendant failed to demonstrate that his

attorney's performance fell below an objective standard of reasonableness, his claim of ineffective assistance of counsel fails. *Williams*, 2017 IL App (1st) 152021, ¶ 36 (defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland*). We note, because defendant has not proved deficient performance, we do not reach the question of whether defendant was prejudiced by not being able to give the eyewitness identification instructions his attorney proffered.

¶ 31 (3) Bolstering of Witness Credibility

¶ 32 We next address defendant's argument the trial court erred in overruling defense counsel's objection to the State's characterization of Wortham Sr. as a "trained observer." Defendant argues the State's argument was improper because it was based on facts not in evidence and unfairly bolstered Wortham Sr.'s credibility. "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue [that] this court reviews *de novo*. [Citation.]" *People v. Harris*, 2017 IL App (1st) 140777, ¶ 60. "[A] prosecutor may not argue that a witness is more credible because of his status as a police officer." *People v. Fields*, 258 Ill. App. 3d 912, 921 (1994).

> "It is well established that prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant. [Citations.] During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses. [Citations.] However, it is improper for a prosecutor to argue inferences or facts not based upon the evidence in the record. [Citation.] *** In reviewing whether comments made during closing argument are proper, the

closing argument must be viewed in its entirety, and remarks must be viewed in context. [Citation.]" *People v. Anthony McGee*, 2015 IL App (1st) 130367, ¶ 56.

¶ 33 The complained of statements in the State's closing argument are the following:

"Is it Paris McGee that was out there? You bet it was. Paris McGee and Toyious Taylor were identified by Mr. Wortham III hours after this murder, attempt armed robbery of his son. Hours.

The police put their pictures in photo arrays. Do you think Mr. Wortham is mistaken? Mr. Wortham saw both these defendants' faces. He saw Toyious Taylor's face. He saw Marcus Floyd's face.

Mr. Wortham is a trained observer. He has 32 years in the Chicago Police Department—

MS. PARRIS [Defendant Taylor's attorney]: Objection.

THE COURT: Overruled.

MS. MURTAUGH [Assistant State's Attorney]: —Department. The Chicago police run in when people run out. They calm chaotic situations. That's how they're trained. You can't separate the training from the man. He's a trained observer. He saw what he saw. And he saw what he saw. *** He's within feet. It's right underneath a street light, illuminating. That's where the car pulled up. He's got lighting, and he's, they are forensically connected to that car."

¶ 34 The State argues the prosecutor's comment was a reasonable inference from the evidence Wortham Sr. was a retired police officer that was not meant to suggest he was more credible simply because of his status as a retired police officer. "An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the usual course of human reasoning. [Citations.]" (Internal quotation marks omitted.) *People v. Sanchez*, 2013 IL App

(2d) 120445, ¶ 28. We need not decide whether, in the usual course of human reasoning, one may conclude that police are trained to observe. "[W]hile a prosecutor may not make arguments or assumptions that have no basis in evidence, even improper comments or remarks are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused. [Citation.]" *Harris*, 2017 IL App (1st) 140777, ¶ 61. To determine whether the prosecutor's comments caused substantial prejudice to the defendant,

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

¶ 35 We find the comments referring to Wortham Sr. as a police officer and trained observer did not constitute a material factor in defendant's conviction. Viewing the State's closing argument in its entirety, the reference to Wortham Sr. as a trained observer was fleeting. See *People v. Byron*, 164 Ill. 2d 279, 296 (1995) ("The prosecutor's remarks were brief, isolated, and came after the jury had already heard an abundance of evidence regarding the defendant's guilt."). Further, the State argued other factors that went to Wortham Sr.'s credibility as an eyewitness that had nothing to do with his status as a police officer in both its closing and rebuttal argument. The State argued that the lighting, Wortham's attention (unrelated to being a "trained observer"), the timing of his identification of defendant in the photo array and physical

lineup, and the importance of identifying his son's killer all demonstrate the reliability of his identification. Notably the State gave an extensive rebuttal argument in which it addressed the strength of Wortham Sr.'s identification without returning to its earlier characterization of him as a "trained observer." The State also argued that the identification was corroborated by physical evidence; and, as noted above, the jury was not required to accept defendant's innocent explanation for the physical evidence. *Supra* ¶ 24. We do not believe the jury could have reached a contrary verdict had the remarks by the State not been made. Moreover, the jury was instructed that the attorney's arguments were not evidence. Given the nature of the complained-of comments in the context of the case, we hold any error resulting from the State's comments was cured. See *People v. Peeples*, 155 Ill. 2d 422, 482 (1993). Accordingly, defendant's argument fails.

¶ 36 (4) Unduly Prejudicial Evidence

¶ 37 Next, defendant argues the trial court committed reversible error when it allowed the State to admit recordings of Mrs. Wortham's calls to 9-1-1 and when it allowed Wortham Sr. to testify that Wortham Jr.'s last words were "It hurts." Defendant concedes the 9-1-1 call was generally admissible. See *People v. Williams*, 181 Ill. 2d 297, 315 (1998) (holding trial court did not abuse its discretion in allowing jury to hear 9-1-1 tape because evidence may properly be admitted even if cumulative to oral testimony covering the same issue). Defendant argues the 9-1-1 call was prejudicial because "any reasonable person would sympathize with Mrs. Wortham" and the prejudicial effect of the recording far outweighed its probative value. Defendant also argues Wortham Jr.'s last words were not relevant to any fact of consequence, and were highly prejudicial because they would cast a negative light on defendant for reasons that having nothing to do with the case. See *People v. Lynn*, 388 Ill. App. 3d 272, 278 (2009) (defining the prejudicial effect of evidence, including to decide on an improper basis such as sympathy or

hatred). Defendant argues there is a reasonable probability the jury would have acquitted him absent the trial court's admission of Mrs. Wortham's 9-1-1 calls and Wortham Jr.'s last words because the evidence was "far from overwhelming and based primarily on Wortham Sr.'s unreliable identification."

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

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

internal quotation marks omitted.) *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). In this case, Wortham Sr. and Mrs. Wortham both testified about the loss of their son, and the jury received evidence, including graphic photographs, detailing his death. We do not believe Mrs. Wortham's demeanor on the 9-1-1 calls could itself sway the jury to decide the case based on sympathy.[1]

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

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

The other properly admitted evidence overwhelmingly supports the conviction. Despite defendant's argument to the contrary, as stated above, we have found that Wortham Sr.'s identification of defendant was reliable and sufficient to sustain his conviction and that physical

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

evidence corroborated his testimony. The jury heard that Wortham Jr. was shot and dragged by a car before hearing that he told his father "It hurts." In light of the totality of the evidence, we cannot conclude that a retrial without the last words would produce a different result.

¶ 41 CONCLUSION

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

¶ 43 Affirmed.