FOURTH DIVISION
May 24, 2018

No. 1-16-0920

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. 2013 CR 14295
	)	
TOMMY STROWDER,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed robbery affirmed. Circuit court did not err when it barred defendant from introducing eyewitness identification expert testimony at trial. Any error in refusing to allow prior statements by victim to be considered for their truth was harmless.

¶ 2 Defendant Tommy Strowder was convicted of armed robbery. At trial, the State's evidence consisted of the testimony of the victim, Earnestine Johnson, and the arresting officer, Officer Charles Hunter. The only evidence directly linking defendant to the crime was Ms. Johnson's identification. Defendant did not present any additional evidence.

¶ 3 On appeal, defendant contends the circuit court erred by barring his eyewitness identification expert and in refusing to instruct the jury regarding the use of prior inconsistent statements for their truth. Because we hold that the circuit court did not err in barring defendant's

expert testimony, and that any error regarding the jury instruction would have been harmless, we affirm defendant's conviction.

¶ 4 BACKGROUND

¶ 5 Earnestine Johnson (Johnson) had two phones: a smart phone and a government phone. Around 12:50 p.m. on July 3, 2013, Johnson was walking on Chicago Avenue to pick up her son from school. As she was walking, Johnson was talking to a friend on her smart phone. While on the call, Johnson noticed three young African American men walking towards her.

¶ 6 Still on the phone with her friend, Johnson received another call. As the young men approached, Johnson was holding the smart phone to switch between the two calls. At trial, Johnson testified that she saw the group for about 60 seconds and only took her eyes off them for a second or two to switch calls.

¶ 7 As Johnson raised her eyes again, one of the three men quickly ran up and took the smart phone from her hand. Johnson described the person who took her phone as approximately 5′ 4″ or 5′ 5″; wearing khakis and a blue hoodie; and having coloring in his hair that she described as dirty gold or orange. Johnson testified that two of the three men had blue hoodies, but only defendant had "orange hair or any type of coloring in [his] hair." At trial, Johnson identified defendant as the person who took her phone.[1]

¶ 8 After taking her phone, defendant ran past Johnson into a nearby parking lot. The other two men stood in front of Johnson to block her. While blocking her, the other male wearing a blue hoodie lifted his sweater to show Johnson a gun. After flashing the gun, the remaining two men took off running in the same direction as defendant.

[1] Johnson testified that she interchanges the terms "hoodie" and "sweater."

¶ 9 After the three men were around the corner, Johnson began chasing them. While chasing the three males, Johnson used her government phone to call 911. Johnson talked to a 911 operator while continuing her chase. The dispatcher put out a radio transmission of an armed robbery, describing the offender as "male black, blue sweater, hoodie, blue hoodie, khaki pants."

¶ 10 After Johnson turned the corner, she saw all three men jump a fence in the parking lot. The fence was too big for Johnson to jump, so she had to run around it. While in the parking lot, a man named Charles Hill (Hill) witnessed the chase and asked what was going on. Johnson told Hill that she was just robbed by the people she was chasing. Hill then drove off to help Johnson chase the three down.

¶ 11 After running around the parking lot fence, Johnson ran to Pine and Chicago and saw the men running to Pine and Rice. Johnson chased them down Rice towards Long, Long to Iowa, and Iowa to Laramie. Around the time that the men turned onto Iowa Street, one of the three men—not one of the two blue-hooded robbers but the one in a t-shirt—split off from the others. Johnson continued to chase defendant and the armed man, who were still running together.

¶ 12 As the two men got to Laramie, they made a left towards Augusta. Johnson lost sight of the two as they turned onto Laramie. When Johnson got to Laramie and Iowa, Hill pulled back up in his truck and told Johnson that "they got one of the guys" and said he would to drive Johnson to the guy. Johnson got into the truck and Hill made a left on Laramie towards Augusta, then made a right on Augusta towards Leamington.

¶ 13 One cross examination, Johnson agreed that she chased the offenders "for a *** minimum 6 minutes 40 seconds," based on the duration of her 911 call.

¶ 14 Officer Charles Hunter (Officer Hunter) was on duty and assigned to a beat car in the district where Johnson was robbed. When the dispatcher sent the transmission regarding the

robbery, Officer Hunter was in the immediate area and responded to a flash message that one of the offenders was currently running through an alley from Laramie towards Leamington.

¶ 15 When Officer Hunter turned on to Leamington, he observed an African American male who fit the description of the offender running down the side of the gangway. The man ran out of the alley and walked up to the porch of an abandoned building. Once on the porch, the man sat down, put up his hood, and looked down.

¶ 16 Officer Hunter described the individual he saw as "wearing tan pants and a blue hoodie on top of his, covering his head, face." At trial, Officer Hunter identified defendant as the man he saw run out of the alley and walk up to the porch. When Officer Hunter saw defendant sit on the porch, he got out of his squad car and started to approach defendant. The officer drew his weapon, as he was responding to an armed robbery.

¶ 17 As Hill and Johnson arrived at Leamington and Augusta, Officer Hunter was on the curb, beginning to approach defendant. Johnson saw defendant on the porch, jumped out of the car, and ran up the street. As Johnson was running up the street, she was pointing at defendant and started yelling, "That's the guy. That's the guy that took my phone." Johnson testified that, once she started yelling, defendant looked up, which led his hoodie to come down and allowed her to see his face and orange-colored hair.

¶ 18 Johnson said she knew defendant was the man who stole her cell phone based on defendant's "hair color, the *** khaki pants, and he had a hood on the blue sweater." She confirmed that, though two of the three robbers wore blue hoodies, only the man who took her cell phone—defendant—had orange-colored hair.

¶ 19 Upon Johnson's identification, Officer Hunter arrested defendant on the porch. At the time of his arrest, defendant did not have Johnson's phone on him; the phone was never found.

¶ 20 Prior to trial, defendant issued his Second Amended Answer to Discovery, which indicated that he intended to call Dr. Robert Shomer as an expert witness on eyewitness identifications.[2]

¶ 21 The State moved to bar Dr. Shomer's expert testimony, arguing that "the facts of this case and Dr. Shomer's eight pages of supporting material reveals that the proposed testimony lacks specific relevance or probative value to the case, while at the same time threatening to prejudice and confuse the jury."

¶ 22 The trial court indicated it had reviewed this court's decision in *People v. Lerma*, 2014 IL App (1st) 121880, *aff'd*, 2016 IL 118496, and read the State's motion. (Our supreme court had not yet reviewed, and affirmed, the appellate court's decision in *Lerma*.)

¶ 23 The trial court then asked defendant's counsel for a "proffer as to what we expect the evidence in this case would show and how [Dr. Shomer's] testimony would be relevant." Because Dr. Shomer's expert report is not in the record on appeal, we provide in detail defense counsel's proffer, and the trial court's ruling. Counsel indicated that Dr. Shomer:

> "can talk about the difference in time, how long a person sees an individual, how that has been shown to affect identification. It is very clear in this case, unlike Lerma, that the victim in this case does not know the Defendant, has never known the Defendant, how trying to hide one's face—and that is exactly what they talk about here—can go to a misidentification, how being involved on a cell phone call with one person on one line and then taking another one can affect the identification because you are paying attention to your phone and not the identification of the individual, how stress can play a role on

[2] Dr. Shomer's expert report is not in the Record on appeal.

that when an individual, second individual, comes up and shows a gun, how stress can affect the memory and the identification of an individual.

I think, because there is no physical evidence linking the Defendant to this case, that the Defendant at most, assuming it was him, at most the witness saw him for two seconds. An expert can go into the misconceptions that people have and jurors have and show them that the identification in this case—that they have to take into consideration all of these factors."

¶ 24 In response to the State's argument that Dr. Shomer would simply testify to things that are common knowledge, defense counsel stated that Dr. Shomer:

"wants to talk about the basic nature and reliability of eyewitness observation and identification and the unique nature of eyewitness evidence. Additional factors that have been found by research to play a significant role in the accuracy of eyewitness identification relative to this case are the following: the nature of human memory for faces. He can talk about how the mind processes identification, how the mind processes the remembering of faces, and the level of reliability. *** He has gone through numerous studies that talk about how the mind processes the remembrance of faces and how reliable that has been, and it has been shown to be unreliable under significant stress, and armed robbery—when you read the preliminary hearing transcript—she admits that she was shocked, freaked out, very, very stressful for her especially when the gun was involved. Then he goes on to talk about that there is a nature of eyewitness evidence in the context of which individuals are first seen, how the brain works when it first sees something, how it is processed especially when it comes to eyewitness testimony and eyewitness remembering identification. The communication of expectancies and the

effect of the first accuracy of the eyewitness identification, how the first thing that they say can show and plays a role in the expectancy of when they finally see the individual that they claim it to be. How do you process this? Were you looking at the clothes first or the face? When an individual comes up and speaks to police officers, what is the first thing that individual said? Did they talk about the hair that was in braids, or did they talk about that he had a tattoo on his arm? Those can play a role in the way they first communicate, what they remember as to what they are seeing at the time."

¶ 25 The trial court interjected and stated, "[T]hat doesn't really apply to this case. Didn't they chase the person and a good samaritan drove her where the Defendant was on a porch like very quickly?"

¶ 26 Defense counsel responded by arguing:

"She never had an opportunity to give an eye witness description of the individuals who did this to her, so when shown the very first male black that they see how that will affect the identification, how many times witnesses will see someone who may fit the description in their own mind and then pick that person because that is the first one they see, which is something a jury would not know, which is something a jury does not have common knowledge of."

¶ 27 In excluding the expert testimony, the trial court reasoned that Dr. Shomer:

"indicated that factors he believes would be relevant to this case include the basic nature on the reliability of eyewitness observation on identification, the nature of human memory for faces and its level of reliability. The nature of eyewitness evidence. Context in which individuals are first seen by eyewitnesses. The initial description provided by that eyewitness. Communication of expectancies, the role of assumptions, relationships

between the confidence of the eyewitness and the actual accuracy of their eyewitness identification.

***

Several of the factors which the doctor lists as to the nature of eyewitness evidence, basic nature of reliability of eyewitness observation. Court believes the concepts that can be understood by jurors, including whether or not someone is distracted, whether or not they have a good opportunity to observe.

In this case there was no initial description given by the witness. There was no lineup, so role of assumptions does not play a part. So after considering the proposed testimony, court believes that [Dr. Shomer's proposed testimony] has limited relevance and its probative value is outweighed by its prejudicial effects.

So the facts of this case, court is of the opinion it may tend to confuse the jury. So as an exercise of court's discretion, the State's motion to bar the testimony is granted."

¶ 28 At the jury instruction conference, defendant sought to include Illinois Pattern Jury Instruction, Criminal (4^{th}), No. 3.11 (IPI Criminal 3.11) in its entirety, including language that instructs jurors regarding the use of prior inconsistent statements for their truth. Defendant argued that the victim, Johnson, made no less than seven pre-trial statements, in various venues, that were inconsistent with her trial testimony that should be considered for their truth.

¶ 29 But the trial court believed that, taken as a whole, Ms. Johnson's prior statements were not inconsistent with her trial testimony. Ultimately, the court held that "the manner in which Ms. Johnson was questioned the Court feels that those prior statements were not, are not admissible as substantive evidence. They were only used as impeachment prior inconsistent statements, and I am going to not give the [*sic*] substantive evidence." So the court allowed that

jury instruction insofar as it permitted the jury to consider the victim's prior statements for impeachment purposes, but not as substantive evidence.

¶ 30 The jury found defendant guilty of armed robbery. The trial court denied defendant's posttrial motion.

¶ 31 ANALYSIS

¶ 32 On appeal, defendant claims the trial courted erred by: (1) excluding expert testimony regarding eyewitness identification and (2) refusing to allow the jury to consider the victim's prior inconsistent statements for their truth. We will take these arguments in order.

¶ 33 I. Eyewitness Expert Testimony

¶ 34 Expert testimony is only necessary where the subject of the testimony is particularly within the witness's experience and qualifications and beyond that of the average juror. *People v. Lerma*, 2016 IL 118496, ¶ 23. Expert testimony regarding matters of common knowledge is not admissible " 'unless the subject is difficult to understand and explain.' " *Id*. (quoting *People v. Becker*, 239 Ill. 2d 215, 235 (2010)).

¶ 35 A trial court is given broad discretion when deciding to admit evidence, including expert testimony. *Enis*, 139 Ill. 2d at 290. A ruling on whether to admit expert testimony is reviewed for an abuse of discretion. *Becker*, 239 Ill. 2d at 234. An abuse of discretion occurs only where the trial court's decision is " 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.' " *Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37). When deciding whether to admit expert testimony, the trial court should balance the probative value of the testimony against its prejudicial effect. *Id*. (citing *People v. Enis*, 139 Ill. 2d 264 (1990)).

¶ 36 The supreme court in *Lerma* reviewed the state of the law regarding eyewitness identification expert testimony more than 25 years after its previous pronouncement in *Enis*. The court acknowledged that scientific advances have confirmed that " 'eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and [is] responsible for more wrongful convictions than all other causes combined.' " *Id*., ¶ 24 (quoting *State v. Dubose*, 699 N.W.2d 582, 591-92 (Wis. 2005)). In re-evaluating its decision in *Enis*, the court held "that [eyewitness identification] research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." *Id*.

¶ 37 A jury convicted the defendant in *Lerma* of first degree murder based on evidence "consit[ing] solely of two eyewitness identifications." *Id*., ¶¶ 5, 18. Prior to trial, the defendant sought to introduce the opinion of an eyewitness identification expert, Dr. Fulero. Dr. Fulero's opinion consisted of various "scientifically documented findings" regarding the unreliable nature of eyewitness identifications. *Id*. ¶ 8. The trial court denied defendant's motion to allow Dr. Fulero to testify, because the trial court believed the eyewitnesses knew the defendant prior to witnessing the shooting. *Id*. ¶ 10.

¶ 38 After Dr. Fulero died, defendant brought a second motion to reconsider and tendered the opinion of a new expert, Dr. Loftus. Dr. Fulero intended to testify that: the level of the witness's confidence does not necessarily correlate with the accuracy of the identification; factors such as stress, the presence of a weapon, the passage of time, wearing partial disguises, and suggestive police procedures can affect the accuracy of an identification; that eyewitnesses tend to overestimate time frames; and that cross-racial identifications are less reliable than same-race ones. *Id*. ¶ 8.

¶ 39 Dr. Loftus' report tracked Dr. Fulero's but contained one significant addition—that a witness's acquaintance with the accused actually cuts against the identification's reliability. *Id*. ¶ 14. Dr. Loftus stated that "the witness will tend to perceive the person as the expected acquaintance even if the person is in fact someone else." *Id*. The court denied the defendant the opportunity to present Dr. Loftus' report for the same reasons as it did Dr. Fulero's: because the witness knew the defendant.

¶ 40 The supreme court held that it was an abuse of discretion to exclude Dr. Loftus' report on the same grounds as Dr. Fulero's report. The court concluded that Dr. Loftus' expert opinions conflicted with the trial court's "personal convictions" regarding matters which were the subject of Dr. Loftus's report—namely, whether personal acquaintance with the defendant strengthened, versus weakened, the eyewitness identification. *Id.*, ¶¶ 28-29. In so doing, "the trial court [denied] 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 doing so for reasons that are both expressly contradicted by the expert's report and inconsistent with the actual facts of the case." *Id*. ¶ 32. Such rationale rose "to the level of both arbitrary and unreasonable to an unacceptable degree" and constituted an abuse of discretion. *Id*. The court was also concerned that one of the eyewitnesses was unavailable for cross examination, leaving the defendant without the ability to meaningfully challenge the testimony otherwise. *Id*., ¶ 26; see also *People v. Ortiz*, 2017 IL App (1st) 142559, ¶ 33.

¶ 41 *Lerma* does not stand for the proposition that eyewitness identification expert testimony must be allowed in every case where a defendant seeks to have it admitted. Instead, *Lerma* recognized that eyewitness identification expert testimony, in light of its modern understanding, is entirely appropriate in certain cases. The court did not abolish the requirement that a trial court

"carefully consider the necessity and relevance of the expert testimony in light of the facts in the case before [it]." *Ortiz*, 2017 IL App (1st) 142559, ¶ 30 (citing *Lerma* 2016 IL 118496, ¶ 23); see also *Enis*, 139 Ill. 2d at 290.

¶ 42 We find the facts of this case distinguishable from *Lerma*. The State in *Lerma* relied exclusively on eyewitness testimony. Here, while eyewitness testimony was not the only evidence—Officer Hunter's testimony was corroborative—we would agree that the evidence in this case at least predominantly relied on eyewitness testimony. But the similarities end there. This case does not involve a typical eyewitness identification. Johnson did not simply report that her phone was stolen and identify defendant days or even hours later, after the police made an arrest. Immediately after her phone was stolen, Johnson gave chase. Her trial testimony was quite clear: the men took her phone and ran around the corner; she chased them over multiple blocks, down multiple streets, and only lost sight of them after having chased them for nearly seven minutes. During this time, she had a clear view of defendant's clothes and build and hair.

¶ 43 And she did not lose defendant for long. Almost immediately after she lost them, Hill drove back up and told her the police had one of the three men she was chasing. When she identified defendant sitting on the porch, she identified him initially based on his tan khakis, blue hoodie and build, and then by his orange-colored hair and his face when defendant raised his head, causing his hood to drop from his head. This identification was not an identification that required a witness to remember a face from the past; this was essentially a contemporaneous identification based on the defendant's distinctive hair color, clothes, and build, as well as his face.

¶ 44 The analysis proffered by Dr. Shomer included either matters of common knowledge or factors that were irrelevant to this case. Dr. Shomer intended to testify about a number of factors

which were also present in *Lerma*: that Johnson did not know defendant; how hiding your face can lead to a misidentification; the stress of the event; the presence of a weapon; and suggestive police procedures. Additionally, Dr. Shomer would have testified about the communications of expectancies, how the witness's first perception can shape their expectancy, and that distraction such as talking on the cell phone could affect identification.

¶ 45 The trial court found that Dr. Shomer's testimony about distraction and the witness's ability to perceive were easily understandable by a jury and not appropriate for expert testimony. We agree. Expert testimony is not needed to argue that if someone is distracted by their cell phone, they might be less likely to focus on the face of the man who stole it from her. Unlike *Lerma*, there is no evidence in the record indicating that Dr. Shomer would have testified that these "easily understandable" concepts were actually based on misconceptions, such as the inverse relationship between confidence and accuracy, or the fallacies of acquaintance identifications.

¶ 46 Defendant also argues that Dr. Shomer's opinion was needed due to the stress of the event and presence of a weapon. But here, the victim was surprised by the phone snatching; it was not preceded by the brandishing of a weapon or any other stressor. Indeed, the weapon did not appear until after the person who stole Johnson's phone had already done so and fled—and after she had already had a look at his face, hair, and clothes. Simply stated, Johnson could not have been distracted by the presence of the weapon or by the stress of the event, because neither of them preceded or accompanied her look at defendant's face and colorful hair and clothes. And however stressful the event must have been for Johnson, it did not stop her from chasing defendant and the others for several blocks, for several minutes, during which time she was able to see defendant's clothing, build, and distinctive hair, if nothing else.

¶ 47 Defendant also points to Johnson and Office Hunter's testimony that defendant was trying to hide his face. But again, Johnson testified that she recognized not only defendant's face but his clothing, the coloring in his hair, and his build. In fact, when she first shouted out her identification, she could not even see defendant's face—only his clothes and build. The fact that defendant was trying to hide his face did nothing to impair Johnson's ability to perceive defendant's clothing. And only after she started shouting, and defendant raised his head, causing his hood to fall and exposing his face and distinctive hair, did she confirm her identification based in part on his face.

¶ 48 Finally, the trial court found that there was no initial description and no-line up, "so the role of assumptions does not play a part." Defendant argues that Johnson made assumptions about defendant's guilt because, when she arrived at Leamington, she already believed the police had apprehended a suspect, and the police officer was holding defendant with his gun drawn.

¶ 49 Officer Hunter testified that he drew his gun, responding as he was to an armed robbery. When he did so, he was on the street, and defendant was on the porch. He said that he "approached [defendant], and at the time I approached *** the victim came running up the street." Officer Hunter testified that he was on the curb when he first noticed Johnson, who was 15 to 20 feet away from him and 25 feet away from defendant. By the time Officer Hunter got to the porch where defendant was sitting, Johnson was only 10 feet away.

¶ 50 Johnson testified that she saw the officer when he was on the porch, at which time she started running and pointing and identifying defendant as the man who stole her phone. And she had earlier testified that Hill, the man who drove her to that spot, had informed her that the police "got one of the guys."

¶ 51 We cannot deny that some amount of suggestiveness was present. By the time Johnson arrived on the scene, the officer was clearly homing in on defendant with his gun drawn, and of course Johnson had already been told that the police had apprehended one of the suspects.

¶ 52 But we still cannot say that the trial court's ruling to bar expert testimony "was arbitrary, fanciful, or unreasonable to a degree that no reasonable person would agree with it." *Lerma*, 2016 IL 118496, ¶ 23. This was not a situation where defendant was in custody *per se*, bent over a car in handcuffs, situated in a line-up, or even presented to the witness in a show-up. The officer was still in the process of moving toward the suspect; it was not presented to Johnson as a *fait accompli*. The trial court also took into account the chase, during which Johnson was able to view defendant from behind and at times by profile—and at all times his clothes and distinctive hair and build—over an extended period of time, and her identification of defendant came after only a short interlude of time when she lost sight of him.

¶ 53 So if we agree that there was some level of suggestiveness, it is the only point with which we can agree with defendant even in part. Overall, in balancing the possible prejudice of placing undue weight on an expert's testimony compared to testimony that would have been of limited probative value, we cannot say that the trial court abused its discretion here. We find no error in the trial court's ruling barring this expert testimony.

¶ 54 II. Jury Instruction

¶ 55 Next, defendant contends that the trial court erred when it refused to give IPI Criminal 3.11 with the language that would have allowed the jury to consider Johnson's prior inconsistent statements for their truth, as substantive evidence. Defendant points to seven allegedly inconsistent statements made by Johnson either at the preliminary hearing, the suppression hearing, or on her recorded 911 call.

¶ 56 The trial court allowed IPI Criminal 3.11 only insofar as it permitted the jury to consider these prior statements for impeachment. Specifically, the trial court instructed the jury that:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you hear from the witness in this courtroom.
>
> It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given an earlier statement, you should consider all the circumstances under which it was made."

¶ 57 The decision to give a jury instruction is within the discretion of the trial court. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 33. Likewise, the determination of whether a witness's prior statements are inconsistent with her trial testimony is left to the sound discretion of the trial court. *People v. Flores*, 128 Ill. 2d 66, 87–88 (1989). An abuse of that discretion occurs when no reasonable person would agree with the trial court. *Lerma*, 2016 IL 118496, ¶ 23.

¶ 58 Defendant relies on section 115-10.1 of the Code of Criminal Procedure, which permits that admission of prior inconsistent statements for their truth. That statute provides in part:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with [her] testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> 1. was made under oath at a trial, hearing, or other proceeding, or

2. narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

***

B. the witness acknowledged under oath the making of the statement either in [her] testimony at the hearing or trial in which the admission into of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

C. the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2014).

¶ 59 Of the three requirements in section 115-10.1, there is no dispute that two of the three were satisfied. It is undisputed that Johnson was "subject to cross-examination" at trial on these allegedly inconsistent statements. 725 ILCS 5/115-10.1(b) (West 2014). Nor is there any question that Johnson made each of the prior statements either "under oath at a *** hearing or other proceeding" (the preliminary hearing or suppression hearing) or, in the case of her recorded 911 call, as a statement that "narrates, describes, or explains an event" that Johnson "acknowledged under oath" making and which she acknowledged was "accurately recorded" by the 911 station. 725 ILCS 5/115-10.1(c)(1), (c)(2)(B), (c)(2)(C) (West 2014).

¶ 60 The only question is whether Johnson's prior statements were "inconsistent with [her] testimony at *** trial." 725 ILCS 5/115-10.1(a) (West 2014).

¶ 61 To qualify as a prior inconsistent statement, the two statements must be inconsistent on a material issue. *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001); *People v. Thomas,* 172 Ill.App.3d 172, 177 (1988). Inconsistency includes a statement that "directly contradict[s]

testimony given at trial" but may also include "evasive answers, silence, or changes in position." *Flores*, 128 Ill. 2d at 87 (quoting *United States v. Williams,* 737 F.2d 594, 608 (7th Cir.1984)).

¶ 62 The contradiction must reasonably discredit the testimony on the material issue. *Eggert*, 324 Ill. App. 3d at 82; *Thomas,* 172 Ill. App. 3d at 177. Inconsistencies on matters collateral to defendant's guilt on the charged offense are non-material and do not warrant the pattern instruction in any form. See, *e.g.*, *People v. Allgood*, 242 Ill. App. 3d 1082, 1087–88 (1993) (inconsistent statements on collateral matters, such as whether victim of sexual assault ate food after assault, were not material to sexual-assault charge and did not warrant giving of instruction); *People v. Larry*, 218 Ill. App. 3d 658, 667 (1991) (officer's preliminary testimony that he spotted defendant one block away from the location where he testified at trial to have seen him was "not material to the question of defendant's guilt" for gun possession, and trial court properly refused pattern instruction).

¶ 63 Defendant contends that Johnson was impeached seven times with inconsistent statements that should have been considered for their truth.

¶ 64 First, we consider this alleged inconsistency: At trial, Johnson testified that she never took her eyes off the three men as they approached her, while at the preliminary hearing, she testified that she looked down at her phone to switch between the two calls before looking up and seeing the man snatch her phone. We see no material inconsistency. First of all, though Johnson did testify at one point at trial that she did not take her eyes off the men, she later explained her statement to mean that she did not stop watching them—not, as defendant contends, that she never physically moved her eyes from the group. At trial, Johnson testified that she "looked down, I switched over [calls], but I put my eyes back and that's when he ripped [the phone] out of my hand."

¶ 65 And even if we could strain to find inconsistency, it was negligible at best. She estimated that she observed the men for 60 seconds as they approached, and she estimated that she took 2 seconds to glance at her cell phone. So the difference between her *never* taking her eyes off the men, on the one hand, and taking her eyes off of them to glance at her cell phone, is the difference between 60 seconds and 58 seconds—hardly a material one.

¶ 66 Another claim of alleged inconsistencies: At trial, Johnson testified that, as she was talking to Hill, the fleeing robbers had already jumped over the fence. But at the suppression hearing, Johnson testified that the three had not yet jumped over the fence when she was talking to Hill. We find no material inconsistency here, either. Whether the robbers jumped just before or just after speaking with Hill does not tend to discredit her testimony that they jumped over the fence in the parking lot, much less discredit her overall identification.

¶ 67 A third inconsistency, according to defendant, is that at trial, Johnson testified that two of the three men were wearing blue sweaters, but during her 911 call, Johnson told the operator that one of the men had on a blue sweater. We do not agree that this constituted a clear inconsistency. Johnson's trial testimony was that two of the men wore blue sweaters—defendant and the man with the gun. The 911 call included the following exchange:

> "OPERATOR: Well, how many are there ma'am?
>
> JOHNSON: It's three of them.
>
> OPERATOR: Okay. Three males?
>
> JOHNSON: Black. It's three guys. They got on a blue sweater.
>
> OPERATOR: One wearing a blue sweater?
>
> JOHNSON: Yes, ma'am."

¶ 68 Defendant says that this exchange can mean one and only one thing—that Johnson was explicitly stating that only one of the three men wore a blue sweater. The trial court would have been reasonably reluctant to reach that conclusion. First of all, when stated in her own words, Johnson said, "*They* got on a blue sweater." Grammar aside, she was telling the 911 operator that more than one person was wearing a blue sweater. It was only in response to a question—the 911 operator's words, not hers—that she could have been understood as saying otherwise with her answer, "Yes, ma'am." And it would be just as reasonable to interpret that exchange as Johnson affirming the detail—the blue sweater—more so than the number of people wearing that sweater. That strikes us as particularly true given that Johnson was chasing the robbers during this call and might not be expected to answer a question with utter precision. We do not find the trial court's determination on this question so unreasonable that no reasonable person would agree with it.

¶ 69 Related to that issue is another instance during the 911 call in which, defendant claims, Johnson identified only one man as wearing a blue sweater: When asked by the 911 operator which person had the gun, Johnson said that it was "the guy with the blue sweater." Defendant's point is that this answer suggested only one "guy" wore a blue sweater and not two. Whatever inference defendant might have us draw, we find no inconsistency. Johnson testified at trial that the man holding the gun was one of the two men wearing a blue sweater. Her answer to that question on the 911 call did not stray from that position in the slightest; it was literally consistent. Perhaps a more complete answer to the 911 operator might have been "*one of the two guys* with the blue sweater," but by no means could we say that the trial court's ruling on this issue was so far afield that no reasonable person would agree with it.

¶ 70 Defendant cites a fifth alleged inconsistency: At trial, according to defendant, Johnson testified that, after the three robbers jumped the fence in the parking lot, she continued to chase two of the three, but that all three were running in the same general direction. But in her grand jury testimony, she stated: "They all split up. When they took off, they all split up somewhere."

¶ 71 This is an example of the court rightly accusing defendant of isolating choice cuts of Johnson's testimony out of context. Johnson did not testify at trial that that the three men "split up" *immediately* after jumping the fence, but she did testify that *later* during the chase—at the time the men had reached Iowa Street and were headed to Laramie—one of the three men had split off from defendant and the man with the gun. That testimony is consistent with the 911 call.

¶ 72 It is true, to be fair, that one of them splitting off (per her trial testimony) is not precisely the same thing as "all" of them splitting up (per her grand jury testimony), but we are reaching the point of splitting hairs. We find no inconsistency, and certainly not one of a material nature.

¶ 73 The next claim of inconsistency is that, at trial, Johnson testified that she saw the men's faces for approximately 60 seconds before her phone was taken, while at the preliminary hearing, she testified that she saw defendant's face for "less than two seconds" before defendant took the phone. We do not believe that defendant has demonstrated a material inconsistency here, either. Johnson testified at trial that she saw the three men approach her over the course of approximately one minute. She did also testify at trial that she could see their faces as she watched them. (Indeed, it would be rather difficult to watch someone approaching you for sixty seconds and *avoid* seeing that person's face, at least to some extent.) She then looked down at her cell phone briefly—two seconds—but then "[she] put [her] eyes back and that's when he ripped it out of [her] hand."

¶ 74 At the preliminary hearing, Johnson testified to looking down at her cell phone briefly, and then it was "less than about two seconds" that she saw defendant's face before he snatched her cell phone. We read her testimony as indicating *not* that the *only* time she saw defendant's face was for those two seconds before he stole her phone, but rather that the period of time that elapsed between her glancing at her phone and defendant stealing it was about two seconds, during which time she saw his face. Again, defendant has taken one sliver of Johnson's testimony out of context. At the very least, this is a debatable proposition, and under the deferential abuse-of-discretion standard, we cannot say the trial court erred on this point.

¶ 75 We agree with defendant, however, that the last of these examples presented an inconsistency. At trial, Johnson testified that after the robbers split up, she followed the two with the blue hoodies—defendant and the man with the gun—and not the man in the t-shirt, who had split off. During the 911 call, however, when Johnson informed the operator that one of the men had split off, the operator asked: "The guy with the blue sweater?" Johnson responded, "Yes, ma'am."

¶ 76 That is an inconsistency. Those two statements cannot be reconciled. Either the robber who split from the other two was a blue-hooded robber or he was not. Whether this inconsistency was material is a difficult call. But even if it was, and the trial court thus erred in not allowing it to be considered for its truth, we would find the error harmless.

¶ 77 Defendant's theory is that there was only one person wearing a blue hoodie—defendant. He has already raised that theory twice, arguing that statements Johnson made in her 911 call indicated that only one perpetrator wore a blue hoodie—the third and fourth alleged inconsistent statements we discussed above. (See *supra*, ¶¶ 67-69.) And so, he says, if this 911 statement were considered for its truth, and the jury believed it—that is, if the jury believed that the man in

the blue hoodie split off from the others—then that means *defendant* split off. Thus, when Johnson testified that she chased the man who stole her cell phone, not the robber who split off, nearly all the way to end, it follows that defendant could not have been the one who stole her phone.

¶ 78 There are problems with this theory. The first is that we have rejected defendant's previous attempts to establish that theory, those third and fourth inconsistencies. We have already found that Johnson did not contradict her trial testimony in this regard. That, alone, cuts the legs out from under this argument. If there were two blue-hooded robbers, as Johnson clearly testified at trial (in our mind, without material contradiction), then the mere fact that *one* of the blue-hooded robbers broke off would not necessarily mean that *defendant* did.

¶ 79 Second, no matter who broke off from whom, no matter which route which robber took, one thing is for certain—only one of the robbers had orange-colored hair. Johnson clearly testified that she got more than a good look at the man who took her cell phone and his uniquely colored hair—for about 60 seconds as he approached her, up close and personal for about two seconds when he took the phone, and then for over 5 minutes as she chased him. And the robber with the orange hair is the one who ended up on the porch, however he got there.

¶ 80 There is yet another reason we find this error harmless. Though the jury was not allowed to consider this prior inconsistent statement as substantive evidence, the jury *was* permitted to consider it for impeachment purposes in assessing the overall credibility of Johnson's testimony, via IPI Criminal 3.11. (In fact, the jury was permitted to consider all seven of these prior statements for impeachment purposes.) This court has previously held that, though the trial court erred in not allowing the jury to consider prior inconsistent statements for their truth, the error

was harmless, because the jury was allowed to consider them for impeachment purposes. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 113.

¶ 81 There, the defendant was charged with sexually assaulting the victim in the woods. The evidence showed that the victim had written a letter claiming that her boyfriend, not the defendant, had assaulted her. *Id*., ¶ 111. The trial court allowed that letter to be considered for impeachment purposes but not for its truth, as substantive evidence; it submitted only the first paragraph of IPI Criminal 3.11 (as the trial court did here). *Id*.

¶ 82 We held that the ruling was error, but we found the error harmless. Because the jury was allowed to consider the prior inconsistent statement for impeachment, the jury obviously understood that " 'any contradiction of a witness's testimony calls into question the accuracy of that testimony, and if that testimony is disbelieved as to one matter, the veracity of the remainder is cast into doubt.' " *Id*., ¶ 112 (quoting *People. v. Luckett*, 273 Ill. App. 3d 1023, 1035 (1995)). And though the jury was instructed that it could consider the victim's prior inconsistent statement in determining her believability—*i.e.*, for impeachment purposes—the jury still convicted the defendant. We took that fact as "a clear indication that even if the jury had been instructed that it could consider [the victim's] prior inconsistent statements as substantive evidence it would not have done so." *Id*., ¶ 113.

¶ 83 What was true in *Cooper* holds doubly true here. The inconsistent statement in *Cooper* cut to the heart of that case—which person sexually assaulted the victim. Here, we have identified only a single, arguably material inconsistency along with six others that were either non-material or not inconsistent at all. Nevertheless, the jury was allowed to consider each and every one of the seven prior statements in assessing the believability of Johnson's testimony—receiving the same jury instruction as in *Cooper*—and it convicted defendant, anyway. It is

unfathomable that, had the jury been instructed that it could consider these statements as substantive evidence, it would have suddenly embraced these statements and reached a different verdict. Any error that may have occurred would have been harmless.

¶ 84 We affirm defendant's conviction.

¶ 85 Affirmed.