2019 IL App (4th) 160491-U

NO. 4-16-0491

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 1, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
HERMAN GALES,	)	No. 15CF1179
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed defendant's convictions and remanded for a new trial, finding the trial court erred in denying defendant's motion for a mistrial.

¶ 2 In February 2016, a jury found defendant, Herman Gales, guilty of two counts of aggravated battery and not guilty of harassment of a witness. In May 2016, the trial court sentenced defendant to 54 months in prison. Defendant filed a motion to reconsider the sentence, which the court denied.

¶ 3 On appeal, defendant argues (1) the trial court erred in denying his motion for a mistrial, (2) he was denied a fair trial when the court allowed certain testimony, and (3) his sentencing order should be corrected to reflect a single conviction for aggravated battery. We reverse defendant's convictions and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In November 2015, the State charged defendant by information with one count of

harassment of a witness (count I) (720 ILCS 5/32-4a(a)(2) (West 2014)) and two counts of aggravated battery (counts II and III) (720 ILCS 5/12-3.05(c) (West 2014)). In count I, the State alleged defendant, or one for whom he was legally responsible, with the intent to harass or annoy Julian Randle, a person who was or expected to serve as a witness in a pending legal proceeding, communicated directly or indirectly with the witness in such a manner as to produce mental anguish or emotional distress or conveyed a threat of injury to Randle. The State also alleged defendant committed the offense of aggravated battery when, in committing a battery and while located on or about property doing business as White Oaks Mall, a public way, public property, or a public place of accommodation or amusement, knowingly (1) made contact of an insulting or provoking nature with Randle (count II) and (2) caused bodily harm to Randle (count III), in that he struck Randle with a knife. Defendant pleaded not guilty.

¶ 6 Prior to trial, the State filed a motion *in limine* to admit evidence of gang involvement. The motion alleged defendant was a suspected member of the gang "BP," and he was present at the mall with other suspected BP members, including James Cooper and Edward Watson. The victim, Julian Randle, was suspected to be associated with the gang "Sqad" [*sic*], and he was present at the mall with three suspected Sqad members. Randle allegedly attacked Cooper on March 9, 2015, and posted a video of the incident online. Hours after the March 9 beating, members of BP and Sqad fired shots at each other, and defendant was charged with aggravated discharge of a firearm and mob action. Randle was subpoenaed to testify against defendant on November 16, 2015, but was stabbed the day before. Prior to the stabbing, members of BP announced they were looking for a rematch, which members of Sqad took to mean another confrontation following the battery and subsequent shooting of March 9, 2015. The State sought to introduce evidence showing defendant's motive for stabbing Randle was the

result of a feud between rival gangs and Randle's willingness to testify against defendant. The trial court barred the use of the word "gang" to describe defendant and/or the rival group involved in the incident.

¶ 7 On February 17, 2016, defendant's jury trial commenced. During the four-day trial, the State presented testimony from several mall employees, police officers, and some of the individuals involved in the fight. We will set forth the testimony pertinent to the issues on appeal.

¶ 8 Cornelious Brown testified he was 18 years old. On November 15, 2015, he went to the mall with Julian Randle, Jermaine Randle, and Tyrone Lee. After leaving a store, Brown "ran into a group of people," which included defendant, known as "Fead," Paul Davis, and an individual known as "Valdez." Words were exchanged, and Brown said the other group "wanted a rematch from a fight from awhile back." Brown saw defendant stab Randle in the lower part of his chest with a knife. Defendant, along with his group, ran out of the mall. Brown then took Randle to the hospital.

¶ 9 On cross-examination, Brown testified he backed away from defendant when he pulled out the knife. Brown then picked up a food tray from a nearby food-court establishment to protect himself. He eventually threw the tray "at the last minute."

¶ 10 Jermaine Randle testified he was 25 years old and the brother of Julian. He went to the mall with Julian, Lee, and Brown. After visiting several stores, Jermaine stated the group was preparing to leave the mall when they "got into an altercation." He stated Julian was standing near Dick's Sporting Goods when he was stabbed, although Jermaine did not see the stabbing.

¶ 11 Julian Randle testified he was 27 years old. He went to the mall on November 15,

2015, with Jermaine, Brown, and Lee. After visiting several stores, he saw several people he knew, including "Paul, Herman, James, and Edward." Randle identified Herman as defendant. He stated his group did not have a "good relationship" with defendant's group. As he attempted to leave the mall, the groups confronted each other. Seeing others with knives, Randle pulled his knife. Words were exchanged, and then things "went haywire." Randle heard someone call his name, and then he was stabbed from behind. He did not see who stabbed him. He walked out of the mall, and Brown took him to the hospital. Randle stated he had been served a subpoena to testify at a hearing on November 16, 2015. He was unable to testify because he was in the hospital due to the stabbing.

¶ 12 On cross-examination, Randle testified he was approximately five feet, nine inches tall and weighed about 240 pounds. He believed he was the only one in his group that carried a knife, but he did not threaten anyone with the knife on the day of the stabbing.

¶ 13 Tyrone Lee testified he was 24 years old. As he and his group were attempting to leave the mall, they got into "a little altercation" with another group. Those in the other group indicated they wanted "a rematch" or a fight. People started running around and it "got to be chaos." Lee saw defendant arguing with Brown. Others began arguing, and Lee turned his head. When he turned his head again, he saw Randle had been stabbed. Lee did not see who stabbed Randle because "it happened so fast." Lee, Brown, and Jermaine took Randle to the hospital.

¶ 14 On the second day of trial on February 18, 2016, Carlos Silva testified he worked as the general manager of Charley's Grilled Subs (Charley's) in the mall. At approximately 4:30 p.m. on November 15, 2015, he heard people screaming and then saw fighting. While in the store, Silva saw "two or three guys" run over and grab "some trays," which they "started to throw off to the other guys."

¶ 15 Marcel Seminara, an assistant manager at Charley's, testified he saw "two groups screaming" before they started to fight. Two or three individuals came to the restaurant, grabbed trays, and started to fight with them.

¶ 16 Springfield police officer Darrin Divjak testified he was on patrol near the mall at approximately 4:30 p.m. on November 15, 2015, when he received a call of a fight in progress. Upon entering the mall, he observed a blood trail that led outside and "food trays scattered throughout the area." Divjak reviewed a security video from Dick's Sporting Goods in which a man could be seen with a possible weapon in his hand along with two people backing away from him.

¶ 17 Jacob Bordewick, a mall security guard, testified he was waiting to get a food order when he saw "a large gathering of people" and realized "there was a fight going on." He reported over his radio there was a fight in progress. He ran outside and saw three individuals, one of whom had his shirt up and was bleeding. The other two individuals helped the victim to a car. All three had knives.

¶ 18 Springfield police officer Charles Peters testified he was on patrol on November 15, 2015, when he received a radio call and headed toward the mall. He was advised that subjects were leaving the area of the mall in a dark vehicle with Missouri license plates. Peters observed "a dark vehicle swerving in and out of traffic, traveling at a high rate of speed." Peters attempted to stop the vehicle, but the occupants signaled they were heading to a hospital. Once they arrived at the hospital, Peters saw Brown and Jermaine Randle exit the vehicle. He ordered them to the ground. He then saw Julian Randle exit the vehicle and noticed he had been injured by the blood on his shirt. Peters placed Brown and Jermaine in handcuffs. While in the squad car, which was approximately three minutes after Brown had parked his vehicle, Peters found

Brown to be "pretty excited" and could tell "his adrenalin was pumping from racing" to the hospital. Brown kept looking toward the hospital and asked "multiple times" whether Julian was going to die. When Peters testified he asked Brown who stabbed the victim, defense counsel objected. The trial court overruled the objection, and Peters testified Brown said Herman Gales stabbed Randle. Also over defense counsel's objection, Brown said a fight had taken place and "he saw [defendant] run up and stab [Randle] with the long black pocketknife."

¶ 19 Springfield police detective Steve Dahlkamp testified he reviewed a security video taken from Dick's Sporting Goods. The State played the video for the jury. Dahlkamp testified Julian Randle had been issued a subpoena to appear in a case involving defendant that was scheduled for November 16, 2015. When Dahlkamp questioned Randle about the stabbing incident, Randle stated his belief that he was stabbed because he was going to testify against defendant.

¶ 20 Springfield police officer Brian Henson testified he responded to an incident at approximately 2:30 p.m. on March 9, 2015. He observed defendant, Michael Lipscomb, Labrius Wallace, Latronze Kelley, Cortez Brown Joiner, and Edward Watson. He also observed another group, which included Thefellio Jefferson, Dontarious Collins, Sean Jackson, Julian Randle, and Shawntase Day. Defendant was eventually arrested and charged in relation to that incident.

¶ 21 At the beginning of the third day of trial on February 19, 2016, defense counsel mentioned to the trial court that he had received a call from the prosecutor at approximately 4 p.m. the previous afternoon. The prosecutor gave him a compact disc recording that allegedly contained at least one phone conversation that indicated "some witnesses may have been paid off." Defense counsel took the disc but was unable to play it. Noting the conversations were "not the easiest to understand," the prosecutor stated his belief that the disc contained statements

by Tyrone Lee, who describes "how he was paid off in testifying." He also describes "who paid him off, the mechanism by which he was paid off," but he "does not indicate how or in what way his testimony changed, if at all." The prosecutor also stated his belief that Julian Randle's voice could be heard making an allegation "that someone close to him may have received monies." The prosecutor believed the content of the disc was not "inherently exculpatory," but he noted "it can be argued that it undermines the State's case."

¶ 22 The recordings of four phone calls, which were approximately 50 minutes in length, were played in court outside the presence of the jury. The prosecutors stated their belief that Lee was talking to Sean Jackson in the first and second calls; Lee said, "You've got to pay now," in the first call; and Julian Randle was talking to Jackson in the fourth call.

¶ 23 When the trial court asked if anyone was "seeking to use any of this," defense counsel stated he did not "know yet" because he could not "understand a lot of what is being said" and would prefer a transcript of the conversation. The court stated the decision whether to play the recordings was one "that's going to have to happen relatively quickly" and counsel would have to proffer how he believed the conversations indicating that witnesses were paid would be helpful to the defense. Defense counsel stated he would make an argument and contended "it's certainly grounds for a mistrial." The court took a recess and allowed counsel an opportunity to listen to the recordings. After the 15-minute recess, when the court questioned counsel about his decision not to take advantage of the opportunity to listen to the recordings, counsel stated he was "not going to listen to it again right now."

¶ 24 The trial court then proceeded to other matters. Later, defense counsel moved to continue the trial "in light of the new evidence" and asked the court to order the preparation of a transcript of the recordings. Counsel believed the recordings indicated "witnesses for the State

lied in order to get the Defendant convicted in this matter." The prosecutor disagreed, stating he "did not hear any commentary by the witnesses that they changed their testimony," only that "they received money."

¶ 25 The trial court noted the jury had been waiting for 90 minutes and the court had not heard a motion for a mistrial. The court believed having the recordings transcribed "would take an extremely long period of time for any court reporter to make sense of what's going on in those phone conversations." Defense counsel reiterated his desire for a continuance and the preparation of a transcript.

¶ 26 The trial court stated it had "carefully listened to the audio" and the conversations "would be difficult to transcribe" because "there's a lot going on there." The court ruled as follows:

> "I gave you an opportunity, [defense counsel], to begin listening to it again. I took a 15-minute break. You didn't take that opportunity. We are in the middle of the trial. The jury has been waiting a long time. That audio could result in all kinds of things happening, meaning with regard to the new charges.
>
> But in light of this trial—it's very collateral. They are not statements made under oath. So I'm going to deny the Motion to Continue. We are going to finish this trial."

¶ 27 Defense counsel moved for a mistrial. The trial court considered it a "fair motion in light of what has happened here," but it found the conversations involved collateral matters. The court denied the motion. Defense counsel objected, arguing a trial witness talking about his testimony and receiving money was not a collateral matter. The court stated "maybe [its] choice

of words isn't the best," but it denied the motion.

¶ 28 After the State rested, defense counsel moved for an acquittal, which the trial court denied. Defense counsel then moved for a mistrial, arguing "it's extremely unfair to the Defense to have the Court know that this evidence exists and nothing can be done about it before a trier of fact is confronted with it." If the court insisted the trial proceed, counsel asked for a break "until at least 1:30" to "get some legal assistance" with the mistrial motion.

¶ 29 The trial court noted its "most important responsibility is to see that [defendant] receives a fair trial" but wished defense counsel "had taken advantage" of the opportunity to listen to the recordings. The court found it "fair" to give counsel an opportunity to review the audio and continued the matter until 1 p.m.

¶ 30 In the Friday afternoon session, defense counsel stated he had listened to the audio recordings and was moving to continue the trial to have transcripts prepared. When asked by the trial court if he intended to use any of the audio in his case-in-chief, defense counsel stated he wanted to and believed the jurors should be provided a transcript. The court continued the trial until Monday to give defense counsel "even more time to review this audio and take up any other issues he hasn't yet been able to research." The court also ordered the State to provide the defense with a transcript by Sunday at 10 a.m.

¶ 31 On the fourth day of trial, on Monday, February 22, 2016, the trial court noted the transcripts had been prepared and provided on Sunday. Defense counsel stated he received the transcripts and reviewed them with defendant. The prosecutor indicated if defense counsel introduced the recordings into evidence, he planned to address three portions of the tapes in rebuttal, including (1) Tyrone Lee discussing what he believed to be an interaction in court that indicated he would get paid, (2) Julian Randle saying he was paid, and (3) Tonia Manning

discussing Cornelious Brown potentially getting paid not to show up in court. The prosecutor also noted his intent to call Detective Dahlkamp, who was familiar with the voices in the recordings and was reviewing the transcripts "to see if there's any alterations or changes" he wanted to make.

¶ 32 Defense counsel responded by noting the transcript was prepared by someone at a California company and included portions marked "unintelligible and inaudible." Counsel moved to strike the testimony of the State's witnesses who talked about being paid, noting he was "at a big disadvantage because [he] [had not] had a lot of time to do this." The court stated it did not "disagree," believing "we are all at a disadvantage to some extent." Counsel stated he had been unable to conduct research on striking the witnesses' testimony but considered calling them as adverse witnesses.

¶ 33 The trial court stated it needed to know defense counsel's trial strategy "going forward *** so that we can proceed with this trial." Counsel stated there were "certain parts" of the recordings that he wanted the jury to hear. The court told counsel he needed to be ready to present the "appropriate approved portions of the audio" because the jury was waiting. If the entire recordings were not played, counsel stated he was not prepared to proceed. The prosecutor objected to a continuance. The court noted it was "extremely disappointed in this trial and the way it has progressed." The court excused the jury until 1 p.m.

¶ 34 In the afternoon session on February 22, 2016, the prosecutor provided defense counsel with a disc, which contained a receipt from the jail showing $50 going from Tyrone Lee to Sean Jackson and a video of Lee and James Cooper going into the bathroom together. The prosecutor stated it was evidence "that objectively could corroborate some of the things that were said" in the recorded jail calls. Lee allegedly saw Cooper show him money in court and they

went to the bathroom together to discuss the payment. In regard to the prior transcribed recordings, the prosecutor stated his intent to refer to an exhibit, which consisted of four pages of transcript that Detective Dahlkamp had "altered," *i.e.*, "identified the speaker and changed what he believed was said[] based on his listening of the recording[s]." The prosecutor provided the exhibit to defense counsel.

¶ 35 The trial court inquired of defense counsel regarding the portions of the calls and transcripts he planned to present to the jury. Counsel stated he listened to the calls but he did not have the ability to stop the disc to pinpoint the time. Thus, counsel could not "parcel out the portions" that he believed were relevant to the defense case. The trial then proceeded.

¶ 36 Defendant testified he was 23 years old. He testified he went to the mall twice on November 15, 2015. Defendant, accompanied by Edward Watson and Paul Davis, first went to the mall at approximately 12:30 p.m. to get fitted for a tuxedo. He later returned with Davis, Watson, and Cooper. When they walked into the mall, they came upon "a group of gentlemen" who asked if they wanted a "rematch." From "previous arguments," defendant knew the men as Julian Randle, Jermaine Randle, Tyrone Lee, and Cornelious Brown. Words were exchanged and "tempers got to flaring" before "Julian upped a knife." Knives were pulled, including by defendant, and "chaos" ensued. Defendant stated he became trapped by Brown and Lee. When he noticed "they had trays" and Brown had a knife, defendant ran to the exit. Defendant stated he "didn't stab anybody" and did not swing his knife. Defendant testified he had been shot in March 2015 and arrested.

¶ 37 On cross-examination, defendant testified he did not pull out his knife until Brown "acted like he was going to charge" him. Defendant stated Brown had a tray and a knife when defendant pulled out his own knife and "took off."

¶ 38 At the close of all the evidence, defense counsel moved for a directed finding of acquittal, which the trial court denied. Following closing arguments, the jury found defendant guilty of both counts of aggravated battery and not guilty of harassment of a witness.

¶ 39 In March 2016, defense counsel filed a motion for a new trial, arguing the trial court erred in, *inter alia*, (1) denying defendant's motion for a continuance and his motion for a mistrial on February 19, 2016, after the State had tendered new discovery to the defense and (2) overruling defense counsel's objections to the questions asked of the State's witnesses.

¶ 40 In ruling on the issue pertaining to the motion to continue, the trial court stated it had "never been involved in a case that's been more disjointed in the actual trial and in the accommodations the Court provided to the defense." The court noted it was "a little taken aback" by the motion for a new trial "based upon the way that this trial played out." The court stated it did "everything in [its] power" to ensure defendant received a fair trial. The court denied the motion.

¶ 41 In May 2016, the trial court sentenced defendant to 54 months in prison on both counts of aggravated battery and noted the counts merged. Defense counsel filed a motion to reconsider the sentence, which the court denied. This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 A. Motion for a Mistrial

¶ 44 Defendant argues the trial court erred in denying his motion for a mistrial, claiming after the State's three main witnesses testified against him, the State disclosed evidence showing those three witnesses had been bribed. We agree.

¶ 45 "A defendant's right to a fair trial is a fundamental liberty interest secured by the sixth and fourteenth amendments to the United States Constitution." *People v. Peeples*, 205 Ill.

2d 480, 527, 793 N.E.2d 641, 670 (2002) (citing U.S. Const., amends. XI, XIV); see also Ill. Const. 1970, art. I, § 2. Thus, the "trial judge has a duty to see that all persons are provided a fair trial." *People v. Sims*, 192 Ill. 2d 592, 636, 736 N.E.2d 1048, 1071 (2000). "A defendant has the right to present a defense, present witnesses to establish a defense and to present his version of the facts to the trier of facts." *People v. Wright*, 218 Ill. App. 3d 764, 771, 578 N.E.2d 1090, 1095 (1991). Moreover, "a defendant has the right to inquire into a witness' bias, interest or motive to testify falsely." *People v. Davis*, 185 Ill. 2d 317, 337, 706 N.E.2d 473, 482 (1998).

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

¶ 47 On the first day of trial, on Wednesday, February 17, 2016, Cornelious Brown, Tyrone Lee, and Julian Randle testified against defendant. At the beginning of the third day of trial, on Friday, February 19, 2016, defense counsel stated to the trial court that he had received a disc the night before from one of the prosecutors in which recorded conversations indicated "some witnesses may have been paid off." The prosecutor proffered the conversations contained statements that Brown, Lee, and Randle had been "paid off" in connection with defendant's case.

Lee allegedly described "who paid him off" and "the mechanism by which he was paid off." Randle allegedly stated "someone close to him may have received monies" and "he was paid off by different people in a different way." The prosecutor also stated the recordings were turned over to the defense because the content arguably "undermines the State's case." The four recordings on the disc were played in court outside the presence of the jury.

¶ 48 The trial court asked if anyone was "seeking to use any of this," and defense counsel stated he did not "know yet" because he could not "understand a lot of what is being said" and would prefer a transcript of the conversation. The court stated the decision whether to play the recordings was one "that's going to have to happen relatively quickly" and counsel would have to proffer how he believed the conversations suggesting that witnesses were paid would be helpful to the defense. Defense counsel stated he would make an argument and contended "it's certainly grounds for a mistrial." The court took a recess and allowed defense counsel to listen to the recordings. After the 15-minute recess, when the court questioned counsel about his decision not to take advantage of the opportunity to listen to the recordings, counsel stated he was "not going to listen to it again right now."

¶ 49 The trial court then proceeded to other matters. Later, defense counsel moved to continue the trial "in light of the new evidence" and asked the court to order the preparation of a transcript of the recordings. Counsel believed the recordings indicated "witnesses for the State lied in order to get the Defendant convicted in this matter." The prosecutor disagreed, stating he "did not hear any commentary by the witnesses that they changed their testimony," only that "they received money."

¶ 50 The trial court noted the jury had been waiting for 90 minutes and the court had not heard a motion for a mistrial. The court believed having the recordings transcribed "would

take an extremely long period of time for any court reporter to make sense of what's going on in those phone conversations." Defense counsel reiterated his desire for a continuance and the preparation of a transcript.

¶ 51 The trial court stated it had "carefully listened to the audio" and the conversations "would be difficult to transcribe" because "there's a lot going on there." Further, the court noted the "jury ha[d] been waiting a long time" and stated "[w]e are going to finish this trial." In denying the motion to continue, the court noted it allowed defense counsel the opportunity to listen to the recordings but he did not take advantage of the opportunity.

¶ 52 Defense counsel moved for a mistrial. The trial court considered it a "fair motion in light of what has happened here," but it found the "unreliable conversations" involved collateral matters. The court denied the motion. Defense counsel objected, arguing a trial witness talking about his testimony and receiving money was not a collateral matter. The court stated "maybe [its] choice of words isn't the best," but it denied the motion.

¶ 53 After the State rested, defense counsel moved for an acquittal, which the trial court denied. Defense counsel then moved for a mistrial, arguing it was "mind boggling" how the case could proceed "unless we know what the heck is happening here." Counsel stated "it's extremely unfair to the Defense to have the Court know that this evidence exists and nothing can be done about it before a trier of fact is confronted with it." If the court insisted the trial proceed, counsel asked for a break "until at least 1:30" to "get some legal assistance" with the mistrial motion.

¶ 54 The trial court noted its "most important responsibility is to see that [defendant] receives a fair trial" but wished defense counsel "had taken advantage" of the opportunity to listen to the recordings. The court found it "fair" to give counsel an opportunity to review the

audio and continued the matter until 1 p.m.

¶ 55 In the Friday afternoon session, defense counsel stated he had listened to the audio recordings and was moving to continue the trial to have transcripts prepared. When asked by the trial court if he intended to use any of the audio in his case-in-chief, defense counsel stated he wanted to and believed the jurors should be provided a transcript. The court continued the trial until Monday to give defense counsel "even more time to review this audio and take up any other issues he hasn't yet been able to research." The court also ordered the State to provide the defense with a transcript by Sunday at 10 a.m.

¶ 56 On the fourth day of trial, on Monday, February 22, 2016, the trial court noted the transcripts had been prepared and provided on Sunday. Defense counsel stated he received the transcripts "slightly before" 10 a.m. and thereafter reviewed them with defendant. The prosecutor indicated if defense counsel introduced the recordings into evidence, he planned in rebuttal to address three portions of the tapes, including (1) Tyrone Lee discussing what he believes to be an interaction in court that indicated he would get paid, (2) Julian Randle saying he was paid, and (3) Tonia Manning discussing Cornelious Brown potentially getting paid not to show up in court. The prosecutor also noted his intent to call Detective Dahlkamp, who was familiar with the voices in the recordings and was reviewing the transcripts "to see if there's any alterations or changes" he wanted to make.

¶ 57 Defense counsel responded by noting the transcript was prepared by someone at a California company and included portions marked "unintelligible and inaudible." Counsel moved to strike the testimony of the State's witnesses who talked about being paid in the recording, noting he was "at a big disadvantage because [he] [had not] had a lot of time to do this." The court stated it did not "disagree," believing "we are all at a disadvantage to some

extent." Counsel stated he had "additional preparation to do in addition to worrying about the contents of those tapes." He also stated he had been unable to conduct research on striking the witnesses' testimony but considered calling them as adverse witnesses.

¶ 58 The trial court stated it was "not trying to press" but noted it was the fourth day of trial and there was "a jury waiting." The court indicated it needed to know defense counsel's trial strategy "going forward *** so that we can proceed with this trial." Defense counsel indicated his desire to offer the recordings into evidence through the sheriff's employee who obtained them. The prosecutor noted the three witnesses made prior consistent statements to police before they allegedly received any incentive to testify. Defense counsel then called the sheriff's employee to testify outside the jury's presence.

¶ 59 Defense counsel stated there were "certain parts" of the recordings he wanted the jury to hear. The trial judge told counsel he needed to be ready to present the "appropriate approved portions of the audio" because the jury was waiting. If the entire recordings were not played, counsel stated he was not prepared to proceed. When asked when he could be ready, counsel stated "probably this afternoon." The prosecutor objected to a continuance. The judge noted he had "a jury sitting back there" and he was "extremely, extremely disappointed in this trial and the way it has progressed." Further, the judge found it "personally embarrassing to the criminal court system, to myself, to have a jury waiting like this." Still, the judge stated he would allow defense counsel to use the recordings with the transcripts but counsel had "to be ready to go." The judge continued the case until 1 p.m., at which time counsel would be "afforded the opportunity to present [his] defense."

¶ 60 In the afternoon session on February 22, 2016, the prosecutor provided defense counsel with a disc, which contained a receipt from the jail showing $50 going from Tyrone Lee

to Sean Jackson, which Lee referenced in one of the recorded calls, and a video of Lee and James Cooper going into the restroom together, which corroborated Lee's statements to Jackson that Cooper showed him money in court and they went to the restroom to discuss the payment. The prosecutor stated it was evidence "that objectively could corroborate some of the things that were said" in the recorded jail calls. Another prosecutor stated the discs contained video footage of the interactions, but she stated the discs, which "may or may not work," were in the process of being copied for defense counsel.

¶ 61 The trial court inquired of defense counsel regarding the portions of the calls and transcripts he planned to present to the jury. Counsel stated he listened to the calls but he did not have the ability to stop the disc to pinpoint the time. Thus, counsel could not "parcel out the portions" that he believed were relevant to the defense case. The trial then proceeded, and defendant testified. Counsel offered no further witnesses, and the defense rested.

¶ 62 In arguing the trial court abused its discretion, defendant contends the court denied his motion for a mistrial because it concluded the recordings involved collateral matters and they were unreliable. We find the evidence of the State's witnesses allegedly being paid in regard to their testimony was highly relevant to the defense case. See *People v. Garrett*, 44 Ill. App. 3d 429, 437, 358 N.E.2d 364, 370 (1976) (stating "[i]nquiries of a witness as to his relations with the accused, his interest in the results of the case, and his feelings of bias, are never collateral"). Because of the midtrial disclosures and the inadequate time for defense counsel to prepare a meaningful defense, we also find the court abused its discretion in denying defendant's motion for a mistrial.

¶ 63 The trial court failed to provide defense counsel with a meaningful opportunity to investigate the alleged bribes in this case. After Brown, Lee, and Julian Randle had testified, the

State provided defense counsel with a disc of the recorded phone conversations, which counsel was unable to play on Thursday evening. On Friday morning, the prosecutor noted the conversations were "not the easiest to understand." While the court continued the matter over the weekend and ordered transcripts to be provided, this did not provide defense counsel an adequate time to prepare a defense. Two of the transcripts do not indicate who is speaking. The other two transcripts indicate "Shawn Jackson" was talking to a "male" or "Speaker." Counsel would have needed time to investigate who was speaking and in what context. With various "street names" being used in the conversations, he would also have had to decipher which individuals were being discussed. Listening to the tapes and reviewing the transcripts with defendant at the jail would also have proven difficult in such a short time frame. Along with the recorded conversations, the State also made disclosures on Monday, including a jail receipt showing Lee put $50 in Jackson's account and surveillance videos, which "may or may not work," showing a meeting between Lee and Cooper. This evidence would have required even more time to allow counsel to properly investigate. Further, the State intimated the transcripts provided on Sunday were inaccurate, and it was having Detective Dahlkamp add the names of speakers and edit the transcripts because he allegedly knew "the context of what's being discussed." Only prior to the defense counsel's case-in-chief did the State provide a copy of this exhibit, which listed the participants as "Tyrone Lee," "Sean Jackson," "Julian Randle," "Moo," and "D'Tanya." Counsel told the trial court he was "at a big disadvantage" because of the lack of time to investigate the matter fully and the need to prepare for other aspects of the trial. The jury never heard evidence of any of the State's witnesses being paid in connection with their testimony.

¶ 64 "The constitutional right of the accused to have the assistance of counsel carries

with it the right of counsel to have adequate time to prepare the defense." *People v. Lewis*, 165 Ill. 2d 305, 326, 651 N.E.2d 72, 82 (1995). In this case, the trial court repeatedly reminded defense counsel about the fact the jury was waiting and pressed counsel on the need to proceed to the conclusion of the trial. However, any impatience of an impaneled jury does not trump a defendant's right to adequately prepare for and present his defense. See *People v. Shrum*, 12 Ill. 2d 261, 265, 146 N.E.2d 12, 13 (1957) (stating the "[s]peedy administration of justice is desirable, but the desire for speed must not be allowed to impinge upon the constitutional requirement of a fair opportunity to defend"). As noted, the "trial judge has a duty to see that all persons are provided a fair trial." *Sims*, 192 Ill. 2d at 636, 736 N.E.2d at 1071. Here, the State's case rested on the credibility of its witnesses and, if it could have been shown the State's principal witnesses had been paid in regard to their testimony, the extent of the bribes could have greatly undermined the State's case. The only way to ensure defendant received a fair trial would have been to declare a mistrial, enabling defense counsel a full and fair opportunity to investigate the alleged payoff of the State's witnesses. As the court erred in not declaring a mistrial, defendant's convictions must be reversed, and the cause remanded for a new trial.

¶ 65 B. Brown's Statement to Officer Peters

¶ 66 Defendant argues he was denied his right to a fair trial when the trial court erroneously admitted as an excited utterance Brown's statement implicating him in response to police questioning while handcuffed and detained in the back of a squad car. The State argues the court properly admitted the evidence of a testifying witness's prior identification of defendant. Even though we are remanding for a new trial, we will address this issue as it may recur on retrial.

¶ 67 At trial, the State questioned Officer Peters about his contact with Cornelious

Brown after Brown and Jermaine Randle had taken Julian Randle to the hospital following the stabbing. According to Peters, Brown was handcuffed and placed in the squad car. At that time, Brown asked Peters "multiple times" whether Julian was going to die. Peters asked Brown who stabbed Julian, and Brown stated defendant stabbed him. The trial court overruled defense counsel's objection to this question. Thereafter, the prosecutor again asked Peters what Brown said had happened. Over defense counsel's objection, Peters testified Brown "said something along the lines of he was there at the hospital [*sic*], and a fight broke out, and he saw Herman Gales run up and stab him with the long black pocketknife."

¶ 68 Defendant argues Brown's statements to Peters were not admissible as excited utterances. In his reply brief, he argues the State's position on appeal that the statements were admissible as statements of prior identification is inconsistent with its position at trial and should be rejected. However, even if a specific argument was not raised in the trial court, "an appellee may raise any argument in support of the trial court's judgment, provided they have a sufficient factual basis before the trial court." *People v. Newbill*, 374 Ill. App. 3d 847, 851, 873 N.E.2d 408, 412 (2007). Moreover, "we may affirm the trial court's judgment on any basis supported by the record, regardless of the trial court's reasoning." *People v. Brannon*, 2013 IL App (2d) 111084, ¶ 19, 990 N.E.2d 1170.

¶ 69 In addressing the substantive admissibility of prior identification, section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12 (West 2016)) provides as follows: "A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." "The reason such statements are admissible is the 'corroborative testimony is considered

reliable *** because both the witness and the third person are subject to cross examination at trial.' " *People v. Zimmerman*, 2018 IL App (4th) 170695, ¶ 76, 107 N.E.3d 938 (quoting *People v. Beals*, 162 Ill. 2d 497, 508, 643 N.E.2d 789, 795 (1994)); see also *People v. Shum*, 117 Ill. 2d 317, 342, 512 N.E.2d 1183, 1191 (1987) (stating "if a witness testifies that he previously identified an offender and the witness' veracity has been tested by cross-examination, a third person may then testify that he heard or saw the witness identify the offender because both the witness and the third person would be subject to cross-examination").

¶ 70 In this case, Brown testified at trial as an eyewitness to the crime and described how defendant stabbed Julian Randle at the mall. Brown was also subject to cross-examination about his statements to the police. See *People v. Lewis*, 223 Ill. 2d 393, 405, 860 N.E.2d 299, 306 (2006) (stating the "opportunity to cross-examine on the issue" of an out-of-court identification "is all that is required under section 115-12(b)"). Thus, the issue centers on whether Brown's statements were ones of identification.

¶ 71 Our supreme court has defined "statements of identification" broadly to encompass "the entire identification process." *People v. Tisdel*, 201 Ill. 2d 210, 219, 775 N.E.2d 921, 926 (2002); see also *Beals*, 162 Ill. 2d at 507-08, 643 N.E.2d at 794-95 (finding the testimony of three prosecution witnesses that, immediately after the shooting, one of the victims stated she was shot by the "fat guy," whom she later identified in court as the defendant, was admissible as corroborative of the victim's in-court identification of the defendant).

¶ 72 In *People v. Tayborn*, 254 Ill. App. 3d 381, 384, 627 N.E.2d 8, 11 (1993), the victim told the police that the defendant was one of the individuals who carried a gun and shot into his home. An officer questioned the victim, who identified the defendant as one of the men who pulled out a gun. *Tayborn*, 254 Ill. App. 3d at 386, 627 N.E.2d at 12. On appeal, the

defendant argued the trial court erred in allowing the officer to testify as to what the victim said about what occurred at his home, claiming it was inadmissible hearsay. *Tayborn*, 254 Ill. App. 3d at 390, 627 N.E.2d at 14. The appellate court disagreed, noting the victim, as the declarant of the out-of-court statement, testified at trial and was subject to cross-examination by defense counsel. *Tayborn*, 254 Ill. App. 3d at 390, 627 N.E.2d at 15. The court also noted the victim's statement to the police identified the defendant as one of the men who carried a gun and shot into the victim's house. *Tayborn*, 254 Ill. App. 3d at 390, 627 N.E.2d at 15. Thus, the court found the officer's testimony was admissible as an exception to the hearsay rule. *Tayborn*, 254 Ill. App. 3d at 390, 627 N.E.2d at 15.

¶ 73 We find Officer Peters's testimony that Brown stated he saw defendant run up during the fight and stab the victim with a long black pocketknife was admissible as an exception to the hearsay rule. Brown testified at trial, he was subject to cross-examination, and his statement was one of identification. See *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 41, 50 N.E.3d 706 (finding section 115-12 "does not require immediate identification" and does not specify the statement must have been made perceiving the defendant in any formal identification procedure, such as lineup, but it includes "any 'identification evidence,' including a witness's statements to police describing the offender"). Moreover, the testimony offered "the minimum detail necessary to make the identifications intelligible to the jury." *People v. Anderson*, 2018 IL App (1st) 150931, ¶ 43, 102 N.E.3d 786. Thus, the trial court properly allowed the testimony.

¶ 74 C. Remand for a New Trial

¶ 75 Because we are remanding for a new trial and we find the record contains sufficient evidence for the jury to have found defendant guilty of the offense of aggravated battery beyond a reasonable doubt, no double jeopardy violation will occur upon retrial. *People*

v. Naylor, 229 Ill. 2d 584, 610-11, 893 N.E.2d 653, 670 (2008). This conclusion does not imply a determination of defendant's guilt or innocence that would be binding on retrial. *People v. Hale*, 2012 IL App (4th) 100949, ¶ 26, 967 N.E.2d 476.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we reverse defendant's convictions and remand for a new trial.

¶ 78 Reversed and remanded.