2016 IL App (5th) 130466-U

NO. 5-13-0466

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. 12-CF-1826
	)	
ANTHONY MOORE, JR.,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Schwarm and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Where the jury instruction misstated the law, the defendant is entitled to a new trial.

¶ 2 The defendant, Anthony Moore, Jr., appeals his conviction for attempted first-degree murder alleging, *inter alia*, that the trial court misstated the law when instructing the jury on eyewitness testimony, thereby depriving him of a fair trial. The State concedes that the eyewitness testimony instruction given by the trial court was erroneous, that the error was not harmless, and that the defendant is entitled to a new trial. For the following reasons, we reverse the judgment of the circuit court of St. Clair County and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 On July 24, 2013, Moore, was found guilty after a jury trial of two counts of aggravated battery with a firearm and one count of attempted first-degree murder for the December 20, 2012, shooting of 15-year-old Jasmine Bradley in Cahokia, Illinois. On September 5, 2013, he was sentenced to 34 years' imprisonment. Only relevant facts and testimony will be discussed below.

¶ 5 At trial, Bradley testified that in the early morning hours of December 20, 2012, she was awakened by her friend, Victoria Walker, tapping on her window. Bradley crawled out of her bedroom window and got into a red van that was driven by Walker, as they were going to go smoke marijuana. Walker drove under a highway viaduct and around "a little neighborhood" close to Bradley's house, but then turned around, backtracking through the same viaduct. When they drove through the viaduct the second time, Bradley saw Moore standing on the sidewalk. Walker stopped the van to pick up the defendant, who stated that he was "fitt'n to kill [Bradley]" because she was "snitching" on him. Bradley believed the defendant was referring to her potentially "snitching" on him about a UPS truck robbery, as she had heard the defendant discuss that robbery days earlier, saying "Round two" when he had seen another UPS truck and commenting on his desire for a FedEx truck. During this discussion, Walker was present and had told the defendant there were too many witnesses around so he should discontinue talking. At trial, Bradley also testified that after the robbery, Walker had numerous boxes of Nubian hair extensions, boots, and hats at her home which were likely stolen merchandise from the UPS truck.

¶ 6 Bradley further testified that as the defendant accused her, he "snatched" her out of the van; he threw her in the ditch; she saw and heard the defendant fire three shots, the first missing her and the other two striking her in the back and the base of the skull; and she heard Walker say that she (Bradley) was dead and they should go. Bradley further testified that the gun looked like a "cowboy" gun. Bradley testified that she then ran home; she crawled back into her bedroom window when she could not get anyone to answer the front door; she woke her grandmother saying "Ty" (the defendant's nickname) shot her; and she then called 9-1-1. At the hospital, she was treated for her gunshot wounds and provided the police with the hair extensions which Walker had placed in her hair a few days earlier from the presumed stolen merchandise from the UPS truck.

¶ 7 Bradley testified that she personally knew the defendant and Walker. She had grown up with the defendant in the neighborhood and had known him for two years, as his grandmother "stayed next door to my grandmother." She had known Walker for about 1½ years prior to entering into a two- to three-year sexual relationship with her. Walker and the defendant had a child together. She identified both the defendant and Walker when she was at the hospital as being present and involved in the shooting, but named and identified the defendant as the shooter.

¶ 8 Also elicited during cross-examination was the fact that Bradley has had juvenile legal issues, was bipolar, and had been unmedicated for some time.

¶ 9 Cahokia police department captain David Landmann also testified at trial. He was the first officer to respond to Bradley's home after the 9-1-1 call. He testified that when he interviewed Bradley immediately after the shooting, she had told him that the

defendant had gotten in the van and started accusing her of "snitching" about the UPS robbery, that she "got out of the van" and started running and heard the gunshots from behind her, and that she ran home and then realized she had been shot. He testified, further, that Bradley had told him that she did not see the gun.

¶ 10 Lieutenant Dennis Plew from the Cahokia police department also testified. He testified that several hours after the incident, he went to the hospital to interview Bradley and took along photo arrays for identification purposes. He stated that at the time he interviewed Bradley at the hospital, she told him that she was "pulled from the car"; that she saw Moore shoot her in the back; that she saw and heard the gun go off; and that she realized that she had been shot and "played dead" after the third shot, and she described the gun as a "cowboy" style gun.

¶ 11 Bradley was the only person to identify Moore as the shooter.

¶ 12 At the close of evidence, the State submitted Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. Supp. 2011) (hereinafter, IPI Criminal 4th No. 3.15 (Supp. 2011)) and, over the objection of the defense, it was given as follows:

> "When you weigh the identification testimony of a witness, you consider all the facts and circumstances in evidence, including, but not limited to, the following: the opportunity the witness had to view the offender at the time of the offense *or* the witness' degree of attention at the time of the offense *or* the witness' earlier description of the offender *or* the level of certainty shown by the witness when confronting the defendant *or* the length of time between the offense and the identification confrontation." (Emphases added.)

¶ 13 The defendant appeals the final judgment alleging, *inter alia*, that due to the use of "or" in the above jury instruction, it was misleading. Because the instructional issue is dispositive, we will not discuss the other issues raised by the defendant.

¶ 14 ANALYSIS

¶ 15 "Instructional errors are reviewed under a harmless error *** analysis," and "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." *People v. Dennis*, 181 Ill. 2d 87, 95 (1998). "[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." *Dennis*, 181 Ill. 2d at 95-96. To show that the error was harmless, "the State must prove that the jury verdict would have been the same absent the error to avoid reversal." *People v. Crespo*, 203 Ill. 2d 335, 347 (2001).

¶ 16 Therefore, the first inquiry is to determine if an error was made in presenting the jury instruction as above, with "or" used.

¶ 17 Illinois Supreme Court Rule 451 (eff. Apr. 8, 2013) requires trial courts to use applicable Illinois Pattern Jury Instructions unless the instruction does not accurately state the law.

¶ 18 Illinois Pattern Jury Instructions, Criminal, No. 3.15 provides as follows:

"When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at the time of the offense.

[2] The witness's degree of attention at the time of the offense.

[3] The witness's earlier description of the offender.

[4] The level of certainty shown by the witness when confronting the defendant.

[5] The length of time between the offense and the identification confrontation."

IPI Criminal 4th No. 3.15 (Supp. 2011).

¶ 19 The Committee Note to the instruction states as follows:

"The bracketed numbers are present solely for the guidance of court and counsel and should not be included in the instruction submitted to the jury.

The jury should be instructed on only the factors with any support in the evidence. Other factors should be omitted. Do not use 'or' or 'and' between the factors where more than one factor is used." IPI Criminal 4th No. 3.15, Committee Note (Supp. 2011).

This note is a direct result of the Illinois Supreme Court's decision in *People v. Herron*, 215 Ill. 2d 167 (2005).

¶ 20 In *Herron*, the defendant was on trial for first-degree murder and armed robbery. The "State's case was based almost solely on the testimony of [one witness] and his identification of defendant." (Internal quotation marks omitted.) *Herron*, 215 Ill. 2d at 173. As in this case, the jury was given Illinois Pattern Jury Instruction 3.15 with the "ors" included between the factors. Unlike the present case, the defendant in *Herron* did not object to the instruction at trial or in posttrial motion, requiring the court to determine whether plain error had occurred. In finding that it had, the court in *Herron* opined:

> "If the instruction initially directs jurors to consider all the facts and circumstances surrounding the identification, but then, through the use of the conjunction 'or,' directs jurors to consider one of five factors regarding the reliability of the identification, then the instruction contains an internal inconsistency. It is ambiguous and misleading, regardless of any further comment on it by the State in its closing argument. We agree with the appellate court in this case and in *Gonzalez* that giving IPI Criminal No. 3.15 with the 'ors' is indeed plain error." *Herron*, 215 Ill. 2d at 191.

Thus, the circuit court in the present case erred in giving IPI Criminal 4th No. 3.15 with the "ors" between the factors.

¶ 21 Having determined that error occurred, we must next determine whether the evidence of Moore's guilt is so overwhelming that the error was harmless beyond a reasonable doubt.

¶ 22 A discussion of the facts in the *Herron* case is helpful. At that trial, it was alleged that two individuals entered a Ramada Inn in Chicago wearing dark jeans and pullover

hoodies and proceeded to rob the hotel. The robbers interacted with at least five to six individuals during the robbery. The second robber, identified as "the shorter man," was described by one of the individuals as 5'5"; by another individual as 5'10"-11"; and by yet another individual as "around six feet tall." Only one witness identified the defendant as the second robber after a lineup 16 months after the robbery. However, this same witness had first stated he was looking at the floor during his conversation with the second robber but later testified he looked up at the man when they talked. There was no physical evidence placing the defendant inside the hotel. *Herron*, 215 Ill. 2d at 171-72. Other witnesses testified as well, but they could not and did not identify the defendant as the second robber. Jury instruction 3.15 was given with the "or" verbiage included without objection of defense counsel. In affirming the appellate court's reversal of the defendant's conviction, the court observed that the conviction was based:

> "almost solely on the testimony of [one witness] and his identification of the defendant. [The witness] testified that he had never seen the man before, but described him as five feet, ten inches or five feet, eleven inches tall *** [and] stated that he viewed the man's face for approximately 20 to 25 seconds before he complied with his demand and laid face down on the floor. [He] first stated that he was looking down at the floor during their ensuing conversation, but later testified that he looked at the man while they talked. *** [His] description of the man who held a gun to him conflicted with [another witness's] account." (Internal quotation marks omitted.) *Herron*, 215 Ill. 2d at 173-74 (quoting *People v. Herron*, No. 1-01-3889 (unpublished order under Supreme Court Rule 23)).

¶ 23 In the present case, as in *Herron*, there was a singular witness to identify the perpetrator, this singular witness's story changed, and there was no physical evidence presented at trial to indicate that Moore was the shooter.

¶ 24 Having determined that the instructional error necessitates a new trial, we need not consider Moore's remaining arguments.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of St. Clair County is reversed, and this cause is remanded for a new trial.

¶ 27 Reversed and remanded.