NOTICE
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2016 IL App (5th) 130395-U

NO. 5-13-0395

NOTICE
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IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 10-CF-244
	)	
ESTIL STAMPS,	)	Honorable
	)	Zina R. Cruse,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Schwarm and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction reversed, and cause remanded for a new trial, because jury was improperly instructed and evidence on key question of the defendant's intent to commit the crime of which he was convicted was not so clear and convincing as to render the error harmless beyond a reasonable doubt.

¶ 2 The defendant, Estil Stamps, appeals his conviction and his sentence to the Illinois Department of Corrections. For the following reasons, we reverse the defendant's conviction and sentence and remand for a new trial.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On March 8, 2010, the defendant was charged by criminal complaint with first-degree murder. The charge resulted from the defendant's alleged involvement in the shooting death, on or about March 4, 2010, of Fananza Beard (Nan). On March 26, 2010, the defendant was indicted on the same charge. The defendant subsequently filed a motion to suppress statements he made to an officer at the scene of the shooting, as well as statements he later made while in custody. Following a hearing at which testimony was adduced, and argument was made, the defendant's motion to suppress was denied by the judge then presiding over the case, the Honorable Milton S. Wharton.

¶ 5 On June 3, 2013, the defendant's jury trial began, before the Honorable Zina R. Cruse. The victim's mother, Willie Dell Beard, was the first witness to testify. Ms. Beard testified that she was 68 years old, and that Nan, the victim, was the third of her six children. She testified that Nan was 46 at the time of his death, and that Nan and Shontiza Goodwin–with whom Nan had a child–had dated for approximately three years prior to Nan's death. When asked by the assistant State's Attorney (ASA) who represented the State to spell her son's first name, Ms. Beard stated, "F-A-N-I-Z-A." The ASA then asked, "It's not Fananza, it's Faniza?" to which Ms. Beard replied, "I might be spelling it wrong."

¶ 6 Ms. Beard testified that Nan and Shontiza had a volatile relationship, stating that "I can't think of the word, but it was off and on, sometimes good days, sometimes bad days, and when they're drinking, it's more." She testified that both Nan and Shontiza

drank, argued a lot, and that their altercations became physical at times. She testified that although Nan at times lived with Shontiza, he moved back in with Ms. Beard near the end of his life. When asked how long Nan had lived with her just prior to his death, Ms. Beard testified, "maybe four or five months. Maybe four months." She testified that she wanted Nan to move back in with her because she "was afraid for his life" as a result of his violent relationship with Shontiza. She described an incident approximately one week before Nan's death in which Nan was badly beaten. She testified that she did not know who was responsible for the beating, but that Shontiza was involved in it. When asked how many days later it was that Nan was shot and killed, she was unable to answer but launched into a narrative in an attempt to do so. The ASA then stated, "Let me ask a few questions."

¶ 7 Ms. Beard subsequently testified that she saw a man she had never seen before, and that the man was with Shontiza. She referred to the man as "Stamps" and testified that she thought his nickname was "L." She testified that when she asked this man who he was, the man stated that he was Shontiza's uncle. Ms. Beard testified that she told the man he was not Shontiza's uncle, and in response the man asked her how she would know that. Ms. Beard testified that she told the man, "Well, because God told me you're not." The ASA asked Ms. Beard if she had "a fairly lengthy conversation" with the man. Ms. Beard responded, "And Shontiza." Ms. Beard then testified that Nan left with Shontiza and the man to go drinking, even though she did not want him to go and had tried to convince him to stay home and to drink in her van–which was "sitting on the street"–instead of drinking elsewhere. Ms. Beard testified that before the three left her house, she

asked the man to bring Nan home if Nan got drunk and started arguing. Ms. Beard testified that the man assured her that he would bring Nan back home. She testified that the three took Shontiza and Nan's baby with them and left.

¶ 8 The ASA then asked Ms. Beard, "the person you're referring to as L or Stamps, do you see him in this courtroom?" Ms. Beard answered, "No." She could not recall what the man was wearing on the night in question, or what he looked like. She testified that she recalled describing him to police, stating, "I think I said he was kind of tall. I said I–I think I said he had a goatee, but I could have been getting him mixed up with–him and my other–my daughter's boyfriend." When asked if she remembered when the three left with the baby to go drinking, Ms. Beard testified, "I think it was six–six something or 7:00, or somewhere around in that area." She testified that she believed the three had already been drinking when they left. She testified that after they left, she prayed for them and went to bed.

¶ 9 Ms. Beard subsequently testified that Nan called her "several times" during the night and told her "something getting ready to start." She testified she told him to get out of the car, that he told her he would be okay, and that she went back to sleep. She testified that "a few minutes" after she got back to sleep, her phone rang again. She testified that she was concerned by the commotion and cursing she heard in the background, and that she again told Nan to get out of the car. She testified that she could hear him getting out of the car. When asked by the ASA to explain this, Ms. Beard testified that, "It was just like you walking away from someone, and you walking towards that room and your voice get hollered [*sic*] like. You can hear him getting out, he was

getting farther away from me. And he–before he–before he got out he said, 'Here, talk to L.' And he hand L his phone." Ms. Beard admitted, upon questioning by the ASA, that she was not present and did not see Nan hand the phone to anyone. She testified, however, that she heard a male voice that she recognized as belonging to "L"–the person with whom she had conversed in her living room.

¶ 10 With regard to the substance of the conversation, Ms. Beard testified that when the man got on the phone, he said, "Yeah." She testified that, "And I say, 'L.' He said, 'Yeah.' I say, 'Did you tell me you was going to bring my baby back home?' " Ms. Beard then testified that she called Nan her "baby" because Nan was her oldest son. She testified that when the man agreed that he had said he would bring Nan home, she asked, " 'But what's going on now?' And he said–he didn't say anything. And then I kept on saying, 'L.' He said, 'Uh-huh.' And he say, 'I'm getting ready to kill this MF.' He said the word, he did not say MF." Ms. Beard testified that "the phone went dead after that."

¶ 11 When the ASA asked Ms. Beard how long she thought her conversation with the man had lasted, Ms. Beard testified, "About seven minutes." She testified that after the phone went dead, she prayed, watched TV, and went to sleep. She testified that she was awakened by a voice–which she attributed to God–telling her to "Get up." She testified that she got up and went to her living room window, because she "thought that maybe they had–he was drunk and they just dumped him on the sidewalk." She testified that when she returned to her bedroom, God spoke to her again, saying "Turn on the TV." She testified that she complied, turning the television to channel two. God then told her to turn it to channel four, which she did, "getting just the part where they said they found

a young man 46 years old dead in the park, and they mentioned that they had caught the suspect with him." Ms. Beard testified that she then called the police, who told her they could not give her any information. She testified that later "the phone rang, and it was a policeman or a detective, I don't know which one. He identified himself, but I forgot who he was. And he said that–I say, 'Is this about my son you found dead?' He said, 'Who told you?' I said, 'Nobody told me, God told me.' He said, 'Well yes.' " She testified that she went to St. Elizabeth's Hospital and identified Nan.

¶ 12 The ASA then asked Ms. Beard to authenticate a studio portrait of Nan taken some time before his death. After doing so, Ms. Beard stated, "Can I say something? I just want to say I think I recognize this guy sitting there." She then identified the defendant as the man she had referred to as "L." Moments later, the ASA asked at approximately what time Ms. Beard had received the "final" phone call from Nan. Ms. Beard testified, "I'm not thinking well right now. Somewhere around 11–11–about 11 something."

¶ 13 On cross-examination, Ms. Beard agreed that the relationship between Nan and Shontiza was volatile, and that she had told investigating officers that, as well as telling them that both Shontiza and Nan had serious drinking problems. She reiterated that the night in question was the first time she saw the man she later identified as the defendant, and agreed that she had not been able to describe to the police what he was wearing that night. She also agreed that she had not gone into any details with the police about the phone conversation she allegedly had with the defendant, other than to tell them about the last statement he allegedly made to her. She agreed that she had not called the police after either of the phone calls she received from Nan on the night in question. When

counsel for the defendant attempted to ask Ms. Beard if she knew whether the police had ever retrieved phone records from the night in question, the State objected, and the objection was sustained. Counsel then asked Ms. Beard, "So did the police ever get any records from you from your phone at home?" Ms. Beard replied that she did not know.

¶ 14 On re-direct examination, Ms. Beard testified that she did not call the police after the calls from Nan because she did not know where Nan was calling from, and therefore did not think the police would be able to send anyone to assist him. On re-cross-examination, Ms. Beard agreed that she did not know how much time elapsed between the calls from Nan and the subsequent shooting. Following the testimony of Ms. Beard, the trial recessed for the day.

¶ 15 When the trial resumed on June 4, 2013, the first witness to testify was Special Agent Benjamin Koch of the Illinois State Police. Koch testified that in the early morning hours of March 5, 2010, he was dispatched to assist the East St. Louis Police Department with a homicide investigation. He arrived at the scene of the shooting "some time well after midnight." Nan's body had been removed from the scene, and the majority of the crime scene had been processed. Koch identified the defendant as someone he interviewed about the crime. His first interview of the defendant took place at approximately 12:15 p.m. He explained that the reason for waiting until 12:15 p.m. to interview the defendant was that "we were informed that he was intoxicated, and we wanted him to sober up a little before we spoke with him." Koch testified that the defendant did not appear to be intoxicated at the time of the first interview. He authenticated a DVD recording of the first interview, which was admitted into evidence

and played for the jury. The ASA then questioned Koch about the contents of the interview, and Koch agreed that the defendant was able to remember some events from the night, but not others, including any details of the shooting. Koch testified that he interviewed the defendant again on the following day, March 6, 2010, because investigators had been instructed by the State's Attorney's office to photograph "the [d]efendant's hands [which] had several scratches and miscellaneous injuries on them," and to show the defendant a photograph of the handgun that was recovered at the crime scene to see if the gun belonged to the defendant. He testified that in response to the photograph, the defendant "said it looked like his gun." Koch authenticated a DVD recording of the second interview, which also was admitted into evidence and played for the jury. On cross-examination, Koch agreed that during the first interview, the defendant remembered "some arguing" going on between Nan and Shontiza, and that the defendant indicated that he did not know whether he had shot Nan or not.

¶ 16 The next witness to testify in the State's case in chief was Detective Sergeant John Vito Parisi with the Sauget Police Department. He testified that he interviewed the defendant on March 5, 2010, at "either 1:30 or 2:30" p.m., following Koch's first interview with the defendant. He authenticated a redacted DVD recording of his interview with the defendant, which also was admitted into evidence and played for the jury. The ASA then questioned Parisi about the contents of the interview, and Parisi agreed that the defendant had stated that it was a "possibility" that the defendant had shot Nan, and agreed that at no point did the defendant say he remembered picking up a gun on the night in question, or remembered shooting Nan. Parisi agreed that the defendant

was able to remember certain details from the night, but not others. He agreed that the defendant admitted to owning a gun. On cross-examination, Parisi agreed that the defendant had stated he did not have a gun when he picked up Nan, and did not know where the gun came from or "how it got to wherever it got to." He agreed that the defendant had told him that Nan accused Shontiza of having an affair with the defendant, and that an argument about that ensued. He agreed that despite him telling the defendant that the defendant knew what happened that night, the defendant persisted in his position that he did not.

¶ 17 The next witness to testify was Shontiza Brown, who testified that she was formerly known as Shontiza Goodwin, and that she had a child with Nan. She testified that she and Nan had an on-again, off-again romantic relationship for approximately the last three years of Nan's life. She testified that she had known the defendant for approximately 20 years, and had never had a romantic relationship with him. She testified that her relationship with Nan was characterized by both verbal and physical "fighting," and that they both drank during the relationship. When questioned about the events of March 4, 2010, Shontiza testified that Nan called her and asked to be picked up, and that she and the defendant went to Nan's mother's house to pick Nan up. She testified that they remained at the house for "about maybe 20 minutes," while waiting for Nan to get ready. During that time, she and the defendant conversed with Ms. Beard, who was worried about Nan going out.

¶ 18 Shontiza testified that eventually she, Nan, and the defendant went to a bar in Belleville, and were drinking on their way there. After drinking at the bar for "maybe an

hour and a half," she and the defendant decided to leave Nan there, because Nan "got drunk" and was trying to embarrass her by calling her names. She testified that the defendant was not involved. When asked if Nan accused her of anything, Shontiza testified that Nan "always" accused her of sexual infidelity. She testified that she ignored Nan. She testified that when she and the defendant tried to leave without Nan, Nan came out to their car and banged on the window, so they let him into the car. Shontiza testified that Nan then sat behind the defendant, who was driving, and Nan and the defendant began to argue.

¶ 19 Eventually, the defendant stopped the car and he and Nan got out and argued with each other. When asked what they argued about, Shontiza testified that Nan kept calling her names and cursing at her, and that the defendant told Nan, " 'you ain't going to keep talking to my little sister like that.' " She testified that after "about five, ten minutes," the men got back into the car and continued driving and arguing. She testified that eventually Nan calmed down, although she could not recall what made him calm down. They continued to drive around because Nan "wasn't ready to go home yet." She testified that thereafter, Nan and the defendant began arguing again, although she did not know what they were arguing about. She then clarified her testimony, stating that they were arguing because Nan claimed to have a pistol, and "had his hand in his jacket like he had a–a gun, but he didn't." Shontiza testified that she was sitting in the front passenger seat, and could see Nan's movements. She testified that Nan did not strike or push the defendant, but continued to act as if he had a gun. She testified that the defendant "pulled over on the side of the road," into a parking lot, and stopped the car. The defendant and

Nan got back out of the car. Shontiza testified that she did not see a gun in either man's hands when they got out of the car. She testified that after the men argued for "probably *** a few minutes," she heard a gunshot. She was not paying attention to the men, and could not see if they were physically fighting before the gunshot. She testified that the defendant got back into the car, and that although she did not see a gun in the defendant's hand, she "knew he had one because he had to to shoot him." She and the defendant left the scene, then returned several minutes later.

¶ 20 The ASA then stated she was "going to back up," and asked Shontiza if Nan had made any phone calls while they were stopped in the parking lot. Shontiza testified that she thought Nan had called his mother. She could not recall if he had made only one call, or more. She did not recall the phone ever being handed to the defendant, stating, "I don't remember, because we all had been drinking." The ASA then asked if she could "speed up again," and eventually adduced from Shontiza that when she and the defendant returned to the parking lot, they did not enter it, but instead parked "across the street on the side." The defendant stayed in the car, and Shontiza went to "check on" Nan. She testified that she realized Nan was dead, "and that's when the police had pulled up." She testified that she could not recall anything the defendant might have said "after the gunshot" about "what happened outside" the car. She testified that she recalled the police finding a gun in the car, and that both she and the defendant were given "a ballistic test to see who fired the weapon." She testified that previously she owned a gun, but that "some years" before it had been seized as evidence by the police after one of her friends used the gun to shoot at the friend's boyfriend. She testified that her firearm owner's card was

expired but that Nan nevertheless kept it in his wallet. She reiterated that she did not see either the defendant or Nan with a gun on the night Nan was killed.

¶ 21 The ASA then asked Shontiza if she remembered telling the police that, after the gunshot, she asked the defendant what he did to Nan, and Shontiza testified, "Yes, I did ask him that. Yeah, I remember that." She testified she said to the defendant, " 'I know you–you just didn't kill my baby daddy.' " When asked how the defendant responded, Shontiza testified, "I don't know." She clarified that she was "trying to think back," and "trying to think," then testified, "I think he said something like 'that's what he get,' or something. I don't know." She testified that she thought she remembered telling that to the police. The ASA then had Shontiza authenticate various photographs from the crime scene, and describe, with the use of a diagram, the layout of the scene.

¶ 22 On cross-examination, Shontiza agreed that she, Nan, and the defendant were drinking on the night of the shooting, although she denied that she had been drinking before arriving at Nan's mother's house. When confronted with the fact that Ms. Beard had testified that Shontiza and the defendant had been drinking before they arrived to pick up Nan, she demurred, saying that only Nan had money, which is why Nan wanted them to pick him up. She testified that she did not see the defendant with a gun at Ms. Beard's house, or at any other time on the night in question. She testified that she did not see the defendant or Nan exit the car with a gun, and reiterated her testimony that Nan had acted as if he had a gun, stating that Nan "had put his hand in his shirt like he had a gun." Shontiza conceded that she and Nan had had a violent relationship for a period of years before Nan's death, that the defendant was not involved in the incident a week prior

to Nan's death in which Nan was beaten up, and that when Nan drank heavily, he tended to cause arguments and get into fights. She conceded as well that on the night in question, Nan was not only calling her names, but calling the defendant names as well. She agreed that she had not seen what happened outside the car prior to the gunshot, and testified that she did not remember much of what she told the police after the shooting. She testified that she did not think she told the police anything that night about Nan placing a phone call to his mother before the shooting.

¶ 23 When asked how long they were at the parking lot prior to the shooting, Shontiza stated, "I'd say a few minutes," and when asked if it could have been as long as 45 minutes, she testified, "No, it wouldn't have been no long time." She testified that when she heard, in the car, Nan threaten to shoot the defendant in the head, she knew "he didn't mean it–because he didn't even have a gun." She could not recall telling the police that at one point while Nan and the defendant were standing outside the car, she thought they might have been "tussling," but she agreed that the two men might have been. She could not recall telling the police various versions of what the defendant said to her after the shooting.

¶ 24 After the State stipulated to the foundation of Shontiza's video recorded interview with the police, the interview was admitted into evidence and played, in part, for the jury. When various elements of Shontiza's confusion were pointed out to her by counsel for the defendant, she testified, "what I told them is what I remember." She agreed that her memory might "not be the best." She conceded that in the interview on the night of the shooting, she told police that when she asked the defendant about shooting Nan, the

defendant said " 'umm, what you thought,' " but maintained that she did not actually remember telling the police that. She testified that her only current recollection was that the defendant said "something like" her earlier testimony: " 'that's what he get.' " She also could not remember telling the police that the defendant said something like "you thought I was playing or something." When confronted with the video of her making the statement, Shontiza testified, "Yeah, I guess I was confused." When asked if she recalled telling police that the defendant told her that Nan "shouldn't be acting like that," she testified, "I believe so." She conceded that her testimony at trial was different from her earlier statements to the police. She agreed that it would be fair to say that because of her drinking, she was not completely clear about what actually happened on the night of the shooting.

¶ 25 On re-direct examination, Shontiza testified that she was clear that the only three people present at the time of the shooting were Nan, the defendant, and herself, and she testified that she was clear that she did not shoot Nan, and that Nan did not have a gun. When asked if the various statements she told the police the defendant made could be attributed to her asking the defendant what happened multiple times, she testified, "No, I asked him one time, because by that time we had came back and that's when the police had came." The ASA then asked, "As you sit here right now, what's your best memory of the comment he made when he got back in the car?" Shontiza testified, "I think he said 'that's what he get.' I think that's what he said."

¶ 26 On re-cross-examination, Shontiza reiterated that she did not see the defendant exit the car with a gun. Counsel for the defendant then asked, "You didn't see Fananza

get out of the car with a gun?" Shontiza testified, "No." Counsel then asked, "It's possible that he found a gun under the seat in the car and got out with it and you just didn't see it?" Shontiza testified, "Exactly." Following Shontiza's testimony, the trial recessed for the day.

¶ 27 When the trial resumed on June 5, 2013, the first witness to testify in the State's case in chief was Officer Michael Hubbard, a 17-year veteran of the East St. Louis Police Department. Hubbard testified that at 11:58 p.m. on March 4, 2010, he was dispatched to the scene of the shooting. He testified that when he arrived at the scene, he observed a man who appeared to be "lifeless" lying in the parking lot, and also observed a blue vehicle "a few yards away." He testified that he observed a black male who "was appearing to force a black female into the vehicle, and she was yelling and screaming, and she was actually looking in the direction of the body that I was securing." Hubbard testified that he sent another officer, Kris Weston, over to the vehicle and the subjects "to possibly talk with them and secure them, because basically her demeanor, it appeared to me that she knew the subject that was on the ground." On cross-examination, Hubbard confirmed that he was the first officer to arrive at the scene, and that when he did so, the black female was not near the subject who was on the ground, but was instead with the black male near the car.

¶ 28 The State then called as a witness Officer Kristopher Weston of the St. Louis County Police Department and formerly of the East St. Louis Police Department. Weston testified that at approximately 11:58 p.m. on March 4, 2010, he was dispatched to the scene of the shooting. He testified that when he arrived, Hubbard instructed him to

"make contact" with a male and female subject who were sitting in a blue Buick with the doors closed. He testified that the male was in the driver's seat, and the female was in the front passenger seat, with the female crying hysterically. Weston testified that he asked the female to step out of the vehicle, and come with him to his patrol car, which she willingly did. He testified that although he had only "brief contact" with the male subject, he did observe two other officers escort the male out of the car, and that after they did so, he "observed Officer Parks remove a handgun from up under the driver's seat of the vehicle." He testified that he did not see the gun prior to Parks removing it. On cross-examination, Weston agreed that the car was not attempting to leave the parking lot, testifying that "it was stationary."

¶ 29 The next witness to testify was Officer Michael Baxton, Jr., a five-year veteran of the East St. Louis Police Department. He testified that he arrived at the scene of the shooting after several of the other officers did, and was asked, along with them, to secure the blue Buick. He testified that as he approached the driver's side with Officer Parks, he observed "in plain view *** the handle of a handgun under the driver's seat." He testified that a black male and a black female were in the vehicle, but could not describe the black male. Over objection, Baxton testified that he heard Officer Parks ask the black male if he had any weapons, and that the black male "advised that there was a gun under the driver's seat." Baxton testified that he "smelled a strong odor of alcoholic beverage emanating from" the black male. On cross-examination, Baxton conceded that his police report did not contain any information about observing the gun under the driver's seat of the Buick, or about hearing Parks ask the black male if he had any weapons.

¶ 30 The State next called as a witness Trooper Jerry Zacheis, a crime scene investigator with the Illinois State Police. He testified that he was contacted at approximately 12:15 a.m. on March 5, 2010, to process the scene of the shooting. He arrived at the scene approximately 30 minutes later, at which point the body of the deceased was still present, but there were no suspects present. He testified in detail about processing the scene. He testified that he was subsequently asked to perform gunshot residue tests on both the defendant, at approximately 2:40 a.m., and on Shontiza, at approximately 2:15 a.m. On cross-examination, Zacheis agreed that on the form Shontiza had filled out prior to the gunshot residue test, Shontiza had indicated that she had washed her hands before the test. He also agreed that on the form the defendant had filled out prior to the gunshot residue test, the defendant had indicated that he had not washed his hands before the test.

¶ 31 The next witness to testify for the State in its case in chief was forensic scientist Scott Rochowicz, who at the time of trial was employed by the Illinois State Police at the Forensic Science Center in Chicago. Following preliminary questioning, the State tendered Rochowicz as an expert on gunshot residue testing. The defendant did not object, and the court found Rochowicz to be such an expert. Rochowicz testified that the gunshot residue tests conducted on both Shontiza and the defendant came back "negative for the presence of gunshot residue." He reiterated his earlier testimony that a negative result "does not definitively say whether or not a suspect has or has not fired a firearm," for the reasons he had mentioned earlier when testifying about the many variables that

can affect test results. On cross-examination, Rochowicz agreed that he had not received a gunshot residue testing kit for Nan.

¶ 32 The State then called as a witness Elesae Howard, who testified she was 80 years old and was Shontiza's grandmother. She testified that the defendant, who she identified in court, was a family friend. She testified that in March 2010, Nan was not allowed in her home because Nan had "tried to run over my granddaughter with a car." She testified that the relationship between Nan and Shontiza was "pretty rough" at times.

¶ 33 The State next called Melissa Gamboe, who testified that she was employed by the Illinois State Police Forensic Science Lab as a latent print examiner. In due course, she was qualified as an expert witness in latent print examination. She testified that she received the gun found in the blue Buick and tested it, but was not able to find any suitable latent prints on it. She testified that she also tested five live cartridges recovered at the scene, but was not able to find any suitable latent prints on any of those items. She did not test the casing found at the scene, testifying that it would be virtually impossible for a print to be left on a fired casing. She testified as to factors that could impact whether latent prints would typically be found on a gun or on live cartridges.

¶ 34 The next witness to testify was Trooper Denis Janis, with the Illinois State Police. He testified that he attended the autopsy conducted on Nan by Dr. Raj Nanduri, and that he took photographs during the autopsy. He then authenticated various postmortem photographs of Nan, which depicted old wounds and newer ones. Janis testified that Dr. Nanduri removed a projectile and a fragment from Nan's skull, and gave them to Janis, who transported them to the Metro East Forensic Science Laboratory. On cross-

examination, Janis agreed that although he was qualified to administer a gunshot residue test to Nan's body, he did not do so.

¶ 35 James Hall, a forensic scientist with the Illinois State Police, testified that he specialized in firearms and tool mark identification. In due course he was qualified as an expert witness in that field. He testified that in the case at bar, he received the gun recovered at the scene of the shooting, and the discharged casing, as well as five unfired live cartridges and the two fragments found in Nan's skull. He testified that following his examination of the items, he "could not specifically identify or eliminate" the casing as having been fired by the gun. When asked if it was possible that the casing was fired by the gun, he testified that it was. He testified that following his examination, he concluded that one of the bullet fragments found in Nan's skull was fired from the gun. Because of "mutilation and lack of the markings present," he could not specifically identify or eliminate the second fragment as having been fired by the gun.

¶ 36 Dr. Raj Nanduri testified that she was a forensic pathologist and that she performed the autopsy on Nan's body on March 5, 2010. She was qualified by the court as an expert witness in forensic pathology. She testified that Nan had suffered a single gunshot wound, with point of entry "on the left upper eyelid." She testified that he also had "lacerations or tears of blunt force injuries on the forehead, on the left fore–left side of the head and on the back of the head," as well as "two healing lacerations which were sutured because he has one on his ear and one on his upper lip." Dr. Nanduri opined that the injuries on the top, side, and back of the head appeared to be fresh and that Nan had "sustained them from a blow to the head." She did not believe he could have sustained

the injuries in a fall. She agreed that three blows to the head from a gun could have created the injuries.

¶ 37 Dr. Nanduri also noted fresh injuries to Nan's shin, his left lumbar, his ankle, and his finger. Based upon stippling she observed on Nan, Dr. Nanduri opined that the barrel of the gun that fired the bullet that struck Nan was "less than one and a half feet" from the point of entry on Nan's body. She described the trajectory of the projectile found in Nan's skull as "front to back, slightly up and back to the right." She testified that in terms of describing the relationship between the gun and Nan when the shot was fired, "[a]ll that I can say is the gunshot came from the front, that's about it." She testified that the gunshot wound was the cause of Nan's death, and that Nan's blood alcohol level was very high, approximately 0.260. On cross-examination, Dr. Nanduri agreed that she could not determine who was holding the gun at the time it was fired, and reiterated that no gunshot residue test was performed on Nan.

¶ 38 Following Dr. Nanduri's testimony, the State rested. The defendant made a motion for a directed verdict, which was denied. The defendant did not call any witnesses. The trial recessed for the day.

¶ 39 When the trial resumed on June 6, 2013, the parties began to discuss, outside the presence of the jury, the instructions to be given to the jury. When the State tendered instruction 21A, counsel for the defendant objected. The ASA referred to the instruction as "the non-IPI regarding intoxication," and counsel for the defendant responded, "Your Honor, we would object to that instruction, it's not IPI, it's not appropriate, it would interfere with the jury's ability to consider [the defendant's] intoxication and what effect

that had on his intent, which is an element of the offense they have to prove." She further stated that although Illinois no longer recognized intoxication as an affirmative defense, "that doesn't mean that the jury can't consider the effect of intoxication on someone's intent, and by giving this instruction it's going to mislead the jury and confuse them, and they started trying to do this back in *voir dire* and we objected to it, and we would–it's a non-IPI instruction and it absolutely shouldn't be given." The trial judge reserved ruling on the instruction. After she returned from a short recess, she announced that the instruction would be given, along with two instructions about knowledge and intent that were requested by the defense but objected to by the State. Of the three instructions, the defense instructions were to be given first, followed by the State's instruction 19, then the objected-to 21A.

¶ 40 Following closing arguments, the jury was instructed. In addition to being told that they must not single out certain instructions and disregard others, the jury was told that the law "that applies to this case is stated in these instructions," and that statements and arguments by the attorneys are not evidence. With regard to the charge of first-degree murder, the jury was instructed, *inter alia*, that the State was required to prove not only that the defendant performed the acts which caused the death of Nan, but that when he did so, the defendant "intended to kill or do great bodily harm to" Nan, or "knew that his acts would cause death to" Nan, or "knew that his acts created a strong probability of death or great bodily harm to" Nan. Very shortly thereafter, the judge began to give the defense instructions, informing the jury as follows:

"A person acts knowingly with regard to the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

A person acts knowingly with regard to the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct.

A person acts with intent to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct."

¶ 41 The judge then gave the objected-to, non-IPI, State's instruction 21A, informing the jury that "A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

¶ 42 This was the last substantive instruction given to the jury. The remaining instructions were about the process of electing a foreperson and deliberating, including instructions about the verdict forms the jury would receive. The jury subsequently retired to deliberate, and eventually returned with a verdict finding the defendant guilty of first-degree murder. The jury also found that the defendant had personally discharged a firearm, during the commission of the offense, that proximately caused death to another person.

¶ 43 The defendant filed a motion for a new trial, which was subsequently denied. Following a sentencing hearing, the defendant was sentenced to a term of imprisonment of 55 years. This timely appeal followed.

¶ 44 ANALYSIS

¶ 45 On appeal, the defendant raises four arguments, which we restate as follows: (1) he was denied a fair trial because the jury was misinformed and misled about the relevance of voluntary intoxication to the State's burden to prove *mens rea* beyond a reasonable doubt; (2) the trial court erred when it allowed the jury to view portions of the defendant's videotaped interview with Detective Sergeant John Vito Parisi of the Sauget Police Department, because the videotape shows the defendant connected by a wire to a laptop, which the defendant contends "impermissibly signaled that [the defendant] took and failed a lie detector test"; (3) the defendant was denied effective assistance of counsel; and (4) the defendant is entitled to three additional days of pretrial credit.

¶ 46 With regard to the defendant's first contention, we first set forth the applicable law, vital aspects of which are missing from the State's brief and analysis of this issue on appeal. "Instructional errors are reviewed under a harmless error, not a reasonable doubt, analysis." *People v. Dennis*, 181 Ill. 2d 87, 95 (1998). When a defendant raises a sufficiency of the evidence claim, it is well-settled that we, as a reviewing court, will view the evidence in the light most favorable to the State and will determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. In contrast, "the test for harmless error in the context of an instructional error is whether the result at trial would have been different had the jury

been properly instructed." *Id.* "[T]he harmless error analysis requires, in the first instance, a determination of whether any error occurred–in other words, whether the instruction was correct. Second, if there was error in the instruction, we must then determine whether, in spite of that error, evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt." *Id.* at 95-96. In an analysis for harmless error, "it is the State that 'bears the burden of persuasion with respect to prejudice.' " *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Accordingly, "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.*

¶ 47 With regard to the substance of the defendant's first contention, he argues that the State's non-IPI instruction 21A was a misstatement of the law that "confuses the burden to prove *mens rea* by suggesting that voluntary intoxication cannot impact proof of criminal responsibility." As the defendant correctly notes, although the Illinois General Assembly has eliminated the affirmative defense of voluntary intoxication, the General Assembly intended that voluntary intoxication remain viable to rebut the State's proof of *mens rea* in specific intent crimes such as first-degree murder. See 92nd Ill. Gen. Assem., Senate Proceedings, Mar. 20, 2001, at 34-36 (Senator Hawkinson) (burden remains on State to prove *mens rea* beyond reasonable doubt; evidence of intoxication may still be introduced to try to negate that state).

¶ 48 In response, the State does not argue that the non-IPI instruction 21A correctly stated the law. Instead, the State first claims "the evidence of the defendant's guilt was overwhelming," then claims that *People v. Loden*, 27 Ill. App. 3d 761 (1975), stands for

the proposition that "[a] trial court does not err in giving an intoxication instruction over defense objection when the defense uses a strategy of presenting evidence and arguing that intoxication may be considered by the jury in an exculpatory manner." The State also posits that other instructions given by the trial court "cured" any error. In support of this proposition the State claims that "the jury was instructed by the court, the State, and the defense 19 times as to the required mental state." Finally, the State asks this court to find that any error was harmless, arguing again that the evidence against the defendant was overwhelming.

¶ 49 The defendant responds to each of the State's arguments. First, the defendant contends that *People v. Loden*, 27 Ill. App. 3d 761 (1975), does nothing to help the State in this case, because in *Loden* the instruction in question was a correct statement of the law, whereas in this case, the instruction clearly was not. We agree with the defendant. We are aware of no case that stands for the proposition that if a defendant argues that voluntary intoxication may be considered by the jury in an exculpatory manner, the State is then entitled to an instruction that misstates the law and distorts the State's burden of proof. We therefore conclude that the first step in our harmless error analysis is satisfied, and that the trial court erred in giving instruction 21A. Because there was error in the instruction, we must now determine whether, in spite of that error, evidence of the defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt, reiterating that it is the State, not the defendant, that bears the burden of persuasion with respect to prejudice, and the State, not the defendant, that must prove

beyond a reasonable doubt that the jury verdict would have been the same absent the error. See *People v. Thurow*, 203 Ill. 2d 352, 363 (2003).

¶ 50 With regard to harmless error, the defendant rebuts the arguments of the State in the following ways. First, the defendant points out that with regard to other instructions "curing" any error, the State's argument "overlooks the impact of the non-IPI intoxication instruction even when read in conjunction with the other instructions," because the broad statement of the instruction that a person who is voluntarily intoxicated is "criminally responsible for conduct" could easily be construed by the jury to mean that in the case of one who is voluntarily intoxicated, the intent that would otherwise be required is not required: if they intended to become intoxicated, they intended everything else that followed. The other instructions–and we remind the State that only the court instructs the jury; the State and the defense, in their arguments, do not instruct the jury–did nothing to alleviate this possible misconception on the part of the jury. Reading the instructions together, the jury could easily believe that broadly holding someone who is voluntarily intoxicated "criminally responsible for conduct" means that once they decided the defendant chose to become intoxicated, his *mens rea* with regard to shooting Nan was no longer of relevance. Although the trial judge instructed the jury that her instructions were the law they were to follow, the judge never instructed the jury that evidence of voluntary intoxication could be considered when determining whether the defendant acted with the *mens rea* necessary to be found guilty of first-degree murder. This is particularly concerning in the case at bar because the faulty instruction was the last substantive instruction given to the jury, and thus could easily have been understood by the jury–

which was instructed to not single out certain instructions and disregard others–to work in conjunction with the other instructions to explain what kind of intent or knowledge was required once the jury concluded that the defendant became intoxicated voluntarily, rather than involuntarily: none. In short, the State has not convinced us that the trial court's error was "cured" by other instructions.

¶ 51 With regard to the State's claim that the error was harmless because the evidence against the defendant was overwhelming, we agree with the defendant that with regard to the defendant's intent, the evidence was in fact far from overwhelming. As counsel for the defendant on appeal points out, the defendant's trial counsel theorized that the gun might have been discharged in a drunken "tussle" between the defendant and Nan, a theory that was supported by Shontiza's testimony that the men may have been "tussling," and by Dr. Nanduri's testimony that: (1) Nan had fresh injuries on various parts of his body; (2) the barrel of the gun that fired the bullet that struck Nan was "less than one and a half feet" from the point of entry on Nan's body; (3) the trajectory of the projectile found in Nan's skull was from "front to back, slightly up and back to the right"; (4) in terms of describing the relationship between the gun and Nan when the shot was fired, she could say only that "the gunshot came from the front, that's about it"; (5) she could not determine who was holding the gun at the time it was fired; and (6) no gunshot residue test was administered on Nan's body.

¶ 52 Counsel for the defendant on appeal also points out that Shontiza did not see the actual shooting, did not see either man exit the car with a gun, and conceded that it was possible that Nan–who Shontiza thought had been "pretending" to have a gun, and who

had been acting aggressively toward both Shontiza and the defendant–might have found the gun under the defendant's driver's seat–which Nan was sitting directly behind–and exited the car with it. Counsel also points out that the defendant returned to the scene of the shooting, which could be construed as "not shielding a guilty conscience, but trying to figure out what to do after a tragic accident."

¶ 53 The State, on the other hand, contends that evidence of the defendant's intent is overwhelming and clear because Ms. Beard testified that in a phone call she received at around 11 p.m., the defendant told her "I'm getting ready to kill this MF," and because Shontiza testified that after the shooting, the defendant told her "that's what he get." The testimony of Ms. Beard, and the testimony of Shontiza, are both recounted in great detail earlier in this order, and will be discussed again, as needed, below. We note at the outset that neither could be considered, by any stretch of the imagination, to be an ideal witness.

¶ 54 Ms. Beard testified tentatively, and with imprecision, with regard to everything from how long Nan lived with her, to how many days passed between the beating he received and the date of the shooting. She testified that when the man she identified as "L" told her he was Shontiza's uncle, she told the man that God had told her he was not. She could not, when asked, identify the defendant at trial, although she later, in the absence of any questioning, made the *sua sponte* declaration that the defendant was "L." She could not recall what the man was wearing on the night in question, or what he looked like. She testified that she recalled describing him to police, stating, "I think I said he was kind of tall. I said I–I think I said he had a goatee, but I could have been getting him mixed up with–him and my other–my daughter's boyfriend." When asked if

she remembered when the three left to go drinking, Ms. Beard testified, "I think it was six–six something or 7:00, or somewhere around in that area."

¶ 55 Ms. Beard testified that Nan called her "several times" during the night. With regard to the call the State wishes to highlight, Ms. Beard testified that she could hear Nan getting out of the car. When asked by the ASA to explain this, Ms. Beard testified that, "It was just like you walking away from someone, and you walking towards that room and your voice get hollered [*sic*] like. You can hear him getting out, he was getting farther away from me. And he–before he–before he got out he said, 'Here, talk to L.' And he hand L his phone." Ms. Beard admitted, upon questioning by the ASA, that she was not present and did not see Nan hand the phone to anyone. She testified, however, that she heard a male voice that she recognized as belonging to "L"–the person with whom she had conversed in her living room.

¶ 56 With regard to the substance of the conversation, Ms. Beard testified that when the man got on the phone, he said, "Yeah." She testified that, "And I say, 'L.' He said, 'Yeah.' I say, 'Did you tell me you was going to bring my baby back home?' " She testified that when the man agreed that he had said he would bring Nan home, she asked, " 'But what's going on now?' And he said–he didn't say anything. And then I kept on saying, 'L.' He said, 'Uh-huh.' And he say, 'I'm getting ready to kill this MF.' He said the word, he did not say MF." Ms. Beard testified that "the phone went dead after that."

¶ 57 As described in detail above, Ms. Beard then testified about what happened after the phone call, culminating in her discussion with police officers about her son's death. Given the tentative, imprecise, and often meandering and disconnected nature of Ms.

Beard's testimony, a jury could easily have concluded that she was not a credible witness, and that her claim regarding her conversation with the defendant was less than credible. This raises the concern that an improperly-instructed jury such as the one in this case, under the misapprehension that it need not find intent on the part of the defendant if it found that he had become intoxicated voluntarily, might have disregarded her questionable testimony about the defendant's intent, but still convicted the defendant of first-degree murder.

¶ 58 Shontiza was far from a stellar witness as well. When the ASA asked Shontiza if Nan had made any phone calls while they were stopped in the parking lot, Shontiza testified that she "thought" Nan had called his mother. She could not recall if he had made only one call, or more. She did not recall the phone ever being handed to the defendant, stating, "I don't remember, because we all had been drinking." Contrary to the State's self-serving and overly-simplified depiction of Shontiza's testimony about what the defendant said after the shooting, in fact Shontiza's testimony was far more tentative and equivocal. She testified on direct examination that she could not recall anything the defendant might have said "after the gunshot" about "what happened outside" the car. When the ASA then asked Shontiza if she remembered telling the police that, after the gunshot, she asked the defendant what he did to Nan, Shontiza then testified, "Yes, I did ask him that. Yeah, I remember that." She testified she said to the defendant, " 'I know you–you just didn't kill my baby daddy.' " When asked how the defendant responded, Shontiza testified, "I don't know." She clarified that she was "trying to think back," and "trying to think," then testified, "I think he said something like 'that's what he get,' or

something. I don't know." She testified that she thought she remembered telling that to the police. On cross-examination, Shontiza testified that she did not think she told the police anything that night about Nan placing a phone call to his mother before the shooting, and testified that she could not recall telling the police various versions of what the defendant said to her after the shooting.

¶ 59 After the State stipulated to the foundation of Shontiza's video recorded interview with the police, the interview was admitted into evidence and played, in part, for the jury. When various elements of Shontiza's confusion were pointed out to her by counsel for the defendant, she testified, "what I told them is what I remember." She agreed that her memory might "not be the best." She conceded that in the interview on the night of the shooting, she told police that when she asked the defendant about shooting Nan, the defendant said " 'umm, what you thought,' " but maintained that she did not actually remember telling the police that. She testified that her only current recollection was that the defendant said "something like" her earlier testimony: " 'that's what he get.' " She also could not remember telling the police that the defendant said something like "you thought I was playing or something." When confronted with the video of her making the statement, Shontiza testified, "Yeah, I guess I was confused." When asked if she recalled telling police that the defendant told her that Nan "shouldn't be acting like that," she testified, "I believe so." She conceded that her testimony at trial was different from her earlier statements to the police. She agreed that it would be fair to say that because of her drinking, she was not completely clear about what actually happened on the night of the shooting.

¶ 60 On re-direct examination, when asked if the various statements she told the police the defendant made could be attributed to her asking the defendant what happened multiple times, she testified, "No, I asked him one time, because by that time we had came back and that's when the police had came." The ASA then asked, "As you sit here right now, what's your best memory of the comment he made when he got back in the car?" Shontiza testified, "I think he said 'that's what he get.' I think that's what he said."

¶ 61 As with the testimony of Ms. Beard, we conclude that a jury could easily have concluded that Shontiza's testimony about what the defendant told her after the shooting was less than credible. Also as with the testimony of Ms. Beard, an improperly-instructed jury such as the one in this case, under the misapprehension that it need not find intent on the part of the defendant if it found that he had become intoxicated voluntarily, might have disregarded her questionable testimony about the defendant's intent but still convicted the defendant of first-degree murder.

¶ 62 Accordingly, we are unable to conclude that the evidence of the defendant's guilt was so clear and convincing as to render the jury instruction error in this case harmless beyond a reasonable doubt. See *People v. Dennis*, 181 Ill. 2d 87, 95-96 (1998). Instead, we conclude the State has not met its burden of persuasion with respect to prejudice, and has not proven beyond a reasonable doubt that the jury verdict would have been the same absent the jury instruction error. See *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). We therefore reverse the defendant's conviction and remand for a new trial.

¶ 63 Our concerns about the quality of the State's evidence with regard to the defendant's intent notwithstanding, if this were a case of a properly instructed jury, and

the issue raised by the defendant was the sufficiency of the evidence, we would, as explained above, view the evidence in the light most favorable to the State and would determine whether *any* "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Dennis*, 181 Ill. 2d 87, 95 (1998). In such a situation, on the facts before us in this case, we would affirm the defendant's conviction. Accordingly, no double jeopardy concerns are raised by our remand of this case for a new trial. See, *e.g.*, *People v. Black*, 2011 IL App (5th) 080089, ¶¶ 29-30.

¶ 64 Because the issue may arise on remand, we now consider briefly the second issue raised by the defendant on appeal. The defendant contends the trial court erred when it allowed the jury to view portions of the defendant's videotaped interview with Detective Sergeant John Vito Parisi of the Sauget Police Department, because the videotape shows the defendant connected by a wire to a laptop, which the defendant contends "impermissibly signaled that [the defendant] took and failed a lie detector test." The defendant concedes that the laptop and wire in question were actually related to a voice stress test conducted by Parisi, but points out that because there was no verbal mention of either, the jury could easily have inferred some kind of lie detector test was involved. In support of this contention, the defendant points to *People v. Taylor*, 101 Ill. 2d 377 (1984), which the defendant claims stands for the proposition that a jury should not see or hear "any evidence from which they can infer that the defendant failed a lie detector test." The defendant describes the content of the videotaped interview, including the manner in which Parisi repeatedly points to the laptop when accusing the defendant of lying, and concludes that it demonstrates that "the jury was free to infer that [the defendant] had just

failed a lie detector test and that they were viewing the resulting interrogation." The defendant also contends that the videotape "was entirely unnecessary to the State's case," because it was cumulative of the previous interviews the defendant had with other officers and added nothing to the State's case.

¶ 65 We agree with the concerns raised by the defendant, particularly in light of the fact that the videotape really adds nothing of substance to the State's case. Accordingly, on remand, if the State wishes to again admit the videotape, the parties–and ultimately the trial court–will need to figure out a way to do so that does not permit the jury to infer that any kind of lie detector or voice stress test was involved in this case, and that does not result in the presentation of cumulative evidence, the undue prejudicial risk of which substantially outweighs its probative value. If they cannot do so, the videotape should not be admitted.

¶ 66 With regard to the third issue raised by the defendant on appeal–that he received ineffective assistance of counsel–we do not believe the allegations raised by the defendant are likely to occur again on remand, and we therefore decline to address them. We note, however, that overall the defendant was very ably represented at trial.

¶ 67 With regard to the final issue raised on appeal by the defendant–that the defendant is entitled to three additional days of pretrial credit–the defendant points out that in the sentencing order, he was given credit beginning on March 8, 2010, despite the fact that he was actually taken into custody on March 5, 2010. In its brief on appeal, the State concedes that the defendant is entitled to an additional three days of credit for time served. Accordingly, should the defendant again be convicted and sentenced, the circuit

court should ensure that any sentence the defendant receives includes the proper amount of credit for all time served in this case as of that time.

¶ 68 CONCLUSION

¶ 69 For the foregoing reasons, we reverse the defendant's conviction and sentence, and remand for a new trial.

¶ 70 Reversed; cause remanded.