

No. 1-12-0385

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 11266
)	
KERRY MASTERSON,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The judgment of the circuit court was reversed and the cause remanded for a new trial where the trial court erred in excluding proposed expert testimony on the reliability eyewitness identification.
- ¶ 2 Following a jury trial, the defendant, Kerry Masterson, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 58 years' imprisonment. The defendant appealed, arguing that the trial court erred in: (1) denying her motion to suppress the lineup identifications of three witnesses; (2) barring the testimony of her eyewitness identification expert; (3) failing to properly admonish prospective jurors during *voir dire* on the

State's burden of proof and her right to refuse to testify; and (4) denying her proffered modified jury instruction regarding identification testimony. Additionally, the defendant argued that her 58-year sentence is excessive and that the mittimus should be modified to reflect 925 days of presentencing credit.

¶ 3 On September 30, 2013, we filed an order pursuant to Illinois Supreme Court Rule 23 (eff. July 1, 2011), rejecting the defendant's claims of error with the exception of her argument addressed to presentence credit. As a consequence, we affirmed the defendant's conviction and sentence and ordered the mittimus corrected to reflect her entitlement to 925 days of presentencing credit. *People v. Masterson*, 2014 IL App (1st) 120385-U. Thereafter, the defendant filed a petition for leave to appeal to the supreme court. On March 30, 2016, the supreme court denied the defendant's petition for leave to appeal and entered a supervisory order directing this court to vacate its judgment and to reconsider its decision in light of the holding in *People v. Lerma*, 2016 IL 118496. *People v. Masterson*, No. 118634 (Mar. 30, 2016). In compliance with that order, we vacated our September 30, 2013 decision and judgment and reconsidered our decision as instructed. For the reasons which follow, we now reverse the defendant's conviction and sentence and remand the matter back to the circuit court for a new trial. As we believe that the defendant's claim of error based on the trial court's refusal to allow her eyewitness identification expert to testify is dispositive of this appeal, we will set forth only those facts pertinent to that issue.

¶ 4 The defendant was charged by indictment with multiple counts of first-degree murder, armed robbery, and aggravated unlawful restraint for her participation in the May 14, 2009, robbery of Norton's Sweet Shop in Chicago (also referred to herein as the store), which resulted

in the shooting death of the store's owner, Michael Norton. Beatrice Rosado and Elvin Payton¹ were also charged with Norton's murder. According to the State's theory of the case, Payton and the defendant, intending to rob Norton, entered the store and tied Norton up. As they exited the store, Payton shot Norton in the head, resulting in his death. For her part, Rosado waited nearby in a getaway van.

¶ 5 Prior to trial, the defendant filed a motion to suppress evidence of her lineup identification by three witnesses, arguing that, in procuring the identifications, the police employed suggestive procedures. The following factual recitation is taken from the testimony of various individuals given at the hearing on that motion.

¶ 6 On May 14, 2009, Chicago police officer Brian Spring responded to a radio call of a robbery at Norton's Sweet Shop. Upon his arrival at the scene, Officer Spring discovered Norton's body on the floor of the store with his hands and ankles tied. Several witnesses, including Regina Evans, Jakeila Tankson, and Lisa Randle, were interviewed by police on the night of the murder. The witnesses described two individuals who were seen exiting the store and then running down the street. One was described as a Hispanic male in his late 20's about 5 feet 7 inches to 5 feet 10 inches tall with long hair worn in a ponytail. The other was described as a black male in his late 20's. Randle told the police that, at approximately 7 p.m., she was walking with Tankson down North Avenue near Norton's Sweet Shop when she saw a short, stocky, Hispanic male with his hair in a long ponytail running toward her from the store. She stated that she saw the individual running east on North Avenue for 5 or 10 seconds. Tankson told the police that, as she was walking down North Avenue with Randle near Norton's Sweet

¹ Payton and Rosado entered into negotiated plea deals in which Payton received a 47-year prison sentence and Rosado received a 22-year prison sentence; neither codefendant is a party to this appeal.

Shop, an individual who was running down North Avenue bumped into her. She described the individual as a Hispanic male with long curly hair worn in a ponytail. She stated that she saw the individual for 5 or 6 seconds. Evans reported that she was walking on North Avenue with her boyfriend, Steven Winters, when she saw a man wearing a mask lock the door of Norton's Sweet Shop from the inside. Suspecting that the store was being robbed, she called the police. According to Evans, she and Winters then went to a restaurant. Evans told the police that, after leaving the restaurant, she saw an individual exit Norton's Sweet Shop, close the door, and start running down North Avenue toward Keating Avenue. She described the individual as a skinny Hispanic male, 25 to 30 years of age, about 5 feet 7 inches to 5 feet 10 inches in height, with a long ponytail. Evans also told the police that she had seen a Hispanic Female standing in a nearby Walgreen's parking lot, calling out: "What the F*** is taking you so long" and "hurry the F*** up."

¶ 7 Chicago police detective Anthony Noradin and his partner, Detective Falk, also responded to the crime scene on May 14, 2009. Detective Noradin testified that he and Detective Falk entered Norton's Sweet Shop where he saw Norton's body lying on the floor in a pool of blood. Norton's hands were tied behind his back with wire and his feet were bound together. Norton had sustained a fatal gunshot wound to the head. According to Detective Noradin, he and Detective Falk examined the crime scene, interviewed witnesses and conducted a canvass of the area. One of the other investigators, Detective Torres, spoke to some of the tenants living on the second floor of the building in which Norton's Sweet Shop was located. One of the tenants, Luz Ruiz, told Detective Torres that she had seen an individual nicknamed Chingy, who also lived on the second floor, standing by the side of the building and then run into the store. Detective Torres was able to ascertain that Chingy was the nickname of an individual named Luis Ochoa.

A photo array was prepared containing the picture of Ochoa and shown to Evans at Area 5 detective headquarters on the night of May 14, 2009. Evans identified the picture of Ochoa as someone who resembled the person she saw exiting Norton's Sweet Shop. Photographs of the defendant, Payton and Rosado were not included in the array shown to Evans.

¶ 8 Several days after Norton's murder, Detective Noradin was able to ascertain that Ochoa was in North Carolina on the day of the murder. Subsequently, Detective Dan Czablewski returned to Norton's Sweet Shop and obtained the leases for the apartments on the second floor. One of those leases was for an apartment rented to Rosado. A photo array containing the photograph of Rosado was prepared and shown to Ruiz who identified her as being a woman she had seen in a van on the night of Norton's murder. Having received information that Payton was Rosado's boyfriend, Detective Czablewski prepared a photo array containing Payton's photograph and showed it to Evans and Winters. They identified Payton as an individual they saw coming out of Norton's Sweet Shop carrying a bag of cigarettes on the evening of Norton's murder. Investigative alerts were issued for Rosado and Payton.

¶ 9 On May 20, 2009, Payton and Rosado turned themselves in at the 15th District police station and were then transported to Area 5 detective headquarters for questioning. According to Detective Noradin, Payton and Rosado were placed in separate interrogation rooms and questioned separately by himself and Detective Falk. Initially both Payton and Rosado denied any knowledge of, or involvement in, the murder of Norton.

¶ 10 On May 21, 2009, Payton was taken for a polygraph examination. After being confronted with the results of that examination, Payton admitted to Detective Falk that he had participated in the robbery of Norton's Sweet Shop on May 14, 2009, and identified the third individual involved as a Hispanic female named "Kerry," who he later identified from a

photograph as the defendant. Payton told Detective Falk that it was the defendant who planned the robbery of Norton's Sweet Shop, and it was the defendant who shot Norton. Payton gave a recorded statement in which he again asserted that it was the defendant who planned the robbery. He stated that the defendant entered the store before him wearing a mask and tied Norton up. According to Payton's statement, the defendant shot Norton with a "big revolver" after he had left the store.

¶ 11 On May 22, 2009, Detectives Czablewski and Adams questioned Rosado concerning the defendant's involvement in the robbery and the murder of Norton. After being told of Peyton's inculpatory statement, Rosado gave a videotaped statement in which she stated that it was Payton who asked her to assist in the robbery of Norton's Sweet Shop on May 14, 2009, and that she saw the defendant and Payton enter the store while she waited outside in a van. According to Rosado, she saw Payton and the defendant run from the store, and when Payton entered her van, he said that he had to kill Norton because Norton had seen his face.

¶ 12 Following the statements of Payton and Rosado, an investigative alert was issued for the defendant. On May 27, 2009, the defendant turned herself in at the 15th District police station and was then transported to Area 5 detective headquarters. On that same day, Evans viewed a physical lineup containing 5 females, including the defendant. When she identified the defendant as the individual she had seen running from Norton's Sweet Shop, Evans expressed shock that the individual was female and not a male as she originally thought.

¶ 13 On May 28, 2009, Tankson viewed a lineup containing four females from which she identified the defendant as one of the individuals who she had seen running from Norton's Sweet Shop on the evening of Norton's murder. Like Evans, Tankson expressed surprise when she realized the person who she had seen was a female, not a male. On June 10, 2009, Randle

viewed a lineup containing three females from which she also identified the defendant, stating that, upon seeing the defendant in the lineup, she realized that the person she saw was actually female, not male.

¶ 14 On November 1, 2010, the trial court denied the defendant's motion to suppress the lineup identifications made by Evans, Tankson, and Randle, finding that the procedures employed by the police during the lineups were not overly suggestive or unnecessary given the unique facts of the case. The court concluded that the defense's arguments related to the credibility of the witnesses, but not to the admissibility of their identifications.

¶ 15 On December 10, 2010, the defendant filed a motion *in limine* requesting that the court conduct a hearing to determine the relevance and materiality of expert testimony addressing the concepts of perception, reconstructive retrieval and suggestibility as they relate to eyewitness identifications. The motion asserted that the expert witness would not offer any opinions as to the veracity of the eyewitness's testimony in this case, but would be addressing how the circumstances surrounding the identifications may have impacted upon the witnesses' memories. In support of the motion, the defendant filed a written offer of proof in which she disclosed Dr. Elizabeth Loftus, a psychologist, as the expert she intended to call to testify concerning the effects of both external and internal factors on perception, memory, retention and retrieval. Following a hearing on the motion, and after considering the testimony adduced at the suppression hearing, the trial court denied the motion to allow the testimony of Dr. Loftus. The court stated it did not find the proposed expert testimony material or relevant and that the witnesses misidentification of the defendant's gender, the amount of time that the witnesses had to observe, and their level of stress, or lack thereof, were all matters within the understanding of the jurors.

¶ 16 The defendant's trial commenced on October 17, 2011. Randle, Evans and Tankson, among others, were called as witnesses for the State. Each testified consistently with their testimony at the suppression hearing, and each identified the defendant in the courtroom as the person they saw running out of Norton's Sweet Shop on the night of Norton's murder.

¶ 17 Payton and Rosado were also called as witnesses in the State's case-in-chief. Rosado testified that she had pled guilty to Norton's murder and was serving a 22-year prison sentence. She admitted that she picked up Payton in her van in an ally across the street from Norton's Sweet Shop in the evening of May 19, 2009. However, she denied ever seeing the defendant on that day. As for the statement which she gave to the police implicating the defendant in the robbery of Norton's Sweet Shop and the murder of Norton, Rosado testified that she was tricked into making the statement by the police and that she gave the statement because she was afraid of Payton. Although she asserted that her statements to the police were lies, Rosado, nevertheless, testified that it was Payton who planned the robbery and that he admitted to her that he had killed Norton. Following her testimony, portions of the videotaped statement that she gave to the police were published and played for the jury. Among other things, the statement depicts Rosado telling the detectives that the defendant and Payton talked about robbing Norton on May 14, 2009, that the defendant and Payton entered Norton's Sweet Shop while she waited outside in a van, and that she saw the defendant run out of the store along with Payton. She also told the detectives that, when Payton entered her van after running from the store, he said that he had to kill Norton because Norton had seen his face. After the videotaped statement was played for the jury, Rosado admitted seeing Payton run out of the store and admitted picking him up in her van. However, she again denied seeing the defendant on that day.

¶ 18 Payton testified that he too had pled guilty to the murder of Norton and that he was serving a 47-year prison sentence for that crime. He stated that, on May 14, 2009, he entered Norton's Sweet Shop intending to rob the establishment, while Rosado waited nearby in her van. According to Payton, he entered the store while Norton was outside putting a bucket in his car, and when Norton re-entered the store, he approached Norton from behind, wrestled him to the ground, threatened him with a 9 millimeter pistol, tied him up and stole his money. Payton admitted that he then shot Norton in the head. Payton stated that the defendant entered the store after he shot Norton, but that "everything was already done" by that time. Payton admitted that the defendant knew about the robbery and had planned to be a "lookout," but had arrived too late. He did not recall any details surrounding his contact with the defendant in connection with planning the robbery except that he initiated the idea while smoking marijuana with her and Rosado in the early morning hours of May 14, 2009. He testified that he got into Rosado's van after leaving the store and told her that he had murdered Norton.

¶ 19 Payton admitted that he gave a recorded statement to police after turning himself in on May 20, 2009, but he stated that he was drunk and "high on pills" at the time. He initially testified that he did not recall what he said in the statement, but subsequently remembered that he initially denied any involvement in Norton's murder. Payton's statement was then published and played for the jury. In that statement, Payton asserted that it was the defendant who planned the robbery. He stated that the defendant entered the store before him wearing a mask, tied Norton up, and shot Norton with a "big revolver" after he had already left the store.

¶ 20 Payton also admitted at trial that he authored a letter in September of 2009, in which he wrote that the defendant shot Norton, but testified that the information in the letter was not true.

He also denied testifying during his own trial that the defendant tied Norton up and then shot him.

¶ 21 Various Chicago police officers and Illinois State Police forensic scientists testified that the police recovered a fired bullet, a cartridge casing, a latent print, a key, a plastic cup, and a pair of glasses from the crime scene. The ballistic tests revealed that the bullet and cartridge came from a Winchester 9 millimeter pistol. The latent fingerprint impressions taken at the scene were unsuitable for comparison, and none of the DNA evidence retrieved from the scene matched Payton's or the defendant's

¶ 22 Detective Falk testified that when he first interviewed Payton on May 21, 2009, he was under the impression that the unknown offender was a Hispanic male. It was Payton who first told him that his accomplice was a female. Detective Falk testified that Payton told him that "it was me and another girl, that girl might look like a dude to you, but she is not." Detective Falk stated that Payton said that the defendant masterminded the robbery plan, that he agreed to participate, and that the defendant shot Norton after he exited the store. According to Detective Falk, Payton told him that the defendant said that she shot Norton because he recognized her. Detective Falk denied that Payton appeared under the influence of drugs or alcohol at the time he made the statement. He also denied that he showed pictures of the defendant to Payton before Payton made his statement or that he gave Payton details of the crime to include in his statement.

¶ 23 On cross-examination, Detective Falk admitted that Evans, Tankson and Randle had initially described the individual that they saw running from Norton's Sweet Shop on the night of the murder as a Hispanic male, and that he was surprised when Payton told him that the individual was a female. He also acknowledged that, at the time that Payton gave his statement,

he knew that the gun used to shoot Norton was a 9 millimeter pistol and not a revolver as Payton had stated.

¶ 24 Chicago police detective Jim Adams, one of the interrogators of Rosado, testified that he never told Rosado who to implicate, and he denied showing her Payton's statement before she confessed and implicated the defendant. However, he did admit that he showed Rosado Payton's videotaped statement hours after she confessed. Detective Adams stated that Rosado cried during the interview and said that she knew that Payton planned to rob Norton with the defendant and admitted to waiting for them in a van. Rosado said that Payton entered her van after the robbery carrying a bag containing two or three cartons of cigarettes. According to Detective Adams, Rosado also told him that the defendant looked "like a man."

¶ 25 Detective Noradin testified at trial, and his testimony was consistent with the testimony he gave during the hearing on the defendant's suppression motion. Additionally, he identified a security surveillance video which showed a black van in a parking lot near Norton's Sweet Shop on the evening of Norton's murder and a man carrying a white bag walking to the van.

¶ 26 The parties stipulated that Payton testified under oath at his own trial that it was the defendant who shot Norton just after he exited the store. They also stipulated that, during her trial, Rosado denied under oath that the police gave her details of the crime prior to making her statement implicating the defendant.

¶ 27 After the State rested its case, the defense presented its case by way of stipulations relating to the previous grand jury testimony of Evans, Tankson and Randle and the parties' stipulation that, if called as witnesses, Ruiz would testify that she heard Rosado threaten to come back and kill Norton if he evicted her and that Dan Rivera would testify that Norton told him that the tenants in Rosado's apartment had threatened to kill him for evicting them.

¶ 28 On October 20, 2011, the jury found the defendant guilty of Norton's murder. On December 8, 2011, the trial court denied the defendant's motion for a new trial and sentenced her to 58 years' imprisonment. Thereafter, the trial court denied the defendant's motion for reconsideration of her sentence, and this appeal followed.

¶ 29 The defendant argues, *inter alia*, that the trial court erred in barring the testimony of her eyewitness identification expert, Dr. Elizabeth Loftus. We agree.

¶ 30 At the time that the trial court entertained the defendant's motion *in limine* seeking an order allowing Dr. Loftus to testify as an expert on the effects of external and internal factors on an individual's perception, memory, retention and revival as they relate to the accuracy of eyewitness identification, the weight of authority in Illinois supported precluding expert testimony on the reliability of eyewitness identification on the ground that it invaded the province of the jury as trier of fact. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 54 (citing *People v. Enis*, 139 Ill. 2d 264, 286-87 (1990) (citing cases)). However, in its January 22, 2016 decision in *Lerma*, the supreme court found that "[t]he decades since *Enis* *** have seen a dramatic shift in the legal landscape, as expert testimony concerning the reliability of eyewitness testimony has moved from novel and uncertain to settled and widely accepted." *Lerma*, 2016 IL 118496, ¶ 24. The supreme court concluded that "whereas *Enis* allowed for[,] but expressed caution toward[,] the developing research concerning eyewitness identifications, today we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." *Id.* From that perspective, the supreme court analyzed the admissibility of expert testimony on the reliability of eyewitness identification testimony in the context of the facts of that particular case. *Id.* ¶¶ 25-35.

¶ 31 "In Illinois, generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." *Enis*, 139 Ill. 2d at 288. Expert testimony addressing matters of common knowledge are not admissible unless the subject matter is difficult to understand and explain. *Lerma*, 2016 IL 118496, ¶ 23. When considering the admission of expert testimony, "the trial court should balance the probative value of the evidence against its prejudicial effect to determine the reliability of the testimony." *Id.* Furthermore, the necessity and relevance of the expert testimony should be carefully considered in light of the facts of the case. *Id.* The review of a trial court's decision concerning the admission of testimony, including expert witness testimony, is conducted by applying the abuse of discretion standard. *Id.*

¶ 32 In this case, the evidence of the defendant's guilt rested upon the statements which Rosado and Payton gave to the police implicating the defendant in the robbery and murder of Norton and the testimony of Evans, Tankson and Randal identifying the defendant as one of the individuals who they saw exiting the crime scene. Rosado and Payton pled guilty to Norton's murder and were serving prison sentences for the crime at the time of the defendant's trial. However, contrary to the statements which they had given to the police, both testified at the defendant's trial that she did not participate in the robbery or murder of Norton. According to Rosado, the police "tricked" her into falsely implicating the defendant. For his part, Payton testified that the defendant never entered Norton's Sweet Shop until after he had already shot Norton. Additionally, there was no physical evidence connecting the defendant to the robbery and murder of Norton, and she never confessed to the crimes.

¶ 33 In light of the fact that the defendant's conviction rested upon the repudiated pre-trial statements of Rosado and Payton and the identification testimony of three witnesses who had initially told the police that the person they saw running from Norton's Sweet Shop on the night of the murder was a Hispanic male, we believe that the proposed testimony of Dr. Loftus regarding the factors which may influence perception and affect the reliability of eyewitness identification would have been both probative and relevant and would have aided the jury in determining the trustworthiness of the identification of the defendant by Evans, Tankson and Randal. Applying the reasoning of the supreme court in *Lerma*, we conclude that it was error for the trial court to exclude the expert eyewitness identification testimony which the defendant sought to introduce. In so holding, we readily concede that, at the time the trial court was called upon to decide the admissibility of Dr. Loftus's proposed testimony, it did not have the benefit of the supreme court's reasoning in *Lerma*. Nevertheless, we believe that the decision in *Lerma* mandates our conclusion on this issue.

¶ 34 We next address the question of whether the trial court's exclusion of the defendant's proposed expert eyewitness identification testimony was harmless error. In determining whether error in the exclusion of evidence is harmless, we consider: whether it may have contributed to the defendant's conviction; whether the State's other evidence overwhelmingly supported conviction; and whether the excluded evidence would have been duplicative or cumulative. *Lerma*, 2016 IL 118496, ¶ 33. In this case, consideration of each of these factors leads us to conclude that the exclusion of the proposed testimony of Dr. Loftus was not harmless error. First, the exclusion of the testimony prevented the jury from hearing relevant and probative expert testimony going to the trustworthiness of the identification of the defendant by Evans, Tankson and Randal. Second, we do not believe that, absent the identification of the defendant

by the three eyewitnesses, the remaining evidence overwhelmingly supported the defendant's conviction. We have given this factor considerable weight in light of the fact that there was no physical evidence linking the defendant to the robbery and murder of Norton and the only other evidence of the defendant's guilt was the repudiated pre-trial statements of Rosado and Payton. Third, the proposed testimony of Dr. Loftus was neither duplicative nor cumulative.

¶ 35 Based upon the foregoing analysis, we reverse the defendant's conviction and remand the matter to the trial court for a new trial with directions to allow expert testimony on the reliability of eyewitness identification subject to the provisions of Rule 702 of the Illinois Rules of Evidence (eff. Jan.1, 2011). We need not, therefore, address any of the defendant's other claims of error. In addition, we find that the totality of the evidence presented at the defendant's trial was sufficient to establish her guilt beyond a reasonable doubt and, therefore, there will be no double jeopardy violation on retrial. *People v. Ward*, 2011 IL 108690, ¶ 50.

¶ 36 Reversed and remanded with directions.