No. 131337

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ANTRELL JOHNSON, Defendant-Appellee.	) Appeal from the Appellate Court) of Illinois, First Judicial District,) No. 1-22-0494)) There on Appeal from the) Circuit Court of Cook County,) Illinois, No. 17 CR 8698)) The Honorable) Thaddeus L. Wilson,) Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Following a jury trial in the Circuit Court of Cook County, defendant was convicted of first degree murder, R928, found to have personally discharged the firearm that killed the victim, *id.*, and sentenced to 55 years in prison, Sup R12.[1] The appellate court vacated defendant's conviction on the ground that the evidence was insufficient to prove his guilt. A17, ¶¶ 107-08. The People appeal the appellate court's judgment. No question is raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

The issue presented is whether the evidence presented at trial — multiple eyewitnesses to the shooting who identified defendant as the shooter — viewed in the light most favorable to the People, was sufficient for a rational factfinder to convict defendant of first degree murder under the test set out by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

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[1] The report of proceedings is cited as "R__," the supplemental report of proceedings as "Sup R__," the common law record as "C__," the impounded common law record as "CI__," the People's trial exhibits as "Peo. Exh. __," and the separate appendix as "A__." Citations to the People's exhibits at trial appear as "Peo. Exh. __." Citations to People's Exhibits 26 and 66-70 — video exhibits identified on the DVD as files VTS_01_1, VTS_02_1, VTS_03_1, VTS_04_1, VTS_05_1, and VTS_06_1, respectively — are cited as "Peo. Exh. __," with time stamps referring to the progress bar of the video player.

JURISDICTION

On March 26, 2025, this Court allowed the People's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

Defendant was tried by a jury on two counts of first degree murder for fatally shooting Taurean Tyler and one count of attempted murder for shooting DeAngelo Mixon. R389; C35-36, 39.

I. At Trial, the People Presented Three Eyewitness Identifications of Defendant as the Person Who Fatally Shot Taurean Tyler.

The evidence at trial showed that one evening in April 2017, Tyler and Mixon were walking to the home of their friend, Tristan Thomas, when a man ran up behind them, pulled out a gun, and opened fire. R425-26, 428-32, 468-69, 551-53, 569. Tyler was shot five times and died from his wounds. R627-32, 639-40. Mixon was shot once in the left buttock and survived. R591-93. Mixon and Thomas (who had walked outside to meet Tyler and Mixon as they approached the house) both identified defendant as the shooter to police, R438-39, 488, then attempted to recant their identifications at trial, R451, 507. A bystander, Janeese Washington, described the shooter to police, R575, 584-85, identified defendant as the shooter from a photo array, R557-58, 574, and then again identified defendant as the shooter in open court, R553. Defendant did not object to any of the identifications on the ground that they were the product of suggestive police procedures.

A. DeAngelo Mixon named defendant as the shooter at the scene of the crime, named him to police, and identified him from a photo array, then tried to recant those identifications at trial.

Mixon testified that shortly after 7 p.m. on the evening of April 24, 2017, he and Tyler were walking to Thomas's house. R462-63, 467. The sun was still out, so the street was brightly lit. R471. They had just turned onto Thomas's street when Mixon noticed a black car behind them. R467-68. As they approached Thomas's house, Thomas came outside. R468. When Mixon saw a shocked expression on Thomas's face, he turned around to find a person standing behind them and pointing a gun at Tyler's back. R469. At the sight of the gun, Mixon got scared and tried to run. R501. He then heard seven shots and "blinked out." R472-73. As he and Tyler fell, Mixon saw the shooter go back toward the black car. R473-74.

Thomas ran to where Mixon lay in the street and tried to pick him up, but Mixon told him to stop. R475. Mixon claimed he did not remember what else he told Thomas. *Id.*

Mixon was taken to the hospital, where he was treated for his injuries. *Id.* He testified that he spoke with detectives at the hospital, told them what happened, and identified the shooter by name. R480. After he identified the shooter, two detectives who were not involved in the investigation came to show Mixon a photo array. R480, 483. (Detectives performing this role are known as "independent administrators." R660-61.)

First, the independent administrators showed Mixon a photo lineup advisory form. R480-81. He denied remembering anything about the contents of the form, R481-82, but he admitted that he signed it and consented to be videorecorded as he viewed the photo array, R482-83; *see* Peo. Exh. 14. The form (which was admitted into evidence, R670) explained that the shooter "may or may not" be depicted in the array, that the independent administrator who showed Mixon the array did not know who the shooter was, and that Mixon should not feel compelled to make an identification because it was "as important to exclude innocent persons as it [wa]s to identify a perpetrator." Peo. Exh. 14; *see* 725 ILCS 5/107A-2(e) (providing procedures governing identifications from photo arrays).

Mixon testified that after he signed the form, he looked at the photo array, saw a picture of defendant (whom he had known for years, R461), and circled it. R484-85. Although Mixon claimed not to remember writing "Antrell" next to the picture, he admitted that the name was written next to the picture and appeared to be in his handwriting. R484; *see* Peo. Exh. 15. One of the independent administrators also testified that Mixon "immediately" identified defendant from the array, circled defendant's picture, and wrote "Antrell" next to it. R670.

Although Mixon initially testified that he was not sure whether an assistant state's attorney (ASA) had interviewed him after he identified defendant from the photo array, R485, Mixon eventually admitted that his

interview with the ASA had been videorecorded, R486, and that he had identified defendant to the ASA as the person who shot him and Tyler, R488. After Mixon denied being able to remember what else he told the ASA about defendant, R490-93, videorecorded excerpts from the interview were played for the jury, R682-85.

In the videorecorded interview, Mixon told the ASA that when he first noticed the black car behind him and Tyler, he had paid it no attention. Peo. Exh. 66 (labeled "VTS_02_1" on the DVD). But after Thomas came out of the house and yelled, *id.*, Mixon turned around and saw "Antrell Johnson," *id.*, who was standing only a couple feet away and pointing his gun at Tyler, Peo. Exh. 68 (labeled "VTS_04_1" on the DVD). Mixon again identified defendant from the photo array as the person who shot him. Peo. Exh. 67 (labeled "VTS_03_1" on the DVD); Peo. Exh. 68. Mixon told the ASA that after the shooting, defendant ran back to the black car and got into the passenger side. Peo. Exh. 69 (labeled "VTS_05_1" on the DVD). When Thomas came to where Mixon was lying in the street and tried to pick him up, Mixon first told Thomas not to touch him, then told him "Trell shot me." Peo. Exh. 70 (labeled "VTS_06_1" on the DVD).

The ASA who interviewed Mixon at the hospital testified that Mixon had denied that the pain from his injury prevented him from reporting what happened. R685. The ASA also confirmed with medical staff that Mixon had

not taken any medication since 4:30 a.m, *id.*, about six hours earlier, *see* R488-89.

On cross-examination, Mixon agreed that in 2017 he smoked a lot of marijuana and drank a lot of alcohol. R499. But he denied that he had smoked any marijuana on the day of the shooting. R499-500. Rather, he had drunk an unspecified amount of alcohol sometime earlier that day. *Id.* Mixon testified that he was "traumatized" when the shots went off, R501, and denied knowing who shot him, R507. He testified that he told the detectives at the hospital only who he "thought" shot him because he "wasn't sure." R504.

However, on redirect, Mixon admitted that he had named defendant as the person who shot him at the first opportunity when he spoke to detectives at the hospital. R509-10. And he admitted that he immediately identified defendant from the photo array. R511. Finally, he admitted that he and defendant used to be friends, their families knew each other, his sister was in a relationship with defendant's brother, and Mixon was currently frightened and worried for his own safety. R511-13.[2]

[2] Both the prosecution and defense counsel acknowledged in their closing arguments that Mixon appeared frightened as he testified. R858 (prosecution's observation that Mixon appeared "scared" and "as if he wanted to cry" while testifying); R847 (defense counsel's observation that Mixon "seemed afraid of something" while testifying")

B. Tristan Thomas identified defendant from a photo array as the shooter, identified him again at trial, then tried to recant that identification at trial.

Thomas testified that on the evening of the shooting, he looked out the window of his house, saw Tyler and Mixon approaching, and went to the front door. R425-26, 428. As he looked out the door, he saw someone with a gun run up behind Tyler and Mixon, R429-30, just as they reached the mouth of the alley next to Thomas's house, *see* R432; Peo. Exh. 4. Thomas opened the door, stepped out on the porch, and shouted to warn Tyler and Mixon, but "it was too late"; the person opened fire, and Tyler and Mixon fell. R429-32.

Thomas went to help them. R433. When he reached them, Mixon told him, "It was Antrell." R447.

Later that night, Thomas spoke with detectives at the police station, where he was shown a photo array by an independent administrator. R434-36. Before Thomas looked at the array, he signed the photo advisory form that explained that the shooter might or might not be included in the array, the independent administrator did not know the shooter's identity, and Thomas should not feel compelled to make an identification because it was as important to exclude innocent people as it was to identify the shooter. *Id.*; *see* Peo. Exh. 6. Thomas was then shown the array and circled defendant's picture. R436-37; *see* Peo. Exh. 8. The next day, he gave a videorecorded statement to an ASA. R441, 452.

At trial, Thomas denied that he got a "clear view" of the shooter, R443, claiming that he was unable to see the shooter's face, which was "partially"

hidden by "something," R431, such that he only "practically" saw the shooter, R439. He claimed that he saw only that the shooter was an African-American person who had "[l]ight skin" and was wearing a black jacket. R431. But he admitted that he told the ASA in his videorecorded statement that he had "a clear unobstructed view" of shooter and could see the shooter's face. R443-44. And he further admitted that when the ASA had asked him what he meant when he said he "practically" saw the shooter, he had explained that he meant he saw "most of [the shooter's] face." R444.

Thomas claimed that he identified defendant as the shooter from the array only because Mixon had told him that defendant was the shooter. R439. But Thomas later admitted that he had not identified defendant as the shooter because of Mixon's statement at the scene but because Thomas had "recognized him." R448. And Thomas admitted that when he identified defendant from the array, he told the detective that he saw defendant "shooting yesterday" and confirmed that defendant was "the person who was shooting." R438-39. Thomas's direct examination concluded with his testimony that defendant, whom he had "recognize[d] as Trell," was "the same person [he] saw out on the street shoot [Tyler] and [Mixon]." R448.

On cross-examination, Thomas testified that he did not want to be in court that day. R455. He agreed with defense counsel that he "d[id]n't see distances that well" and "probably should have glasses." R451-52. But when counsel asked whether he saw who shot Tyler, Thomas confirmed that he did

see the shooter, although he denied that he knew the shooter. R452. He denied that the shooter's face was covered by a mask and explained that the shooter's face was covered "just a little bit." *Id.* Thomas denied that he told police that defendant was the shooter because that was what he "needed to say to get out of there." R455-56. Rather, he "told them what [he] [had] seen." R456.

C. Janeese Washington described the shooter to police at the scene of the crime, identified defendant from a photo array, and then identified him again at trial.

Janeese Washington was sitting in a car parked outside a church just up the street from the scene of the shooting with her husband (Robert Laster), her friend, and her friend's brother while they waited for the church to open for choir rehearsal. R549-50, 560-61; *see* Peo. Exh. 24 (marked with "X" where the car was parked). She was sitting in the backseat with Laster and was looking toward the alley next to Thomas's house. R550-51, 566. It was still daylight out, and she had an unobstructed view as she watched two boys walking down the street. R551; *see* R561; Peo. Exh. 24 (marked with "boys" where Washington first saw Tyler and Mixon). After the boys passed the car where Washington was sitting, R569, she saw defendant run up behind them, R551, 553; *see* R561; Peo Exh. 24 (marked with "S" where Washington first saw the shooter). At first, she thought he was just trying to catch up to them, R551, but when he reached them just before the mouth of the alley, *see* R561; Peo. Exh. 24, he pulled out a gun and shot them, R552, 569. Defendant fired "a lot, definitely more than four [times]." R554, 569-70.

When defendant opened fire, Laster started telling everyone to get down and get out of sight. R572. Although Washington was scared, she did not "duck down," which she understood to mean putting one's head down. R570-71. Rather, she "scooted" down in her seat, R571, and never lost sight of defendant, R577. He was wearing a dark baseball cap and white jeans. R552, 572-73. The jeans stood out to her because she could not understand why a person would shoot someone while wearing white jeans; she would have been worried about getting blood on herself. R552-53. She testified that she remembered defendant's face, which was not something she would forget, and that she was "certain" that he was the person she saw shoot the boys. R577.

After he shot Tyler and Mixon, defendant ran back up the street, past the church, and out of view. R553. The prosecutor showed Washington surveillance footage taken at the time of the shooting from a camera mounted farther up the street. R564-65; *see* Peo. Exh. 26 (labeled "VTS_01_1" on the DVD).[3] The footage showed a black car drive toward the street where the shooting happened, Peo. Exh. 26 at 00:08-00:14, and reappear about 30 seconds later, driving back the way it had come, *id.* at 00:48-00:52, and chased by a man wearing a dark baseball cap under a hood, a dark jacket,

[3] The timestamp on the footage was "ahead by three hours and five minutes," such that a timestamp of 10:25 reflected the events of 7:20. R564.

and white pants, *id.* at 00:51-00:53. Washington identified that man as the shooter. R565.

Washington and Laster stayed on the scene and spoke with police. R553-54. According to the officer who spoke to Washington and Laster, they "both describe[d] the suspect" as a "male black, medium brown complected." R584-85. The officer later clarified that he developed this description "based" on his conversation with both Washington and Laster. R586.

About a week after the shooting, Washington viewed a photo array at the police station. R554. An independent administrator explained the photo identification advisory form to her, she signed the form, and then she identified defendant from the array. R554-57. She told the detectives that she recognized defendant as the shooter from his photo because he had "the same mouth and nose." R557-58, 574.

She then met with an ASA, R558, who asked her what she had noticed about the shooter's face, R575. She explained that she had not really been able to see the shooter's eyes because he was wearing a baseball cap, "but [she] noticed his nose and lips" — "his nose was big and his lips were big" — and she noticed that he had "kind of caramel skin." *Id.* The ASA showed her the photo array from which she had just identified defendant, R558-59, and Washington said that she "th[ought] that [wa]s him," R559-60. Asked on the stand what she meant by that, she testified that it meant she "was pretty

sure" that he was the shooter, but then clarified that she "wouldn't have picked someone unless [she] w[as] certain." R560.

Washington's husband, Laster, who was also in the car outside the church, testified that he had also noticed the two young men walking down the street and saw a third man run up behind them, pull out a gun, and open fire. R516-19. But Laster was not sure of the shooter's skin color or appearance, R518 — he was focused on his companions inside the car and on trying to keep them safe and calm, R520, 521-22 — and he was unable to describe the shooter except by his clothing, R518-19: white pants, a black jacket, and a black hat, R519, 531-32.

Still, Laster told the detective at the scene that he "got a pretty good look" at the shooter — "[t]o some extent," Laster clarified at trial, R547 — and thought he would be able to identify him. R535. But when Laster was shown a photo array about a week later, R535-36, he was unable to make an identification, R521, 540. Laster told police he would be willing to come in and view an in-person lineup, R541, and when he did so about a week later, he felt confident enough — again, at least "[t]o some extent" — to pick one of the men, who was not defendant. R545. But Laster explained again that he had not been looking at the shooter's face because he had been focused on keeping everyone in the car safe. R546.

II. Defendant Presented Testimony from His Ex-Girlfriend and His Mother in Support of an Alibi Defense.

Defendant's ex-girlfriend testified for the defense that she met defendant at his grandmother's house on the day of the shooting. R777-78. She arrived sometime in the afternoon, R789, and they stayed there for a few hours, R786. Then she and defendant left for her house, where they stayed until 8 or 9 p.m. (that is, about an hour after the shooting took place), R789-90. She admitted that before trial she might have told an investigator with the prosecution that they arrived at her house between 7 and 7:30 p.m., but testified at trial that it was dark when they got to her house. R788. She never told anyone that she was with defendant until she was approached by the defense team, even after defendant was arrested outside her house. R791-92.

Defendant's mother testified that defendant met her at his grandmother's house on the day of the shooting, collected his daughter, and left. R770-73. She did not know what time he left, but she testified that it could have been noon or 1 p.m. R775. In any event, defendant left before she did, R773, and he was not with her at around 7:30 p.m., R775. She did not know where he was at that time. *Id.*

III. The Jury Found Defendant Guilty of First Degree Murder and Not Guilty of Attempted Murder (Although It Found He Personally Fired the Gun That Injured Mixon).

The circuit court instructed the jurors that they were "the judges of the believability of the witnesses and of the weight to be given to the testimony of

each of them." R870. The court further instructed the jurors that, when evaluating a witness's testimony, they "may take into account[ ] his ability and opportunity to observe, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony, considered in the light of all the evidence in this case." R870; *see* Ill. Pattern Jury Instruction (IPI), Criminal, No. 1.02. And when "weigh[ing] the identification testimony of a witness," the jurors "should consider all the facts and circumstances in evidence," including "but not limited to" (1) "[t]he opportunity the witness had to view the offender at the time of the offense," (2) "[t]he witness'[s] degree of attention at the time of the offense," (3) "[t]he witness'[s] earlier description of the offender," (4) "[t]he level of certainty shown by the witness, when confronting the Defendant," and (5) "[t]he length of time between the offense and the identification confrontation." R876; *see* IPI, Criminal, No. 3.15.

After deliberating, the jury found defendant guilty of first degree murder for killing Tyler and that he had personally discharged the firearm that caused a death while committing that first degree murder. R928; CI50-51. The jury found defendant not guilty of attempted first degree murder for shooting Mixon, although it found that he personally discharged a firearm that caused great bodily harm while committing attempted first degree murder. R927-28; CI52-53. The circuit court denied defendant's motion for a new trial, R1030, in which he claimed that the evidence was insufficient and

that trial counsel was ineffective for not calling additional alibi witnesses, C291-92, and sentenced him to 55 years in prison, Sup R12.

IV. In a Split Opinion, the Appellate Court Vacated Defendant's Conviction on the Ground That the Evidence Was Insufficient Under *Neil v. Biggers*.

On appeal, defendant argued that the evidence was insufficient to prove that he murdered Tyler and that counsel was ineffective for not calling a third alibi witness. *See* A5, ¶ 29; A34, ¶ 158 (Tailor, J., dissenting).

A majority of the appellate court reversed defendant's conviction, holding that "no rational trier of fact could have convicted [defendant] under the test set out in the United States Supreme Court's opinion in *Neil v. Biggers*, 409 U.S. 188 (1972)," A2, ¶ 3, which addressed due process limits on the admission of an eyewitness's out-of-court identification of a defendant to police following a suggestive identification procedure, *see Biggers*, 409 U.S. at 196, 199. Because the majority found that "the State failed to satisfy its evidentiary burden under *Biggers*," A12, ¶ 83, it did not address defendant's ineffective-assistance claim, A17, ¶ 108.

With respect to Mixon's identification of defendant as the shooter, the majority acknowledged that "'[i]t is well established that a single witness's identification is sufficient to sustain a conviction,'" A9, ¶ 65 (no source cited for quotation), and that, "[v]iewing the evidence in the light most favorable to the prosecution, a rational juror might have given more weight to Mixon's statement to the ASA than his trial testimony, due to Mixon's familiarity with [defendant] and familial ties," *id.* But the majority nonetheless declined

to find Mixon's identification sufficient absent "a reason under *Biggers* to reject his unequivocal recantation at trial." A10, ¶ 67.

The majority similarly declined to consider that Mixon knew defendant at the time of the shooting as a basis to credit his identification because "*Biggers* contains no exception for eyewitness familiarity." A14, ¶ 89. The majority acknowledged this Court's precedent explaining that an eyewitness's familiarity with the defendant renders *Biggers*'s other reliability factors less relevant but rejected that precedent on the ground that it was "a 25-year-old decision, which in turn cites a 55-year-old decision." A12, ¶ 79 (citing *People v. Brooks*, 187 Ill. 2d 91, 130-31 (1999) (citing *People v. Robinson*, 42 Ill. 2d 371, 375-76 (1969))). Based on the majority's view of subsequent scientific research on eyewitness identifications, it believed that this Court's "[o]lder cases in this area of law must be considered with heightened scrutiny." *Id.*

The majority also declined to credit Mixon's identification over his recantation at trial because, although a rational juror could do so, the majority believed that "inferring that Mixon recognized [defendant] remains improbable" given "the weapon focus effect." A9, ¶ 65. The "weapon focus effect" was a factor that the majority derived from its review of an article (never presented at trial) about eyewitness identifications of armed offenders, which the majority believed "show[ed] that the presence of a weapon commands an eyewitness's attention and diminishes the ability of the eyewitness to describe or recognize the offender." A6, ¶ 33 (citing Jonathan

M. Fawcett, Kristine A. Peace & Andrea Greve, *Looking Down the Barrel of a Gun: What Do We Know About the Weapon Focus Effect?*, 5 J. of Applied Res. in Memory & Cognition, 257, 261 (2016)). The majority recognized that the "articles in legal and research journals" upon which it relied to discredit the eyewitness identifications involved science that was "'largely unfamiliar to the average person' and include[d] 'counterintuitive' principles," A12, ¶ 80 (quoting *People v. Lerma*, 2016 IL 118496, ¶ 24), but the majority rejected the argument that the science had to be presented to the jurors before it could be used to challenge the sufficiency of the evidence supporting their verdict, A15, ¶ 94.

The majority similarly rejected Thomas's identification of defendant as the shooter. It held that his identification "cannot stand" because he testified on cross-examination that he had "poor eyesight" and claimed that he only "practically" saw the shooter and could not describe the shooter other than by skin color and clothing. A9, ¶ 64. The majority credited this testimony over Thomas's statement to police that he had an unobstructed view of the shooter and that the shooter was defendant, A3, ¶ 14; A6, ¶ 34, and the majority did not address Thomas's direct examination testimony that defendant was "the same person [he] saw on the street shoot [Tyler] and [Mixon]," R448.

With respect to Washington's identification of defendant as the shooter, the majority found her physical description of defendant lacked sufficient "distinct or unique identifiers" to prove his guilt, A10, ¶ 68,

although the majority acknowledged that this Court has held that an eyewitness identification is sufficient even if the eyewitness's physical description was general, A8, ¶ 50 (citing *People v. Slim*, 127 Ill. 2d 302, 309 (1989)). The majority inferred that Washington's physical description reflected "a lack of attentiveness," which it attributed to her being "rattled by fear." A7, ¶ 43. The majority further discredited Washington's identification based on a purported conflict between her and Thomas's descriptions of the shooter's skin tone ("caramel" versus "light") and the fact that police had not asked her to identify defendant from a lineup, which it considered "a crucial investigative step that would have given credence to her selection of [defendant] from the photo array." A10, ¶ 68.

The majority concluded that because the shooting happened quickly and was stressful to the eyewitnesses, it was "inevitab[le]" that all three eyewitnesses misidentified the shooter. A13, ¶ 84. In the majority's view, several additional factors also discredited all of the identifications. First, although the majority recognized that Laster "testified he did not look at the shooter's face," A6, ¶ 35, it found that his inability to identify defendant as the shooter nonetheless "detract[ed]" from the credibility of the other eyewitnesses' identifications, A9, ¶ 63. Second, the majority found that the fact the jury acquitted defendant of the attempted murder of Mixon indicated that the evidence was insufficient to allow a rational jury to find that he murdered Tyler. A15-16, ¶ 99. In response to the dissent's observation that

the United States Supreme Court has held that it is improper to consider a jury's split verdict when evaluating the sufficiency of the evidence, A31, ¶ 151 (Tailor, J., dissenting) (quoting *United States v. Powell*, 469 U.S. 57, 67 (1984)), the majority rejected that proposition as "naïve," A15-16, ¶ 99. Finally, the majority appeared to discredit all eyewitness identifications based on the general proposition that such evidence is insufficient to support a conviction absent corroborating physical evidence or evidence of motive. A16, ¶¶ 103-05.

The dissent would have held that the three eyewitness identifications were sufficient to prove that defendant murdered Tyler. A33-34, ¶¶ 156-57 (Tailor, J., dissenting). The dissent noted that the majority (1) "omit[ted] or dismiss[ed] critical facts that favor the State," (2) "accept[ed] recantation testimony of two witnesses that the jury obviously rejected as incredible," (3) "ignore[d] the United States Supreme Court's holding that a jury's split verdict is irrelevant to a sufficiency of the evidence analysis under the due process clause," and (4) "*sua sponte* invoke[d] social science research in an effort to undermine the identification of all three eyewitnesses even though that research was never presented at trial and the State had no opportunity to refute it." A18, ¶ 114. The dissent further noted that defendant had not cited the social science upon which the majority relied in his briefs before the appellate court. A28, ¶ 144.

STANDARD OF REVIEW

"When a defendant challenges the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Jackson*, 2020 IL 124112, ¶ 64; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). "Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses." *Jackson*, 2020 IL 1302310, ¶ 64. Although a factfinder's presumed credibility determination in favor of the prosecution "is not conclusive and does not bind the reviewing court," *People v. Gray*, 2017 IL 120958, ¶ 35, under the sufficiency standard "'eyewitness testimony may be be found insufficient 'only where the record evidence *compels* the conclusion that no reasonable person could accept it beyond a reasonable doubt,'" *id.* ¶ 36 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)) (emphasis added).

ARGUMENT

The evidence presented at trial — three eyewitness identifications of defendant as the person who fatally shot Taurean Tyler — was sufficient to prove beyond a reasonable doubt that defendant was the person who murdered Tyler. The majority below reached its contrary conclusion by improperly refusing to view the evidence in the light most favorable to the People and substituting its own credibility determinations for those of the jury. In failing to afford the jury's guilty verdict the deference that it was owed under *Jackson v. Virginia*, the majority erroneously held that its evaluation of the sufficiency of the evidence was governed, instead, by *Neil v. Biggers*. But *Biggers* addresses only the admissibility of an eyewitness identification made after suggestive police identification procedures, not the sufficiency of an eyewitness identification to support a conviction once it has been admitted into evidence. Further, when the majority discredited the eyewitness identifications that the jury had credited, it did so in reliance on two improper factors: (1) materials that were never presented at trial and (2) the fact that the jury had acquitted defendant of attempting to murder a different victim.

The dissent pointed out that the majority's analysis was contrary to both this Court's and the United States Supreme Court's binding precedent, but the majority rejected that precedent as poorly reasoned or invalid in light of the majority's view of subsequent developments in social science research.

This Court should reverse the judgment of the appellate court, affirm defendant's conviction, and reaffirm that both the principle of stare decisis and the Supremacy Clause remain binding on the appellate court.

I. The Evidence Was Sufficient to Prove That Defendant Committed First Degree Murder.

To prove defendant guilty of first degree murder for fatally shooting Tyler, the People had to prove that (1) he fatally shot Tyler and, in doing so, (2) either intended to kill or do great bodily harm to Tyler or knew that there was a substantial probability that repeatedly shooting Tyler created a strong probability of killing or doing great bodily harm to him. 720 ILCS 5/9-1(a)(1), (2); C35-36. There is no dispute that the person who walked up behind Tyler, pointed a gun at him, and shot him five times, killing him, committed first degree murder. *See People v. Thomas*, 171 Ill. 2d 207, 219 (1996) (evidence that one intentionally pointed a gun at someone and fired is sufficient to prove requisite intent for first degree murder (citing *People v. Cannon*, 49 Ill. 2d 162, 166 (1971)). The only question is whether the People presented sufficient evidence to prove defendant was that person. Viewed in the light most favorable to the prosecution, *Jackson*, 2020 IL 124112, ¶ 64, Mixon's, Thomas's, and Washington's eyewitness identifications of defendant as the person who fatally shot Tyler were sufficient to prove that defendant committed first degree murder by intentionally killing Tyler.

It is axiomatic that "[t]he testimony of a single witness is sufficient to convict if the testimony is positive and credible, even where it is contradicted

by the defendant." *Gray*, 2017 IL 120958, ¶ 36; *see also, e.g., People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) (single eyewitness's positive identification is sufficient to support conviction); *People v. Slim*, 127 Ill. 2d 302, 307 (1989) (same). Here, there were three such witnesses. Thomas testified that he was standing at his front door when he saw defendant approach Mixon and Tyler from behind, draw a gun, and open fire on them. R429-32, 448. After defendant fled, Thomas ran to help Mixon, R433, who told him "[i]t was Antrell," R447. Thomas then identified defendant from a photo array as the person who shot Tyler. R436-39, 456. Although Thomas attempted to recant this identification at trial, claiming that he did not really see the shooter, *see* R431, 438-39, he ultimately admitted at trial that defendant was "the same person [he] saw out on the street shoot [Tyler] and [Mixon]," R448.

Mixon testified that when he saw Thomas's expression, he turned and saw the shooter, R469, 471, whom he later identified to detectives by name when he spoke with them at the hospital, R480, 509-10. He then identified defendant (whom he had known for years, R461) from a photo array. R484. Although he attempted to recant these identifications on cross-examination, R504, 507, he admitted on redirect that he immediately identified defendant as the shooter when he spoke to detectives at the hospital, R509-10, immediately identified defendant as the shooter again when he was shown the photo array, R511, and that he feared for his safety while testifying at

trial, R511-13. The video recording of his interview at the hospital showed that he named defendant as the shooter to detectives, Peo. Exhs. 67 & 68, and to Thomas at the scene, Peo Exh. 70.

Finally, Washington testified that she had an unobstructed view of defendant as he ran past her to catch up to Tyler and Mixon, shot them, and then ran past her again as he fled. R551-53, 577. She identified defendant as the shooter from a photo array, R554-57, and testified at trial she would never forget defendant's face and was "certain" he was the shooter, R577.

These three eyewitnesses' identifications of defendant as the person who shot Tyler were more than sufficient to prove defendant's guilt. *See People v. Brooks*, 187 Ill. 2d 91, 132-34 (1999) (multiple eyewitnesses' identifications of defendant as drive-by shooter were sufficient to prove guilt, even though some recanted and their accounts conflicted in some respects).

II. The Majority Below Erred by Reviewing the Sufficiency of the Evidence Under the Wrong Standard, Considering Evidence Never Presented at Trial, and Relying on the Fact That the Jury Returned a Split Verdict.

The majority's invocation of *Neil v. Biggers* as license to substitute its own credibility determinations for those of the jury was wrong, as was its reliance on material that was never presented at trial and the fact that the jury returned a split verdict. The majority not only applied the wrong standard to defendant's sufficiency challenge, but "wholly ignore[d] the role of a reviewing court in considering the sufficiency of the evidence," for "[i]t is not the function of a court to retry a defendant, nor is it permissible for a

reviewing court to take judicial notice of material that was not considered by the trier of fact" when evaluating the credibility of testifying witnesses. *People v. Cline*, 2022 IL 126383, ¶ 33 (internal citations omitted).

A. The majority erred by reviewing the sufficiency of the evidence under *Neil v. Biggers* rather than *Jackson v. Virginia*, then treating the *Biggers* factors as the only factors that a jury may consider when weighing credibility.

The majority recognized that Mixon's prior identifications of defendant as the shooter were alone sufficient to prove defendant's guilt under the *Jackson* standard. *See* A9, ¶ 65. It recognized that "'[i]t is well established that a single witness's identification is sufficient to sustain a conviction,'" *id.* (no source provided for quotation), and that, "[v]iewing the evidence in the light most favorable to the prosecution, a rational juror might have given more weight to Mixon's statement to the ASA than his trial testimony [recanting that statement], due to Mixon's familiarity with [defendant] and familial ties," *id.* But rather than conclude that the evidence was sufficient under *Jackson v. Virginia*, the majority erroneously reviewed defendant's sufficiency challenge under *Neil v. Biggers*. *See* A9, ¶ 62 (reviewing evidence "[u]nder *Biggers*"); A11, ¶ 74 ("Our legal analysis draws primarily on *Biggers*[.]"); A15, ¶ 97 ("our inquiry follows the *Biggers* mandate"). As the majority admitted, "the framing of an issue influences the . . . outcome," and by framing the sufficiency of the evidence as a *Biggers* question, it could "evaluate the likelihood of misidentification, as opposed to . . . evaluat[ing] the likelihood of identification." A10, ¶ 72. In other words, it could make its

own credibility determinations and decline to draw inferences in favor of the People, as it was required to do under *Jackson v. Virginia*.

For example, although the majority admitted that a rational jury could credit Mixon's prior identifications over his later recantation, A9, ¶ 65, the majority refused to do so absent "a reason under *Biggers* to reject his unequivocal recantation at trial," A10, ¶ 67. The majority further discredited Mixon's and Thomas's prior identifications of defendant as the shooter on the ground that when they identified defendant, they did so by name rather than physical description, reasoning that *Biggers* considers only the accuracy of descriptions and "contains no exceptions for eyewitness familiarity." A14, ¶ 89; *see* A7, ¶ 47 (rejecting Mixon's and Thomas's prior identifications of defendant by name because they had not given "a prior description of the shooter"); A13, ¶ 86 (rejecting Mixon's prior identifications of defendant by name because he "never described the shooter").

The majority similarly rejected Washington's identifications by substituting its own credibility determinations for those of the jury and reweighing the evidence. For example, the majority discredited Washington's identifications of defendant from the photo array and at trial because it believed her identification of the shooter's skin tone ("caramel") conflicted with Thomas's description ("light"), A10, ¶ 68, presumably reasoning that no skin tone could be described as "caramel" by one person and "light" by a different person. The majority further discredited Washington's

identifications because police had not asked her to identify defendant from a lineup after he was apprehended, A10, ¶ 68, and because the majority inferred that her attention must have been "compromised" by "the trauma of the shooting," A7, ¶ 39; A7, ¶ 43 (inferring that "Washington's attentiveness was rattled by fear").

After rejecting the jury's credibility determinations and drawing these inferences in favor of the defense, the majority concluded that the evidence was insufficient "under the test set out in the United States Supreme Court's opinion in *Neil v. Biggers*." A2, ¶ 3 (citation omitted); *see* A10, ¶ 69 (finding evidence insufficient "under the *Biggers* factors").

But *Biggers* does not apply to a review of the sufficiency of the evidence. Nor does *Biggers*'s identification of certain factors as relevant to the reliability of an eyewitness identification prevent a rational factfinder from considering other factors when evaluating that evidence to determine guilt.

1. *Biggers* governs admissibility, not sufficiency.

In *Neil v. Biggers*, the United States Supreme Court "set forth . . . the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement." *Perry v. New Hampshire*, 565 U.S. 228, 238 (2012). *Biggers* held that "[t]he central question" when an eyewitness makes an identification following a suggestive procedure is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation

procedure was suggestive." *Biggers*, 409 U.S. at 199. Only if "the 'indicators of [a witness's] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion," must the identification be suppressed. *Perry*, 565 U.S. at 239 (quoting *Manson v. Braithwaite*, 432 U.S. 98, 114, 116 (1977)). Factors relevant to such an identification's admissibility "include" (1) the witness's opportunity to view the criminal during the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's description of the criminal prior to the suggestive confrontation; (4) the witness's level of certainty at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200.

But *Biggers* applies only to determine "whether improper police conduct created a 'substantial likelihood of misidentification.'" *Perry*, 565 U.S. at 239 (quoting *Biggers*, 409 U.S. at 201). Contrary to the view of the majority below, *see* A5, ¶ 30, the due process reliability review under *Biggers* is not motivated by "suspicion of eyewitness testimony generally, but only [of] improper police arrangement of the circumstances surrounding an identification," *Perry*, 565 U.S. at 242. "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 245. Accordingly, the Supreme Court declined to expand *Biggers*'s reliability analysis to all eyewitness identifications because it "recogni[zed] that the jury, not the

judge, traditionally determines the reliability of evidence." *Id.* Once admitted into evidence, "[t]he reliability of . . . eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury." *Foster v. California*, 394 U.S. 440, 442 n. 2 (1969).

Although courts reviewing the sufficiency of the evidence under *Jackson v. Virginia* sometimes discuss the factors identified in *Biggers* — those factors being among the many relevant to an eyewitness's credibility (and therefore to determining whether, viewed in the light most favorable to the prosecution, an eyewitness could be credited by a rational juror) — both this Court and others have recognized that *Biggers* governs admissibility, not sufficiency. *See Brooks*, 187 Ill. 2d at 134 (rejecting defendant's invocation of "the reliability factors" in challenge to sufficiency of evidence as "better directed toward the admissibility of the statements" because "[o]nce the statements are deemed admissible, our standard of review is limited to the [*Jackson* standard]"); *see also Sample v. Commonwealth*, 897 S.E.2d 68, 76 (Va. 2024) (explaining that "an identification analysis [under *Biggers*] does not address the sufficiency of the evidence" but instead "focuses upon due process considerations" related to admissibility, which "is a very different thing than evaluating the identification within a sufficiency matrix," where reviewing courts "give[ ] deference to the trier of fact's finding of witnesses' credibility"); *Potts v. Commonwealth*, 172 S.W.3d 345, 348-49 (Ky. 2005) (*Biggers* "addressed only the *admissibility* of identification testimony" and

did not "suggest[ ] that the Due Process Clause's standards for admissibility of identification testimony should be extended to govern appellate review of claims of insufficiency of evidence"; "*Jackson,* therefore, reserves questions of credibility for the finder of fact and does not require an evaluation of the 'qualitative sufficiency' of the evidence" (emphasis in original)); *Kelley v. State*, 281 S.E.2d 589, 590 (Ga. 1981) (defendant's reliance on *Biggers* in sufficiency challenge was "misplaced" because *Biggers* "deal[t] with suggestive confrontation procedures used by police to obtain identification" and "[t]he issue here is simply one of credibility of a witness who was subjected to a thorough cross-examination," which "must be resolved by the trier of fact"); *Robinson v. State*, 365 N.E.2d 1218, 1221 (Ind. 1977) (rejecting defendant's request to apply *Biggers* to sufficiency claim because defendant "made no showing that the identification testimony of the witnesses had been influenced in any way by any State action" and, "[a]bsent such a showing, when eyewitness identification is presented as a sufficiency issue upon appeal, there is no reason to treat it any differently than other evidence").

Thus, as this Court has explained, once an identification has been admitted, the question whether to credit an eyewitness identification in light of the individual *Biggers* considerations must be resolved by the jury. *See, e.g.*, *People v. Holmes*, 141 Ill. 2d 204, 242 (1990) ("While [a] large time lapse [between offense and identification] might be significant, it only goes to the weight of the testimony, making it a question for the jury."); *Slim*, 127 Ill. 2d

at 308 ("discrepancies and omissions as to facial and other physical characteristics are not fatal, but simply affect the weight to be given the identification testimony").[4] At that point, the constitutional safeguard against a jury "placing undue weight on eyewitness testimony of questionable reliability" is "the defendant's Sixth Amendment right to confront the eyewitness" with the assistance of counsel and thereby "expose the flaws in the eyewitness'[s] testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments." *Perry*, 565 U.S. at 245-46; *see id.* at 237 (constitution "protects a defendant against a conviction based on evidence of questionable reliability . . . by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit"). Additionally, "[e]ye-witness-specific instructions, which many federal and state courts have adopted" — and which were given here, R876 — "likewise warn the jury to take care in appraising identification evidence." *Perry*, 565 U.S. at 246; *see* IPI, Criminal, No. 3.15.

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[4] Although Illinois courts do not apply *Biggers* to evaluate the sufficiency of evidence, they do apply it to determine whether the evidence is closely balanced for the purposes of first-prong plain error, where courts "'err on the side of fairness'" rather than deference to the jury's verdict. *See Piatkowski*, 225 Ill. 2d at 566-67 (quoting *People v. Herron*, 215 Ill. 2d 167, 193 (2005). But, this Court has emphasized, "[w]hether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient," and the latter must be resolved by "viewing the evidence in the light most favorable to the prosecution." *Id.*

Here, defendant did not challenge the admission of any of the eyewitness identifications on the ground that they were the product of suggestive police procedures. Nor did defendant argue on appeal that the identifications should have been excluded on that ground. And for good reason: police scrupulously avoided any possibility of suggestion, advising the eyewitnesses beforehand that the photo arrays might not include the offender, that the detective showing them the arrays did not know who the shooter was (thereby preventing the eyewitnesses from looking to the detective for cues), and that it was as important to exclude innocent people as it was to identify the shooter. *See* R434-36, 480-83, 554-56; Peo. Exhs. 6, 14 & 21; *see also* 725 ILCS 5/107A-2 (providing procedures for conducting photo lineups). Therefore, *Biggers* did not apply, and the majority below erred by conducting a de novo review of the eyewitness identifications under *Biggers*. The proper inquiry was under "[t]he *Jackson* standard, which focuses on whether any rational juror could have convicted, [and] looks to whether there is sufficient evidence which, *if credited,* could support the conviction," and under which "the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo,* 513 U.S. 298, 330 (1995) (emphasis added). The jury here plainly credited the eyewitness identifications, and those identifications, viewed in the light most favorable to the People, were sufficient to allow a rational juror to convict.

2. The *Biggers* factors do not cabin the jury's evaluation of eyewitness testimony.

In addition to applying *Biggers* analysis in the wrong context, the majority applied *Biggers* incorrectly in its own right, treating the five specified reliability factors as an exclusive list and refusing to consider other factors that contribute to the totality of the circumstances. To be sure, the five factors enumerated in *Biggers* are relevant to a factfinder's evaluation of an eyewitness identification that has been admitted into evidence. Indeed, IPI 3.15 instructs Illinois juries to consider those five factors. *See* IPI, Criminal, No. 3.15. But, like *Biggers* itself, IPI 3.15 does not prohibit consideration of additional relevant factors; to the contrary, it instructs the jury to "consider all the facts and circumstances in evidence, including, but not limited to," the *Biggers* factors. *Id.*; *see Biggers*, 409 U.S. at 199 (court determining admissibility of identification made after suggestive procedure must consider totality of the circumstances, which "include[s]" five specified factors).

Thus, even a court determining the admissibility of an identification made after a suggestive identification procedure may consider factors other than the five specifically mentioned in *Biggers*. For example, a court evaluating the admissibility of an eyewitness's identification is free to consider "whether the witness was acquainted with the suspect before the crime." *Brooks*, 187 Ill. 2d at 130. Similarly, a jury evaluating the credibility of an eyewitness's identification (or recantation of an earlier identification) is

free to consider whether the witness already knew the suspect, as well as the host of other factors relevant to the witness's credibility, such as "his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." IPI, Criminal, No. 1.02.

Here, the majority wrongly held that no rational juror could credit the eyewitnesses' identifications based on such factors just because *Biggers* did not specifically mention them. *See* A10, ¶ 67 (rejecting possibility that rational juror could credit eyewitness's prior identification over subsequent recantation absent "a reason under *Biggers*"); A14, ¶ 89 (rejecting possibility that rational juror could credit identifications made by eyewitnesses who already knew the defendant because "*Biggers* contains no exception for eyewitness familiarity").

3. *Biggers* does not allow the appellate court to disregard this Court's precedent regarding eyewitness identifications.

The majority also erred by relying on *Biggers* to reject this Court's precedent regarding eyewitness identifications. For example, when the majority refused to credit Mixon's prior identifications over his later recantation absent "a reason under *Biggers*," A10, ¶ 67, it ignored the dissent's observation that this Court has recognized that recantations are "'generally regarded as unreliable'" and that "'it is for the trier of fact to determine the credibility of the recantation testimony,'" A21, ¶ 123 (quoting *Jackson*, 2020 IL 124112, ¶ 67).

The majority again disregarded this Court's precedent when it discredited Washington's identification of defendant based, in part, on the ground that her physical description of defendant "lack[ed] any distinct or unique identifiers." A10, ¶ 68. Here, the majority recognized but ignored this Court's instruction in *People v. Slim* that "'a witness'[s] positive identification can be sufficient even though the witness gives only a general description based on the *total impression* the accused's appearance made.'" A8, ¶ 50 (quoting and adding emphasis to *Slim*, 127 Ill. 2d at 309); *see also Slim*, 127 Ill. 2d 308-09 ("It has consistently been held that a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification.").

And when the majority further refused to credit Mixon's and Thomas's identifications of defendant on the basis of their familiarity with defendant because *Biggers* "contains no exceptions for eyewitness familiarity," A14, ¶ 89, it expressly refused to follow this Court's precedent recognizing the significance of an eyewitness's familiarity with the defendant, A12, ¶ 79. In *People v. Brooks*, this Court explained that "whether the witness was acquainted with the suspect before the crime" is not only one of the factors relevant to the admissibility of an identification made after a suggestive identification procedure, it "is particularly important because it renders the other factors less relevant." 187 Ill. 2d at 130-31 (citing *People v. Robinson*, 42 Ill. 2d 371, 375-76 (1969)). Yet the majority refused to follow *Brooks*,

opining that, as "a 25-year-old decision, which in turn cites a 55-year-old decision," *Brooks* "must be considered with heightened scrutiny" based on the majority's view of subsequent developments in social science. A12, ¶ 79.

Indeed, the majority rejected the importance of precedent entirely on the ground that "[a]fter over 50 years of case law, one can find support for nearly any proposition." A11, ¶ 74. Rather than consider the extensive body of common law that Illinois has developed concerning the sufficiency of evidence (and of eyewitness identification evidence in particular), the majority instead rested its analysis "primarily on *Biggers*, the evidence in this case, and the myriad interconnected 'estimator variables,' the formal term academics use to refer to factors outside the criminal justice system that affect eyewitness perception." *Id.*

But the majority was not free to disregard this Court's precedent, Illinois's common law system, and stare decisis. "'Where [this Court] has declared the law on any point, *it alone can overrule and modify its previous opinion*.'" *Price v. Philip Morris*, 2015 IL 117687, ¶ 38 (quoting and adding emphasis to *Agric. Transp. Ass'n v. Carpentier*, 2 Ill. 2d 19, 27 (1953)). Once this Court has ruled, "'the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.'" *Id.* (quoting *Carpentier*, 2 Ill. 2d at 27). "[I]f the [majority below] disagreed with [one of this Court's decisions], it remained bound by that decision and should have left it to this court to reassess the decision's

validity," *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 29, for the appellate court "lacks the authority to declare [this Court's] precedent a dead letter," *Yakich v. Aulds*, 2019 IL 123667, ¶ 13. Accordingly, the majority erred by relying on *Biggers* as license to ignore this Court's precedent.

B. The majority erred by finding the evidence insufficient based on materials that were never presented at trial.

The majority below also erred by relying on social science articles that were never presented at trial to discredit the eyewitness identifications. *See* A6, ¶ 33; A7, ¶ 39; A8, ¶ 53; A10, ¶¶ 68, 72; A11, ¶¶ 74, 76; A12, ¶ 80; A14-15, ¶¶ 91-93. The majority justified its reliance on these extra-record materials by citing this Court's decision in *People v. Lerma*, 2016 IL 118496, and asserting that the appellate court "regular[ly] refer[s] to academic works to inform a deeper understanding of issues." A11, ¶ 77. But both this Court and the United States Supreme Court have been clear that a reviewing court may not consider material outside the trial record when evaluating the sufficiency of the evidence, and *Lerma* is not to the contrary.

Review of the sufficiency of the evidence at trial "must be limited to evidence actually admitted at trial, and judicial notice cannot be used to introduce new evidentiary material not considered by the fact finder during its deliberations." *Cline*, 2022 IL 126383, ¶ 32; *see Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("[T]he sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence.'" (quoting *Jackson*, 443 U.S. at 318)). Indeed, had the jury sought out and relied upon extra-record studies

regarding eyewitness identifications to inform its evaluation of the evidence presented, it would have denied defendant due process. *See People v. Yarbrough*, 93 Ill. 2d 421, 429 (1982) ("Due process does not permit [a trial judge acting as factfinder] to go outside the record . . . or conduct a private investigation in a search for aids to help him to make up his mind about the sufficiency of the evidence."); *People v. Harris*, 57 Ill. 2d 228, 232-33 (1974) ("It is clear . . . that a trial judge in his deliberations [as factfinder] is limited to the record made before him at trial and should he draw conclusions based on any private investigation made by him the accused will have been denied due process of law.").

Lerma only reinforces the principle that a defendant cannot rely on scientific evidence on a matter of uncommon knowledge to challenge the prosecution's case against him unless he presents that evidence through the testimony of an expert witness at trial. In *Lerma*, the Court held that the trial court abused its discretion by not allowing the defendant to present expert testimony regarding research on factors relating to the reliability of eyewitness identifications, 2016 IL 118496, ¶ 27 — including "the stress of the event itself, the use and presence of a weapon, [and] the wearing of a partial disguise," *id.* ¶ 26 — because that research remains "'largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive," *id.* ¶ 24 (quoting *State v. Guilbert*, 49 A.3d 705, 723-24 (Conn. 2012)). For that reason, the Court recognized that such research was

a "perfectly proper subject for expert testimony," *id.*, and the trial court therefore erred by preventing the defendant from presenting his expert to the jury, *id.* ¶¶ 25-26.

Contrary to the appellate majority's suggestion, *see* A11, ¶ 77, the Court did not suggest that a defendant could challenge the rationality of a jury's verdict based on research that he did *not* present to the jury. To the contrary, the Court recognized a court may not "substitute[ ] its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert." *Id.* ¶ 28. Therefore, the majority below erred by finding the evidence below insufficient based on its own view of scientific research that was never presented at trial and tested through the adversarial process.

C. The majority erred by relying on the jury's split verdict to find the evidence insufficient.

Finally, the majority improperly relied on the fact that the jury acquitted defendant of attempting to murder Mixon to find that the evidence was insufficient to prove defendant murdered Tyler. A15-16, ¶ 99. The United States Supreme Court has squarely rejected consideration of the jury's acquittal on one count when evaluating the sufficiency of the evidence on another count. *See United States v. Powell*, 469 U.S. 57, 67 (1984) ("Sufficiency-of-the[-]evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was

insufficient." (internal citations omitted)); *see also Jackson*, 443 U.S. at 319 n.13 ("The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder — if known."). The majority rejected this binding precedent as "naïve." *See* A15, ¶ 99. This was error.

Under the Supremacy Clause, Illinois courts "'are bound to follow the United States Supreme Court's interpretation of the Constitution of the United States.'" *People v. Hale*, 2013 IL 113140, ¶ 20 (quoting *People v. Wagener*, 196 Ill. 2d 269, 287 (2001)). Just as the majority below could not opt out of stare decisis to ignore this Court's precedent, *see supra* § II.A.3, it could not opt out of the Supremacy Clause to ignore United States Supreme Court precedent.

In any event, this case perfectly demonstrates why the Supreme Court was correct to reject relying on a jury's split verdict to guess at that jury's reasoning. The majority reasoned that the jury's finding that the evidence was insufficient to prove that defendant attempted to murder Mixon "signal[ed] potential doubts about the reliability of the evidence and the credibility of the witnesses," A15-16, ¶ 99 — that is, that the jury perhaps doubted the eyewitnesses' identification of defendant as the shooter. But it is

not at all clear that the jury had such doubts. To be sure, the jury found the evidence insufficient to prove beyond a reasonable doubt that defendant attempted to murder Mixon, R927-28 — *i.e.*, that he shot Mixon with the specific intent to kill him. R879. But the jury indicated that it did not doubt that defendant shot Mixon; when it mistakenly answered the special interrogatory related to the attempted murder charge, it found that defendant personally discharged a firearm that caused great bodily harm. R928. Though this special interrogatory finding had no practical consequence, it appears to show that the jury concluded that defendant shot both Tyler and Mixon, but that he did so with the intent to kill only Tyler (understandable given that when defendant fired his seven shots, *see* R472, 645, five struck Tyler, with several striking his chest and back, R627, and only one struck Mixon, who was standing next to Tyler, hitting him in the buttock, R475-76). The jury may have concluded that the shot that struck Mixon had also been intended for Tyler.

It is rarely if ever possible to know a jury's intent in issuing a split verdict, and ultimately it does not matter how confidently one may reconstruct the jury's reasoning, for that reasoning is irrelevant to whether the evidence was legally sufficient. *Powell*, 469 U.S. at 67; *see People v. Jones*, 207 Ill. 2d 122, 133-34 (2003) (following *Powell* to hold that Illinois defendants cannot challenge convictions on the ground that they are inconsistent with acquittals on other charges).

* * *

In sum, in finding the multiple eyewitnesses' identifications of defendant as the shooter insufficient to prove defendant's guilt, the majority below applied the improper standard, considered improper evidence, and refused to follow this and the United States Supreme Court's precedent.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court with respect to defendant's sufficiency challenge and remand for consideration of his remaining claim.

August 11, 2025

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10,477 words.

/s/ Joshua M. Schneider
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 11, 2025, the foregoing **Brief of Plaintiff-Appellant People of the State of Illinois** and **Separate Appendix** were filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ANTRELL JOHNSON, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0494 There on Appeal from the Circuit Court of Cook County, Illinois, No. 17 CR 8698 The Honorable Thaddeus L. Wilson, Judge Presiding.

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Illinois Official Reports

Appellate Court

***People v. Johnson*, 2024 IL App (1st) 220494**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTRELL JOHNSON, Defendant-Appellant.
District & No.	First District, Sixth Division No. 1-22-0494
Filed	November 22, 2024
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 17-CR-08698; the Hon. Thaddeus L. Wilson, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, and Christina Solomon, of State Appellate Defender's Office, of Chicago, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham, Tasha-Marie Kelly, and Caitlin Chenus, Assistant State's Attorneys, of counsel), for the People.
Panel	JUSTICE HYMAN delivered the judgment of the court, with opinion. Justice Oden Johnson concurred in the judgment and opinion. Justice Oden Johnson also specially concurred, with opinion. Presiding Justice Tailor dissented, with opinion.

OPINION

¶ 1 The quest for justice faces formidable challenges, especially when the decisive evidence is eyewitness testimony. Antrell Johnson appeals his first degree murder conviction, which was based solely on testimony from four eyewitnesses. He argues that the State failed to prove his guilt beyond a reasonable doubt, as there was no physical evidence or a motive and, most consequentially, a high likelihood of eyewitness misidentification.

¶ 2 The State insists the eyewitnesses' inconsistencies with one another, and with their own prior statements, "as a whole," do not undermine its case, though a jury split its verdict in finding Johnson not guilty of attempt first degree murder of one victim and inexplicably, guilty of first degree murder of another.

¶ 3 Eyewitness identification seems intuitive, but, as we will discuss, it involves complex audio and visual processes that impact perception. After closely examining the record and drawing reasonable inferences in the State's favor, as we must, we conclude that no rational trier of fact could have convicted Johnson under the test set out in the United States Supreme Court's opinion in *Neil v. Biggers*, 409 U.S. 188 (1972). That test directs the courts to weigh the " 'totality of the circumstances' " in "evaluating the likelihood of misidentification." *Id.* at 199-200.

¶ 4 The majority and the dissent interpret the same record differently. Each of the four eyewitness accounts, as we will explain, is fraught with inconsistencies, contradictions, and the risk of errors under the *Biggers* factors. The dissent, however, does not acknowledge any of this, referring to "the strength of the eyewitness testimony." *Infra* ¶ 152. The majority's approach reflects an objective analysis of the evidence rooted in both reason and reality, not speculation or assumption. We reverse.

¶ 5 BACKGROUND

¶ 6 A jury delivered a split verdict, finding Antrell Johnson guilty of first degree murder of Taurean (Torey) Tyler while acquitting him of attempted first degree murder of shooting Deangelo Mixon, though both were shot by the same assailant at the same time. At trial, the State had no physical evidence tying Johnson to the shooting and relied on the testimony of four eyewitnesses. We summarize the evidence.

¶ 7 The security camera from a nearby muffler shop captured grainy video footage showing a dark car turn 90 degrees, let out someone wearing dark clothes, and retreat in the direction it came. A person in a black top and white pants runs across the screen for less than a second.

¶ 8 At about 7:30 p.m., Robert Laster and his wife, Janeese Washington, sat in the rear seats of a Nissan Altima parked in a church lot, waiting for choir practice to begin. Laster was on the driver's side, and Washington was next to him. From about 30 feet away, Laster, facing south, saw the back of a person in a black bomber jacket, white pants, and a black hat. Suddenly, the person fired several shots at two young men from behind them and, an instant later, ran past the car.

¶ 9 At the scene, police interviewed Laster and Washington, combining their description without attributing either. The resulting composite reflected a "male black, medium brown complected between the age of 16 and 25, about [five-six], [five-nine], between [125], 150 pounds with black hair in a faded type of haircut."

¶ 10 Laster testified he "knew" the shooter was a man but did not look at his face or discern his skin color. He recalled: "[J]ust trying my best to keep everyone in the car calm so, you know, we weren't any other casualties. *** I was yelling, everybody kind of crouched down, just keep quiet."

¶ 11 Nine days later, Laster reviewed a photo array that included Johnson's photo. He selected no one. Nine days after that, he participated in an in-person lineup that included Johnson, identifying someone other than Johnson as the shooter.

¶ 12 Washington testified that she saw the shooting through the driver's side windshield and door window. Both the shooter and the victims had their backs to Washington. The shooter, wearing white jeans and a baseball cap, ran up and shot the two young men. Washington "kind of scooted" down when she heard the shots, trying to stay out of sight and avoid becoming a target. She said the baseball cap obscured part of the shooter's face. She could not recall what else the shooter wore or which hand held the gun.

¶ 13 Washington participated in a photo array and selected Johnson. After choosing him, she cited his "kind of caramel skin" and that "his nose was big and his lips were big." Police did not have Washington participate in a lineup.

¶ 14 Tristan Thomas was on his porch, an unspecified distance away. Thomas struggles to see distances and needs but does not use prescription eyeglasses. Thomas could not testify to any details about the shooter except that the person was a light-skinned African American, wearing a black jacket and a "hoody pulled tight." He did not know the shooter's gender.

¶ 15 The morning after the shooting, police officers interviewed Thomas. At trial, the State confronted Thomas with his response, "Yes," when asked if he had a "clear, unobstructed view of this person [the shooter]." He also told the police that he could "practically" see the shooter's face, clarifying that he could see "most of his face," "just his head, and a little bit of his mouth covered." Shown a photo array, he identified Johnson.

¶ 16 Before the jury, Thomas denied he had a clear, unobstructed view. He recounted seeing someone run up behind his friends, Tyler and Mixon, and shoot from seven to eight feet away. After the shooter fled, Thomas rushed to them, and Mixon said, "It was Antrell." Thomas testified that the shooter wore a mask "just a little bit," and insisted he identified Johnson because of what Mixon told him. The State introduced part of the transcript from Thomas's photo identification of Johnson:

> "OFFICER: [H]ow do you recognize this person?
> THOMAS: [T]hat's him?
> OFFICER: [Y]ou seen him, where I mean?
> THOMAS: [S]hooting yesterday.
> OFFICER: [S]hooting yesterday where.
> THOMAS: 69th and Honore.
> OFFICER: [S]o this is the person who was shooting on 69th and Honore.
> THOMAS: [Y]esterday.
> OFFICER: [D]id you see anyone get shot there where they were shooting.
> THOMAS: [Y]eah.
> OFFICER: [A]nything.
> THOMAS: [Y]es, my friend got killed and the other one got shot[.]"

¶ 17 When confronted with this statement, Thomas acknowledged that he recalled giving those answers but clarified, "that was after the fact, after I told y'all that I practically seen somebody and I said that was the shooter because that's what my friend said." Asked by the State whether the person he circled was the shooter, Thomas said: "I told y'all that's what [Mixon] told me who did the shooting." Thomas testified that he recognized the person he circled in the photo because "I been knew him," and maintained that the shooter was not Johnson. "I didn't technically see him do anything, I seen somebody with a mask shooting my friend." He repeatedly said he based his identification on what Mixon told him, adding that the shooter had "[l]ight skin." To a question whether the same person he saw "out on the street shoot Torey and Delo" was in court, Thomas said, "Yes."

¶ 18 Mixon testified that he had known Johnson for "a few years," they were friends, his family knew Johnson's family, and he had visited Johnson's house. At the time of the trial, Mixon's sister was dating Johnson's brother and had a child together.

¶ 19 Around the shooting, Mixon had been getting into trouble, smoking marijuana "a lot" and drinking "a lot." Mixon admitted to having been drinking on the day he got shot, though he did not specify how much, and he admitted to having just bought a cigar for the purpose of "roll[ing] a blunt" and smoking with Thomas. It was daylight as he and Tyler neared Thomas's house. Mixon noticed a black car but paid no attention to it. Thomas appeared on his porch and all at once looked "like he was shocked." Startled, Mixon spun around to find a gun about a foot from Tyler's back.

¶ 20 Mixon did not see the shooter. He was scared, traumatized, and preoccupied with the gun. He repeatedly testified that he "don't know who it was holding the gun." When he turned, "all I seen was the gun, shots went off[,] and I blinked out." Mixon heard seven shots, fell to the ground face-first, and saw the shooter run toward the black car, which drove off. Mixon could not recall what he had told Thomas when he came to help. Mixon remained "scared and traumatized," continuing to fear for his safety. He felt pain in his "left buttocks." Asked if he knew who shot him, Mixon said, "I really don't." Asked if he felt bad for identifying someone who did not shoot him, he said, "That's what I've been telling the State."

¶ 21 Mixon's trial testimony diverged from his statements to investigators on the night of the shooting. The trial record does not reveal how intoxicated or medicated Mixon was in the aftermath of the shooting. (An assistant state's attorney testified that he confirmed with Mixon's nurse how Mixon had received medication as recent as 4:30 a.m. before the videotaped interview from his hospital bed.) Sometime after the shooting, Mixon spoke with detectives and named Johnson as the shooter. At 4 a.m., two other detectives administered a photo array. Mixon circled Johnson's photo and wrote "Wolcott Antrell."

¶ 22 About six hours later, an assistant state's attorney (ASA) spoke with Mixon from his hospital bed and made a 1 minute, 59 second video, which was introduced into evidence. Mixon said he turned around when shots were fired and saw Johnson about two to three feet away. He told Thomas, "Trell shot me." At trial, Mixon denied that Johnson shot him and that his family ties to Johnson had nothing to do with his recantation.

¶ 23 Dr. Ponni Arunkumar, the Chief Medical Examiner of the Cook County Medical Examiner's Office, testified she conducted the autopsy on Tyler. She said it showed five gunshot wounds, none fired at close range.

¶ 24 In his defense, Johnson called his mother Dorothea Morris and Kennedi Myles, an ex-girlfriend, both of whom saw him on the day of the shooting. Johnson visited a grandmother's

house, where his mother was with his daughter. His mother saw him pick up his daughter but could not recall what time that occurred. She did not mention seeing Myles. Myles recalled meeting Johnson at a grandmother's house but did not mention seeing his grandmother. Johnson's cousin, Vernon Johnson, who was on house arrest, was there, as was Vernon's girlfriend. At one point, Johnson and Vernon Johnson were on the porch. Shortly after arriving, Myles heard gunshots, and Johnson quickly came inside.

¶ 25 Myles said they left Johnson's grandmother's house when the sun was about to set but did not know the time. The State reminded Myles that she had told an investigator she had arrived home between 6 p.m. and 7 p.m. Myles reported this timeline in a written statement, saying she got home around 7 p.m. or 7:30 p.m. Based on these statements, she said that the gunshots she heard would have been around 3:30 p.m. She said that Johnson left her house later that night, around 8 p.m. or 9 p.m., but she could not remember where she and Johnson were around 7:30 p.m.

¶ 26 While deliberating, the jury asked for transcripts of testimony from Washington and Laster as well as transcripts of testimony from Morris and Myles. The jury also asked about the definitions of "intent" and "great bodily harm." The jury returned a split verdict, finding Johnson guilty of the first degree murder of Tyler and not guilty of the attempted first degree murder of shooting Mixon.

¶ 27 In a posttrial hearing, Johnson argued that the evidence was insufficient to convict, owing to the lack of physical evidence and the contradictory trial testimony. Johnson also argued that the trial counsel provided ineffective assistance by failing to call Vernon Johnson. The trial court denied Johnson's motions and sentenced him to 55 years in prison.

¶ 28 ANALYSIS

¶ 29 Johnson argues that the State failed to prove him guilty of first degree murder beyond a reasonable doubt. To decide whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt, we review the sufficiency of the evidence in the light most favorable to the prosecution. *People v. Lloyd*, 2013 IL 113510, ¶ 42. A reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or witness credibility. It will reverse only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt regarding the defendant's guilt remains. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 30 No physical evidence linked Johnson to the crime. He did not confess. The State presented no evidence of motive. The case hinges entirely on the testimony of the four eyewitnesses. In *Biggers*, 409 U.S. 188, the United States Supreme Court set out factors to protect defendants from convictions based on "the likelihood of misidentification," including (i) the opportunity to view the perpetrator during the crime, (ii) the degree of attention, (iii) the accuracy in reporting prior descriptions of the perpetrator, (iv) the level of certainty at the time of identification, and (v) the length of time between the crime and the identification. *Id.* at 199-200. We evaluate each factor for the likelihood of misidentification.

¶ 31 *Opportunity to View Offender at Time of Offense*

¶ 32 The first *Biggers* factor—the witness's ability to view the offender at the time of the offense—is the most critical, although no individual factor dictates the outcome. See *In re*

O.F., 2020 IL App (1st) 190662, ¶ 32. The distance, lighting conditions, attentiveness, quality, length of time of the view, and presence of distractions—among other variables—can directly affect the reliability of what the witnesses claim to have seen. See *People v. Lerma*, 2016 IL 118496, ¶ 26 (noting "the stress of the event itself" and "use and presence of a weapon" can impact the witness's opportunity to view and study offender). In addition, without circumstantial evidence, the brevity of the encounter has a heightened impact on the risk of misidentification. See *People v. Herrett*, 137 Ill. 2d 195, 204-06 (1990) (circumstantial evidence, including proceeds of robbery, confirmed identity where witness had "several seconds" to observe attacker from "only two feet").

¶ 33 Here, each eyewitness caught a fleeting glimpse of the shooter, mainly from behind, amid an extremely stressful situation. Over 40 years of extensive research on eyewitness identification shows that the presence of a weapon commands an eyewitness's attention and diminishes the ability of the eyewitness to describe or recognize the offender, a phenomenon known as the weapon-focus effect. See Jonathan M. Fawcett, Kristine A. Peace, & Andrea Greve, *Looking Down the Barrel of a Gun: What Do We Know About the Weapon Focus Effect?*, 5 J. of Applied Res. in Memory & Cognition, 257, 261 (2016) ("[E]ach witness account must be scrutinized to determine whether weapon focus is relevant ***."); *State v. Henderson*, 27 A.3d 872, 921-22 (N.J. 2011) (noting stress, weapon focus, and duration as factors that interfere with eyewitness's ability to view and study offender).

¶ 34 Thomas told police he had a clear and unobstructed view but later admitted that his poor eyesight made it difficult for him to see the shooter's features. At trial, he could not even say if the shooter was a man or a woman. Likewise, Mixon described Thomas as appearing so "shocked" he could not speak. Contrary to the dissent's implication (*infra* ¶¶ 121, 123), Thomas consistently maintained he "practically" saw the shooter, noticing just two details—race (a light-skinned African American) and clothing (black jacket and a tight hoodie). See *infra* ¶¶ 64, 87 (majority analysis regarding Thomas).

¶ 35 Robert Laster had the next-best view of the shooter, but due to the stress of the moment and the 30-foot distance between them, he could discern little more than the shooter's skin color and clothing. Laster, concerned about his safety, crouched down and testified he did not look at the shooter's face. Laster's wife, Washington, seated to her husband's right, also crouched down. She could not see what the shooter wore and said that his baseball cap partially blocked her view of his face. Neither knew Johnson.

¶ 36 Mixon was closest but provided the most conflicting accounts. Initially, in the hospital, he said he turned on hearing shots and saw Johnson. His account, however, lacked specifics, including duration. At trial, he described how he turned to see the gun on Tyler's back just before shots went off, was scared and traumatized, and "blinked out." We do not know what medications he had been administered for his injury before he spoke with investigators. But we know that Mixon said he was drinking that day and highlighted how, at that time, he generally drank and smoked marijuana "a lot." See *Henderson*, 27 A.3d at 921 (noting influence of alcohol or drugs as relevant to ability to observe). Contrary to the dissent's contention otherwise (*infra* ¶ 129), the record establishes Mixon's impairment at the scene and does not clear that cloud by the time of the hospital interview. Only by disposing of these facts out of hand does the dissent restore Mixon's account. Compare *infra* ¶ 114 (arguing majority dismisses critical facts), with *infra* ¶ 129 (asserting "I reviewed" record and "saw no visible signs of impairment").

¶ 37 This factor benefits the defense. The shocking suddenness of the shooting—together with the weapon focus effect, distance, obscured views (shooter behind the victims and the victims between the shooter and the other three witnesses), stress level, and shooter's rapid movement—adversely impacted each eyewitness's ability to view and perceive the shooter.

¶ 38 *Degree of Attention*

¶ 39 Again, the weapon focus effect and the trauma of the shooting compromised Laster's, Washington's, and Mixon's attention.

¶ 40 Mixon's trial testimony indicates that he was under inordinate duress, fixated on the gun, and felt frightened and traumatized. He admitted to drinking earlier and "blink[ing] out" on seeing the gun. He insisted that he never had a chance to look beyond the gun before being shot. Mindful of these facts, Mixon's account conveys a justifiable risk of misidentification.

¶ 41 Even disregarding his trial testimony, Mixon's statements to the ASA while hospitalized lacked specifics on attentiveness. He recounted that he "looked back. Shots were fired," suggesting his glance toward the shooter coincided with his being shot. Yet, he stated, "Trell shot me," with no elaboration whatsoever.

¶ 42 Tellingly, the testimony of the Cook County Medical Examiner contradicts Mixon. In his statement to the ASA, Mixon described the shooter as about two to three feet away. Similarly, at trial, Mixon said the shooter stood a foot away with the gun against Tyler's back. The Cook County Medical Examiner, however, testified that no physical evidence indicated the gun was fired from close range. The discrepancies between Mixon's accounts and the medical examiner's independent findings signal that stress and the weapon focus effect distorted Mixon's perception and memory.

¶ 43 Laster's attention was directed to protecting everyone in the car. He shouted for safety, huddled down, and did not see the shooter's face. Washington's attentiveness was rattled by fear as well. That she recalled generalities reflected a lack of attentiveness.

¶ 44 Thomas testified about "practically see[ing]" the shooter and relying on what Mixon told him, classifying his degree of attention as low.

¶ 45 This factor favors the defense.

¶ 46 *Accuracy of Prior Description of Offender*

¶ 47 Neither Mixon nor Thomas gave a prior description of the shooter. While in the hospital, Mixon identified Johnson but explicitly retracted that statement at trial. Thomas, too, disavowed having seen Johnson, emphasizing he repeated to police what Mixon had told him at the scene.

¶ 48 As for Washington and Laster, police took a joint description after the shooting: "[M]ale black, medium brown complected between the age of 16 and 25, about [five-six], [five-nine], between [125], 150 pounds with black hair in a faded type of haircut." These characteristics are both general and vague (for example, the nine-year spread in age) and would apply to tens of thousands of local young men.

¶ 49 At trial, the couple offered minimal to no descriptions. Laster said the shooter wore white pants, a black bomber jacket, and a black cap. Washington gave conflicting descriptions of the shooter's skin color. At the photo array, Washington justified her choice with new revelations: the shooter had caramel skin (statement to police was "medium brown complected") and a big

nose and big lips (not in statement to police), which is probative of misidentification. Similarly, at trial, she could only say the shooter wore white jeans and a baseball cap.

¶ 50 Our supreme court has found that "a witness' positive identification can be sufficient even though the witness gives only a general description based on the *total impression* the accused's appearance made." (Emphasis added.) *People v. Slim*, 127 Ill. 2d 302, 309 (1989); see *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 28 ("general or imprecise description *** does not necessarily render the witness's identification unreliable"). Glaringly absent from the trial record is any evidence substantiating the validity or accuracy of the original descriptions. Critically, the accuracy of a prior description favors defendant unless the State's witness gives a description at trial, which did not occur here. *In re O.F.*, 2020 IL App (1st) 190662, ¶¶ 48-50.

¶ 51 This factor also weighs in Johnson's favor.

¶ 52 *Level of Certainty*

¶ 53 The level of certainty should be applied cautiously, so as not to overshadow other critical aspects of the identification process because a witness's confidence alone does not determine accuracy. Shari R. Berkowitz *et al.*, *Convicting With Confidence? Why We Should Not Over-Rely on Eyewitness Confidence*, 30 Memory 1, 2 (2020), available at https://escholarship.org/content/qt2h1562k3/qt2h1562k3.pdf?t=qnyefj [https://perma.cc/M6JN-BLM6] (noting study of first 250 DNA exonerations showed "mistaken eyewitness identifications occurred in the largest subset: 190 (76%) of [the] cases"). Though the continued validity of this factor has been challenged, it remains relevant. See *Macklin*, 2019 IL App (1st) 161165, ¶ 77 (Hyman, J., dissenting) ("The reliability of a witness's [degree of] certainty about his or her identification has been roundly criticized in this court and elsewhere."); *People v. Lemcke*, 486 P.3d 1077, 1081 (Cal. 2021) (exercising supervisory power to omit certainty from pattern instruction unless requested by defendant); *State v. Derri*, 511 P.3d 1267, 1283-84, 1288 (Wash. 2022) (noting research undermines presumed value of certainty as factor and holding "relevant, widely accepted scientific evidence" must inform reliability analysis of identification procedures).

¶ 54 Ironically, the State's most certain witness was Laster, who could not identify Johnson twice. Robert Laster told officers he had a good view of the shooter and could identify him. Yet, he failed to identify anyone in the photo array and identified a person other than Johnson in the lineup. While Washington described being "pretty sure" about her initial description when presented with photos of suspects, she and Laster identified different people as the shooter despite having sat near each other.

¶ 55 Although Mixon informed the ASA that the shooter was Johnson, at trial, he testified unequivocally that he did not see the shooter and Johnson was not the shooter. For his part, while Thomas identified Johnson in a photo array, he testified at trial that he never saw the shooter, saying he repeated to police what Mixon told him.

¶ 56 Whatever value this factor has favors Johnson.

¶ 57 *Length of Time Between Crime and Identification*

¶ 58 The final factor examines the time between the offense and the identification. Mixon identified Johnson in a photo array while hospitalized shortly after the shooting. Thomas

identified him the next day. Washington identified Johnson in a photo array nine days after the shooting, which, while not ideal from a recollection standpoint, falls within an acceptable range under Illinois law. See *Macklin*, 2019 IL App (1st) 161165, ¶ 88 (Hyman, J., dissenting) ("Despite Illinois cases suggesting otherwise, the reality is that an interval of 10 days before a lineup can alter and impair a person's memory."). Finally, Laster failed to identify Johnson as the shooter.

¶ 59 This factor leans in favor of the State, though it is of little value here due to the many deviations between what was said in the shooting's aftermath and the eyewitness's trial testimony.

¶ 60 *Summary of Biggers factors*

¶ 61 The four eyewitnesses' statements before and during the trial attest that the rapid shooting's compressed timeframe left little room for them to observe or process. And this, in turn, left little for the jury to sift, weigh, and assess before drawing inferences.

¶ 62 Under *Biggers*, we decide the likelihood of misidentification, as assessed by the totality of the circumstances surrounding the identifications, drawing rational inferences in the State's favor. See *Biggers*, 409 U.S. at 199-200 (*Biggers* factors "to be considered in evaluating the likelihood of misidentification"). All but one factor favors Johnson. Under the totality of the circumstances, the State's meager evidence on the *Biggers* factors was legally insufficient to sustain the conviction.

¶ 63 To begin, the State's characterization of Robert Laster as credible ignores that he failed to identify Johnson twice: at the photo array and in the lineup. No reasonable trier of fact could rely on Laster to prove Johnson guilty beyond a reasonable doubt. See *In re Christian W.*, 2017 IL App (1st) 162897, ¶¶ 78-80 (reversing where witness testimony, "concerns [were] too many and run too deep for us to have any confidence"). The State's startling disregard for the likelihood of misidentification by Laster detracts from its position on the remaining eyewitnesses.

¶ 64 Despite the State's efforts to bolster Thomas's credibility, Mixon telling Thomas that Johnson shot him is probative. In addition, his poor eyesight seriously undermines his pretrial statement. See *People v. Kilgore*, 59 Ill. 2d 173, 175 (1974) (reversing conviction where, among others, witness "being nearsighted and without glasses, could not identify the man, nor could she state whether the man was black or white"). Thomas maintained he "practically" saw the shooter, could not determine the shooter's gender, and offered no identifying specifics other than the shooter was a light-skinned African American. Because of these facts alone, Thomas's identification cannot stand.

¶ 65 This leaves Mixon and Washington. While "[i]t is well established that a single witness's identification is sufficient to sustain a conviction," misidentification hinges on considering all *Biggers* factors. Viewing the evidence in the light most favorable to the prosecution, a rational juror might have given more weight to Mixon's statement to the ASA than his trial testimony, due to Mixon's familiarity with Johnson and familial ties. But inferring that Mixon recognized Johnson remains improbable, even more so considering the weapon focus effect (recall that Mixon said he "blinked out").

¶ 66 Mixon's terse statement to the ASA lacked any basis to evaluate reliability:

"MIXON: [Thomas] came out the house, we on the corner, we ain't cross yet. [Thomas] come out the house. [Thomas] yelled. I looked back. Shots were fired.

STATE: Okay, so you looked back. And when you looked back, what did you see?

MIXON: I seen Antrell Johnson."

¶ 67 Rather than confronting the absence of details, the State endeavors to discredit Mixon's trial testimony and quibbles with Johnson's reliance on *Lerma*. But its response does not articulate a reason under *Biggers* to reject his unequivocal recantation at trial.

¶ 68 So, too, with Washington. She identified Johnson after scooting down in her seat and seeing, for seconds, a person wearing a baseball cap and his face partially obstructed. Along with Laster, she offered a vague description at the scene. Later, at the photo array, after staring at the photo she had selected, which was of Johnson, she mentioned for the first time the size of his lips and nose as "big," details that could be ascribed to hundreds of thousands of young black men. Further, she said Johnson's skin was "caramel" (at photo array and trial) and "medium brown complected" (at scene), which contradicts Thomas's "light skin" characterization. See, *e.g.*, Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 16 (2001) (meta-study concluding, for example, blacks better recognize black faces). But see *infra* ¶ 140 (describing Washington's different descriptions as "perfectly consistent"). Her identification lacks any distinct or unique identifiers, which limits the value of her identification. Furthermore, unlike her husband, Washington did not participate in a lineup, a crucial investigative step that would have given credence to her selection of Johnson at the photo array. Its omission is both conspicuous and telling.

¶ 69 Considering, under the *Biggers* factors, the testimony of each witness, we conclude that no rational trier of fact could find Johnson was the shooter beyond a reasonable doubt. A rational trier of fact could not rely on the out-of-court incantations of Johnson's name alone to convict him. Yet, the sum of what little the State offered failed to prove not just the attempted murder of Mixon, as we know from the split verdict, but also that it was Johnson who shot Tyler.

¶ 70 *Regarding the Dissent*

¶ 71 Question Before Us

¶ 72 In legal proceedings and other contexts, the framing of an issue influences the response and outcome. So, as the *Biggers* Court commands (*Biggers*, 409 U.S. at 199), we weigh the " 'totality of the circumstances' " to evaluate the likelihood of misidentification, as opposed to the dissent's opposite approach, which evaluates the likelihood of identification. See generally Katie Kronick, *Forensic Science and the Judicial Conformity Problem*, 51 Seton Hall L. Rev. 589, 611 (2021) (noting research shows judges, like all people, "are susceptible to all five cognitive biases," including hindsight bias). We must take the State's case on its own terms and draw reasonable inferences in its favor, but we must not then speculate about how the State might now act with a second bite at the apple. *Cf. infra* ¶¶ 144, 147, 150 (pondering if State could "test" or "refute" failures in proof). For the dissent to say that we somehow have acted "*sua sponte*" in analyzing whether the State's proof was so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt is an unfortunate mindset that fundamentally misunderstands our appellate role. See *Brown*, 2013 IL 114196, ¶ 48 ("Although these determinations by the trier of fact are entitled to deference, they are not conclusive. Rather, a

criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. [Citations.] This same standard of review applies regardless of whether the defendant receives a bench or jury trial.").

¶ 73 The dissent concludes that "all three [eyewitnesses] positively identified Johnson as the shooter shortly after the shooting occurred." *Infra* ¶ 156. This confirms what is known from the outset: some, but not all, eyewitnesses identified Johnson, it does not end the inquiry, as the dissent believes, but rather marks the beginning. See *Stovall v. Denno*, 388 U.S. 293, 302 n.6 (1967) (citing legal literature to note "widely condemned" nature of showups); *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977) (considering, among other things, scholars' views while adopting constitutional rule on identification evidence); *Lerma*, 2016 IL 118496, ¶ 24 (citing state supreme courts as collecting scientific studies relevant to identification evidence).

¶ 74 The dissent cites case law to support discrete facets of the testimony as if this suffices under *Biggers*. After over 50 years of case law, one can find support for nearly any proposition. That goes for the majority, too. Like fingerprints, however, no two cases involving eyewitnesses to a shooting share precisely the same facts affecting perception. Our legal analysis draws primarily on *Biggers*, the evidence in this case, and the myriad interconnected "estimator variables," the formal term academics use to refer to factors outside the criminal justice system that affect eyewitness perception.

¶ 75 *Biggers* acknowledged that five factors were incomplete by inserting the word "include" before enumerating them. *Biggers*, 409 U.S. at 199 ("the factors to be considered in evaluating the likelihood of misidentification *include*" (emphasis added)). Since *Biggers*, additional estimator variables have been recognized, including, among others: (i) anxiety and stress, (ii) age, (iii) physical and mental health condition, (iv) past experiences and background, (v) race, (vi) collaboration, (vii) memory issues, and (viii) intoxication or drug use, along with (ix) nature of event as violent or traumatic, (x) weapon focus, (xi) environmental conditions, distance, and visibility, (xii) lack of distinctive characteristics, (xiii) police procedures, (xiv) disguises or obstructive clothing, and (xv) sequence of the event.

¶ 76 We have discussed the interplay of many of these estimator variables because, in isolation, they tell a different story than when viewed, as they must be, collectively. See, *e.g.*, *supra* ¶¶ 31-36 (variables (i), (vii), (ix), (x), (xi), (xiv), (xv)), ¶ 40 (variables (iii), (viii)), ¶ 48 (variable (vi)), ¶ 49 (variable (v)), ¶ 54 (variables (xii), (xiii)); see generally Henry F. Fradella, *A Synthesis of the Science and Law Relating to Eyewitness Misidentifications and Recommendations for How Police and Courts Can Reduce Wrongful Convictions Based on Them*, 47 Seattle U. L. Rev. 1, 22 (2023) (noting *Biggers* factors "depend on complex psychological issues pertaining to perception and memory—some of which are quite counterintuitive").

¶ 77 The dissent does not outright reject a full analysis of these factors, preferring to waffle between criticizing the majority for discussing them and describing at least some variables as "widely accepted." *Infra* ¶ 145. In leveling its critique, the dissent overlooks Johnson's briefing on *Biggers* and *Lerma* and our appellate courts' regular reference to academic works to inform a deeper understanding of issues. *E.g.*, *In re Marriage of Cotton*, 103 Ill. 2d 346, 357-59 (1984) (holding "somewhat contradictory order" on child custody was not against manifest weight of evidence when read against record, caselaw, and academic literature); *People v. Bush*, 2023 IL 128747, ¶¶ 60-61 (rejecting as "arbitrary" a ruling on admissibility of statement given statute, caselaw, and academic literature).

¶ 78 Simply put, no "eyewitness exception" bars appellate review of Johnson's sufficiency challenge. As even the dissent's citations illustrate, appellate courts increasingly rely on social science research in eyewitness identification cases to prevent wrongful convictions. *Infra* ¶ 145. And, as we will discuss, eyewitness testimony carries immense weight in the courtroom, contributing to more wrongful convictions than any other cause. *Infra* ¶ 90. Recognizing this, courts turn to scientific studies to pinpoint the issues that undermine accuracy, such as the misplaced confidence of witnesses.

¶ 79 This is a matter of procedural fairness and is fundamental to the result due to the unreliability of human perception. To see how, consider the dissent's malleable concept of common sense. The dissent cites a 25-year-old decision, which in turn cites a 55-year-old decision, for the proposition that familiarity renders the other factors less relevant. *Infra* ¶ 120 (citing *People v. Brooks*, 187 Ill. 2d 91, 130-31 (1999), citing *People v. Robinson*, 42 Ill. 2d 371, 375-76 (1969)); see *infra* ¶ 124 (noting how Mixon knew Johnson before). But decades ago, "relevant research was in its relative infancy." *Lerma*, 2016 IL 118496, ¶ 24. Since then, "we not only have seen that eyewitness identifications are not always as reliable as they appear, but we also have learned, from a scientific standpoint, why this is often the case." *Id*. Older cases in this area of the law must be considered with heightened scrutiny.

¶ 80 To inform legal reasoning properly, common sense involves examining societal and individual norms and behaviors rooted in human nature. As the essayist William Hazlitt remarked, "Common sense, to most people, is nothing more than their own opinions." For that and other reasons, we follow decades of caselaw, articles in legal and research journals, and "widely accepted" science on eyewitness accounts. See *id.* (science of eyewitnesses "largely unfamiliar to the average person" and includes "counterintuitive" principles (internal quotation marks omitted)); see also *Derri*, 511 P.3d at 1288 (holding "relevant, widely accepted scientific evidence" informs reliability analysis of identification procedures).

¶ 81 Finally, we disagree over what inferences support the State's position. Only reasonable ones do. To be reasonable, an inference must arise from a realistic evaluation of the evidence, using rational and logical reasoning drawn from established facts, avoiding suspicion, imagination, conjecture, or subjective impressions. *People v. Davis*, 278 Ill. App. 3d 532, 540 (1996) ("If an alleged inference does not have a chain of factual evidentiary antecedents, then within the purview of the law it is not a reasonable inference but is instead mere speculation."). Asserting, as the dissent does (*infra* ¶ 155), that the jury picked a side when faced with conflicting evidence is error. A jury verdict standing alone is never conclusive. *Brown*, 2013 IL 114196, ¶ 48. As a reviewing court, we assess the factual basis of a witness's identification, whether made in court or out. See *id.* And then, drawing reasonable inferences in the State's favor, we set aside a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of guilt. *Id.* The dissent slams the door on performing the review *Brown* sets out.

¶ 82 Face-Value Acceptance of Eyewitness Accounts

¶ 83 The dissent accepts the eyewitnesses' accounts to support the jury's split verdict (i) even though the State failed to satisfy its evidentiary burden under *Biggers*, (ii) even though the eyewitnesses contradicted one another and themselves, and (iii) even though the State presented no physical evidence or evidence of motive by a masked shooter.

¶ 84 The record reveals the following portrait. Face partially covered, the shooter darted to and from the scene, much to the admitted shock of Thomas, Mixon, and Washington. Consider that (i) the whole incident unfolded in seconds, (ii) with the eyewitnesses 30 or more feet away, except for Mixon, who thought the shooter was within a foot or two, (iii) their view hindered by obstructions, (iv) of a fast-moving person, (v) about whom they could not identify any distinctive features, (vi) while in emotional states of stress and anxiety, (vii) from an unexpected, sudden, and violent act, (viii) that left no time for observation, let alone comprehending what was happening. Based on the unique interplay of these variables, each eyewitness's likelihood of misidentification becomes no longer a possibility but an inevitability. Yet the dissent's analysis glides over these facts and instead clings to uncertain evidence and weak reasoning.

¶ 85 The dissent also grants itself wide latitude in recounting the evidence. Examples: explosive, sudden violence becomes an "incident last[ing] less than a minute" (*infra* ¶¶ 119, 126) (analyzing Thomas and Mixon testimony); looking down the barrel of a loaded gun becomes an "adequate opportunity" (*infra* ¶ 126) (describing Mixon's testimony); uttering a name becomes an "immediate[ ]" identification (*infra* ¶¶ 128, 130) (describing Mixon's out-of-court statements); four eyewitnesses become "all three" (*infra* ¶¶ 114, 156) (summarizing own analysis); a height-and-weight description that is wrong becomes "slightly off" (*infra* ¶ 140) (describing Laster and Washington's initial description to officers); and a witness providing "additional details" over time becomes "perfectly consistent" (*infra* ¶ 140) (describing arrest report and Washington's statements at scene and photo array). Under such an interpretation, the *Biggers* framework crumbles.

¶ 86 What the dissent calls an "adequate opportunity" amounts to a presumption about witness certainty. See, *e.g.*, *infra* ¶¶ 128, 118 (asserting Mixon "immediately" accused Johnson and that Thomas and Washington "positively" identified Johnson in array). That Washington was frightened—looking across car seats and actively hiding from the masked shooter streaking past her unexpectedly—carries no weight for the dissent because it was " 'pretty much daylight.' " *Infra* ¶ 138 (quoting Washington). Washington's opportunity to see the shooter was no better than Laster's. Yet, the dissent disregards Laster and accepts Washington, who, after selecting Johnson from the photo array, commented on his skin color and big lips and big mouth and was never asked to attend a lineup, unlike Laster. *Infra* ¶ 143. That Mixon had been drinking "a lot" and saw only the gun carries no weight for the dissent because, out of court, at least, he had named Johnson, though he never described the shooter afterward or to the jury and unequivocally recanted. *Infra* ¶ 129. Indeed, the dissent remarkably proclaims Mixon had "no need" to provide factual details or description (*infra* ¶ 130), though *Biggers* says otherwise. *Biggers*, 409 U.S. at 199 (directing courts to consider " 'totality of the circumstances' ").

¶ 87 Surprisingly, the issue of Thomas's eyesight carries no weight for the dissent. *Infra* ¶ 121. We know the shooter ran up behind Tyler and Mixon, placing the two of them between Thomas and the shooter. It defies belief that Thomas could make an identification when the shooter's head and mouth were covered and Tyler and Mixon were in his line of sight. Recall, Thomas said he did not know whether the shooter was a man or a woman. Likewise, the dissent's account depends on the exact positions of Thomas, Tyler, Mixon, and the shooter, details not in the record. Without those details, the dissent has no basis to infer that, standing on the porch, Thomas could identify the shooter. Indeed, the paucity of details supports Thomas's insistence that Mixon told him the shooter was Johnson.

¶ 88 As concerns the case on which the dissent principally relies, *People v. Brooks*, 187 Ill. 2d 91, it is distinguishable in every relevant respect. In *Brooks*, an "adequate" identification was possible where an unmasked offender "lean[ed] forward" in the back seat of a car "slowly" moving past the eyewitness yards away. *Id.* at 130. Adequate means "sufficient for a specific need or requirement," "of a quality that is acceptable but not better than acceptable," and "lawfully and reasonably sufficient." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/adequate (last visited Oct. 31, 2024) [https://perma.cc/CA36-L7KX]. Considering the vast disparity between the circumstances here and in the *Brooks* case, none of the eyewitnesses had an "adequate" identification.

¶ 89 Next, the dissent relies heavily on Mixon's and Thomas's familiarity with Johnson. *Biggers* contains no exception for eyewitness familiarity. *Biggers*, 409 U.S. at 199-200 (factors apply to all eyewitness accounts). The jury needed to know what Thomas and Mixon purportedly saw and heard to reasonably credit the initial out-of-court identifications. *Id.* That did not happen. Without it, there is no way of knowing the reliability of their initial identifications. Thomas testified that his identification came from Mixon, not independently of Mixon, which, as already explained, aligns with the trial evidence. Similarly, in light of Mixon's recantation at trial, the credibility of Mixon's statements while hospitalized after the shooting become highly questionable, as the absence of specific details undermines the reliability of the initial identification and its accuracy. Crucially, Mixon thought he was shot at close range, which directly contradicts the testimony of the chief medical examiner that no shots were fired from close range. This discrepancy creates grave doubt as to whether Mixon even saw the shooter, who approached from behind him.

¶ 90 The literature on eyewitness misidentification highlights how vague or incomplete accounts can lead to wrongful convictions and erroneous conclusions about an offender's identity. Scientific advances "have confirmed that 'eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined.' " *Lerma*, 2016 IL 118496, ¶ 24 (quoting *State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 699 N.W.2d 582); see *Macklin*, 2019 IL App (1st) 161165, ¶ 77 (Hyman, J., dissenting) ("The reliability of a witness's [degree of] certainty about his or her identification has been roundly criticized in this court and elsewhere."). Furthermore, the dissent runs afoul of our supreme court's prohibition on overemphasizing certain *Biggers* factors or, for that matter, any of the estimator variables, to the exclusion of others. *People v. Herron*, 215 Ill. 2d 167, 191 (2005) (prohibition on using "or" or "and" between the factors in Illinois Pattern Jury Instructions, Criminal, No. 3.15, Committee Note (approved July 28, 2017) where more than one factor is relevant (internal quotation marks omitted)).

¶ 91 We now know "[e]mpirical evidence and an array of DNA exonerations have confirmed that familiarity does not eliminate misidentification problems." James E. Coleman Jr. *et al.*, *Don't I Know You? The Effect of Prior Acquaintance/Familiarity on Witness Identification*, The Champion, April 2012, at 52, 54. Despite the dissent's insistence, the other *Biggers* factors do not become less relevant. *Infra* ¶¶ 145-46. "[S]ituational factors, the typicality effect, own-race bias, and the inaccuracy of eyewitness confidence" persist in plaguing eyewitness identifications of familiar people. Coleman, *supra*, at 54.

¶ 92 Moreover, the dissent misinterprets the implications of relevant caselaw and social science research, suggesting they somehow mitigate the need for witnesses to offer the bases for their

identifications. *Infra* ¶¶ 145-46. The dissent contends that "social science research" bolsters reliance on prior familiarity because some jurisdictions have added prior familiarity as a factor under *Biggers*. *Infra* ¶ 146. But "because information about a familiar individual's identity is already stored in an identifier's brain, both contextual information and expectations triggered by surroundings or circumstances associated with the familiar person 'prime' the identifier's brain to more likely misidentify a stranger as the familiar person." Coleman, *supra*, at 54. Thus, conflating an eyewitness's willingness to make an identification with his or her reasons or bases introduces error. *Id.* at 53. DNA has exonerated defendants in numerous cases involving eyewitnesses with prior experience with the accused. *Id.* at 56 n.32. We must not allow evidence to be insulated from meaningful appellate scrutiny.

¶ 93 Regarding confidence, the dissent cites " 'an appropriately administered lineup' " and similar articles that have negligible relevance to this case. *Infra* ¶ 147 (quoting John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 10, 55 (2017) (concluding, "[a]ccording to the available data, the relationship between confidence and accuracy for an initial [identification] from an appropriately administered lineup is sufficiently impressive that it calls into question the very notion that eyewitness memory is generally unreliable")).

¶ 94 Finally, notwithstanding the dissent's implication (*infra* ¶ 148), neither *Lerma* nor *Macklin* dictate that defendants present "expert testimony" at trial before contesting their convictions on appeal. See *Lerma*, 2016 IL 118496, ¶ 24 (citing other states' supreme courts as collecting relevant scientific studies). Instead, while entitled to deference, the factfinder's findings are never conclusive when "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt." *Brown*, 2013 IL 114196, ¶ 48. Again, appellate review has long relied on authoritative articles to better understand an issue before them.

¶ 95 Role of Jury

¶ 96 Against this backdrop, we find troubling the dissent's belief that our analysis somehow has usurped the jury's "prerogative" (*infra* ¶ 131) and "invades the province of the jury" (*infra* ¶¶ 123, 131). The quest for justice does not end with the jury's verdict. Unfettered reverence for the jury's verdict, selective quotations notwithstanding, elevates error to the status of infallibility and invades appellate review, which exists precisely to correct errors by the trier of fact. *Brown*, 2013 IL 114196, ¶ 48 ("Although these determinations by the trier of fact are entitled to deference, they are not conclusive."). While we defer to a jury as the trier of fact, that deference does not replace our role of oversight. *People v. Coulson*, 13 Ill. 2d 290, 296, 298 (1958) (duty of reviewing court to "always" set aside verdicts resting on ostensibly conflicting evidence that proves "improbable, unconvincing and completely unsatisfactory").

¶ 97 The dissent relies on weak links in the chain of Illinois cases since *Biggers*. *Infra* ¶ 156 (summarizing acceptance of Thomas, Mixon, and Washington testimony). Again, our inquiry follows the *Biggers* mandate, which serves to protect against the unreliability of human perception and the all-too-common dangers of misidentification.

¶ 98 Split Verdict

¶ 99 For the dissent, the jury's split verdict has little significance. *Infra* ¶ 151. It is naïve to suggest that the jury's verdict regarding the shooting of Tyler can be entirely divorced from its verdict regarding the shooting of Mixon, especially when the same evidentiary foundation

underlies both. The acquittal signals potential doubts about the reliability of the evidence and the credibility of the witnesses. Plus, the jury's request for clarification on the definition of "great bodily harm" suggests the jury was grappling with sufficiency of the State's proof. Thus, in evaluating the sufficiency of the evidence as a whole, the split verdict reflects the jury's doubts about the State's case.

¶ 100 Eyewitnesses Contradicted One Another and Themselves

¶ 101 The dissent downplays the contradictions riddling the eyewitnesses' accounts. For instance, Washington and Laster, who were seated near each other in the back seat of a car during the shooting, gave a joint description at the scene, but later identified different people as the shooter. They failed to offer specifics about the shooter's face. Regarding what the eyewitnesses said about the shooter's outfit: Was the shooter wearing a mask? Yes, Thomas testified. Or was it a hoodie pulled tight? Yes, again, said Thomas. Or was it a baseball cap? Yes, Washington and Laster testified. How about the color of the shooter's skin? No clue, Laster testified. Or medium brown, Laster and Washington said at the scene. Or caramel, Washington later testified. No, light skin, Thomas said on the stand.

¶ 102 Significantly, the dismissal of Laster's testimony (*infra* ¶ 143) is not only legally unsound but also fundamentally unjust. We know eyewitness testimony to be unreliable, which explains why *Biggers* imposes the necessity for careful scrutiny of each eyewitness. A fair assessment of guilt or innocence under the *Biggers* factors requires evaluating *all* the evidence, especially conflicting testimony, and *all* the eyewitnesses, not fixating on testimony that aligns with a particular narrative and giving short shrift to the rest. Brushing aside Laster's inability to identify the shooter while accepting Washington's photo identification—despite their nearly identical view of the shooting and the shooter and their joint statement to police—undermines Washington's identification as much, as if not more than, Laster's. Further compounding this doubt is the police's failure to invite Washington to participate in a lineup.

¶ 103 No Physical Evidence or Evidence of Motive

¶ 104 We should learn from cases of wrongful convictions based on eyewitness identification to avoid repeating errors in judgment. See, *e.g.*, Matthew Hendrickson, *Prosecutors Won't Oppose Certificate of Innocence for Man Convicted on Testimony of Legally Blind Witness*, Chi. Sun Times, May 30, 2024, https://chicago.suntimes.com/crime/2024/05/30/certificate-innocence-man-convicted-legally-blind-witness [https://perma.cc/FHC3-3T84] (vacatur of murder conviction which rested on, among other things, no physical evidence and a legally blind witness).

¶ 105 Lack of physical evidence or motive places immense pressure on the eyewitnesses' testimony to prove guilt beyond a reasonable doubt. See, *e.g.*, *People v. Rodgers*, 53 Ill. 2d 207, 213-14 (1972) (rejecting challenge to *Biggers* factor because "identification testimony was in part corroborated by the matching description of defendant's car with the car of the assailant"); *Herrett*, 137 Ill. 2d at 204-06 (circumstantial evidence, including proceeds of robbery, confirmed identity where witness had "several seconds" to observe attacker from "only two feet").

¶ 106 CONCLUSION

¶ 107 In making its assertions, the dissent overlooks key deficiencies in the eyewitness testimony and paints an incomplete picture of the facts. Eyewitnesses admitted they could not see the shooter's face or were uncertain in their identification. The dissent also fails to account for the recantations and shifting testimonies. All this, together with the split verdict acquitting Johnson of one shooting despite both victims being attacked simultaneously, raises serious doubts about the reliability of the identifications and the sufficiency of the evidence. No physical evidence and no forensic evidence—such as DNA, fingerprints, or ballistics—link Johnson to the shooting. Plus, the jury's request for transcripts of testimony and clarification on legal definitions during deliberations reflects their difficulty in reaching a conclusion based on the evidence. Confronted by the proper scrutiny of *Biggers* and its progeny—including *Kilgore*, *Brown*, and *Lerma*—the State's case unravels.

¶ 108 Because the State failed to prove Johnson guilty of first degree murder beyond a reasonable doubt, we need not address his claim that trial counsel provided ineffective assistance.

¶ 109 Reversed.

¶ 110 JUSTICE ODEN JOHNSON, specially concurring:

¶ 111 While I concur with the majority opinion, I write separately to express my disagreement with the dissent's decision to include photographic evidence from the trial court depicting readily identifiable private residences within the dissent.

¶ 112 I believe that the lengthy dissent (approximately 57 paragraphs long) is not particularly bolstered by the use of the photographs that, by the dissent's own description, clearly depict one of the witnesses' homes with distinctive characteristics. Indeed, the dissent explicitly describes the exact location and physical characteristics of the home. Additionally, the photographs also depict neighboring homes and a nearby church. While it is one thing for an evidentiary photograph to be used during trial and published to the jury, it is quite another thing for such photographs to be included in a published opinion of the reviewing court. In light of the fact that this is a murder case, my main concern is for the safety of the individuals who reside in those homes or attend the church. However, I must also pause at the privacy rights that may be implicated by persons who live in the pictured homes that were not part of this case. While there are no standards governing the use of trial court exhibits in published opinions, and indeed the United States Supreme Court has attached exhibits to its opinions (maps and photographs of inanimate objects), I believe that great care and caution should be exercised when using photographs that contain identifying characteristics such as an address or a very distinctive façade as those used here. Such photographs, regardless of whether they bolster a particular argument, should be subject to the same type of scrutiny that their admissibility is subject to in the first place—namely, whether the prejudicial effect outweighs any probative value. I believe that these types of photos do more public harm than good, as they publicly expose the residents of those homes to potential retaliation and danger. I therefore disagree with, and vehemently oppose, the use of the photographs in the dissent.

¶ 113 PRESIDING JUSTICE TAILOR, dissenting:

¶ 114 Three eyewitnesses in close proximity to the scene identified Antrell Johnson as the individual who shot and killed Taurean Tyler and shot and injured Deangelo Mixon on April 24, 2017, in the Englewood neighborhood of Chicago. One of the eyewitnesses "grew up" with Johnson and had known him for 10 years, a second eyewitness "knew" Johnson before the shooting and told police he "recognized" Johnson, and defense counsel conceded that the third eyewitness's testimony was "unimpeached." Nevertheless, the majority characterizes the State's evidence as "meager" (*supra* ¶ 62), finding that two witnesses were too far, one witness was too close, and no witness was positioned just right to reliably identify the shooter. To justify this conclusion, the majority (a) omits or dismisses critical facts that favor the State; (b) accepts recantation testimony of two witnesses that the jury obviously rejected as incredible; (c) ignores the United States Supreme Court's holding that a jury's split verdict is irrelevant to a sufficiency of the evidence analysis under the due process clause; and (d) *sua sponte* invokes social science research in an effort to undermine the identification of all three eyewitnesses even though that research was never presented at trial and the State had no opportunity to refute it. But when the evidence is viewed in the light most favorable to the prosecution, it is more than sufficient to uphold the jury's verdict. Therefore, I respectfully dissent.

¶ 115 The majority begins by asserting that the State's case "hinges entirely on the testimony of the four eyewitnesses" (*supra* ¶ 30), but the State's case "hinged" on the testimony of the three eyewitnesses who positively identified Johnson as the shooter—Tristan Thomas, Deangelo Mixon, and Janeese Washington.

¶ 116 The first eyewitness, Tristan Thomas, testified that he knew both Johnson and the victims prior to the shooting. Thomas said he was standing on his front porch, looking right at Tyler and Mixon, when he saw someone run in his direction and shoot Tyler from behind. Thomas's home is located on the southwest corner of South Honore Street and the alley immediately south of West 69th Street, and the shooting occurred in the intersection of the alley and Honore Street. Thomas was not specifically questioned about distance, but the photographs submitted into evidence show that Thomas was in very close proximity to the victims and the shooting. The photograph shown below, the State's exhibit No. 4, was admitted during Thomas's testimony. It shows the intersection of South Honore Street and the alley south of 69th Street, as well as the front of Thomas's house, which has a grey river rock facade.

¶ 117 During his testimony, Thomas marked the photograph by identifying 69th Street, drawing a red arrow to show where he first saw Tyler and Mixon walking down Honore Street, marking a red "X" on the front porch of his home to show where he was standing during the shooting, and writing the letters "NT" and "DM" to show where Tyler and Mixon, respectively, fell to the ground after they were shot. Although the red "X" is not visible in the reproduced photo above, it is visible on the original photograph in the record, and Thomas testified that he was standing on his front porch when the shooting occurred.

¶ 118 During cross examination, Thomas testified that he "do[es]n't see distances that well" and that he "probably should have glasses," but nevertheless confirmed that he saw the person who shot Tyler. After the shooting, Thomas ran over to Tyler and Mixon to assist them, at which point Mixon told him, "Trell [Johnson] shot me." The day after the shooting, Thomas positively identified Johnson as the shooter, after viewing Johnson's photo in a six-person photo array. After picking Johnson, he told police, "I seen him shooting yesterday around 7:30 pm at two of my friends," who he identified as Tyler and Mixon. When Thomas subsequently met with the ASA and was asked if he had a "clear unobstructed view of [the shooter]," Thomas said that the shooter's "head and a little bit of his mouth [were] covered," but confirmed that he "still had a view of [the shooter's] face" and could see "most of" it. Thomas recanted at trial. He said that he "didn't see what the [shooter] looked like"; that he only saw an African American person with "light skin," a black jacket, and "a mask shooting [his] friend"; and that he told the ASA that Johnson was the shooter because "that's what [Mixon] told [him]." However, he admitted on redirect that he told the ASA and the detective that Johnson was the shooter "[b]ecause [he] recognized him because of light skinned." He also testified that Johnson was the "same person [he] saw out on the street shoot [Tyler] and [Mixon]."

¶ 119 Under the *Biggers* test, Thomas's identification was sufficiently reliable. Although the shooting lasted less than a minute, this was long enough for Thomas to make a positive identification of Johnson. See *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006) (rejecting defendant's argument that the "brevity of the witness's observation undermines his

identification, testimony"); *People v. Thompson*, 2020 IL App (1st) 171265, ¶ 45 (finding the evidence sufficient even though one witness saw one of the shooters for only 5 to 10 seconds and another witness observed him for less than 5 seconds); *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 30 (finding that the witness had a "sufficient opportunity to observe" the defendant during the robbery, even though it only lasted for "seconds"); *People v. Parks*, 50 Ill. App. 3d 929, 933 (1977) (finding the fact that the eyewitness had only 5 or 10 seconds to observe her assailant "was a matter to be considered by the jury in weighing the testimony, but did not render her identification insufficient, as a matter of law, to support the finding of guilty"); *People v. Rodriguez*, 134 Ill. App. 3d 582, 589-90 (1985) (finding the eyewitness's identification "sufficiently reliable," even though he "saw the face of the person who carried the gun for only a couple of seconds").

¶ 120 The reliability of Thomas's identification is bolstered by the fact that he knew Johnson prior to the shooting. See *People v. Brooks*, 187 Ill. 2d 91, 101, 130-31 (1999) (finding that the witness had an "adequate opportunity to view the assailant," even though the shooting lasted only " 'a second or so' " because the witness testified that "he had known defendant *** for a number of years," reasoning that this was the "strongest factor weighing in favor of admission" of his testimony); *People v. Williams*, 2015 IL App (1st) 131103, ¶ 74 (affirming defendant's conviction in part based on an identification made by an eyewitness who knew the defendant by the nickname "L'il Nuk" and "had met him 'on multiple occasions' over the previous two or three years"); *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 35 (after noting that one of the eyewitnesses had known the defendant for "several years," the court found "the familiarity of two eyewitnesses with [the defendant] personally, support the conclusion that the evidence was sufficient").

¶ 121 Thomas also had an unobstructed view of the shooting. He was standing on his front porch, in broad daylight, and he was focused on the shooter as he ran up to his friends Tyler and Mixon from behind, as they were walking toward his house. As shown in the photograph above, Tyler, Mixon, and the shooter were only a short distance away from Thomas. Although the majority cryptically contends that Thomas "told police he had a clear and unobstructed view but *later admitted* that his poor eyesight made it difficult for him to see the shooter's features" (emphasis added) (*supra* ¶ 34), Thomas never told the police he had poor eyesight or that he could not see the shooter's features; rather, he consistently maintained that he "had a view of [the shooter's] face" and that Johnson was the person who was shooting at Tyler and Mixon. Thomas did not "admit[ ] that his poor eyesight made it difficult for him to see the shooter's features" to anyone else, either. In fact, the only testimony about Thomas's eyesight was elicited by leading questions from defense counsel, who asked Thomas, "the fact is you don't see distances that well, do you?" and "you probably should have glasses, is that fair?" The majority then attempts to undercut Thomas's testimony by claiming "[i]t defies belief that Thomas could [see to] make an identification when the shooter's head and mouth were covered and Tyler and Mixon were in his line of sight." *Supra* ¶ 87. But to reach this conclusion, the majority discounts Thomas's statement to police that he "had a view of [the shooter's] face" and ignores Thomas's unrebutted testimony that he was standing on his front porch at the time of the shooting. As the State's exhibit No. 4 shows, Thomas's front porch was six staircase steps above ground level, giving him a view of Tyler, Mixon, Johnson, and the shootings, from a perch. See *supra* ¶¶ 116-17. Moreover, the majority introduces new facts into the record when it takes the liberty to precisely position Tyler and Mixon "between Thomas and the

shooter" (*supra* ¶ 87), so that Thomas could not have possibly seen the shooter. The majority contends that Thomas's view of the shooter was blocked not only at the moment of the shootings but at all times, including in the moments before the shootings as Thomas saw Johnson run toward his victims. However, nothing in the record supports the majority's conclusion that Thomas's view of Johnson was blocked because Tyler and Mixon were "in [Thomas's] line of sight." *Supra* ¶ 87.

¶ 122 In addition to this testimony, the jury heard evidence that Thomas positively identified Johnson in a photo array the day after the shooting, told the police that he "s[aw the shooter] shoot" Tyler and Mixon, and confirmed that he "had a view of [the shooter's] face." Thomas said that the shooter's "head and a little bit of his mouth [were] covered," but he could see "most of" the shooter's face, so the fact that part of Johnson's face may have been covered does not undermine the reliability of his identification either. See *Barnes*, 364 Ill. App. 3d at 890, 893-95 (finding the evidence sufficient to support an eyewitness's identification of the defendant, even though the shooter wore a hood covering his head and a bandanna covering his face from the tip of his nose down, because the witness's identification of the defendant was "positive and *** consistent in selecting [his] picture from the photo array, in choosing him from a lineup, and in naming [him] as the gunman at trial").

¶ 123 Thomas recanted at trial and said that he "didn't see what the [shooter] looked like"; that he only saw an African American person with "light skin," a black jacket, and "a mask shooting [his] friend"; and that he told the ASA that Johnson was the shooter because "that's what [Mixon] told [him]." But the jury also heard testimony from the detective who presented the photo array to Thomas the day after the shooting, when Thomas positively identified Johnson as "the person who fired shots at the victims," and heard the statements Thomas made to the ASA after the shooting, in which Thomas confirmed he "ha[d] a view of [the shooter's] face," could see "most of [it]," and was able to positively identify Johnson, "recogniz[ing] him because he was light skinned." The jury also heard Thomas admit on redirect that Johnson was the "same person [he] saw out on the street shoot [Tyler] and [Mixon]." While Thomas's trial testimony conflicted with his earlier statements to police and the ASA, it was up to the jury, as the trier of fact, "to accept or reject as much or as little of [Thomas's] testimony as it please[d]" (*People v. Sullivan*, 366 Ill. App. 3d 770, 782 (2006)) and to determine which of his statements was more credible. *People v. Armstrong*, 2013 IL App (3d) 110388, ¶ 27 ("it is for the trier of fact to weigh the statement, weigh the disavowal and determine which is to be believed"); *People v. Jackson*, 2020 IL 124112, ¶ 67 ("[i]t is well settled that the recantation of testimony is generally regarded as unreliable," and "it is for the trier of fact to determine the credibility of the recantation testimony"). As is apparent from its verdict, the jury determined that Thomas was honest when he made his prior statements to police and the ASA and that he was dishonest at trial (*People v. Davis*, 2018 IL App (1st) 152413, ¶ 46), and we must defer to its determination. See *People v. Green*, 2017 IL App (1st) 152513, ¶¶ 103, 107 (upholding defendant's conviction even though it rested " 'almost exclusively' " on a statement from an eyewitness who later recanted at trial because "the jury had the opportunity to hear [the witness's] prior statement and observe his testimony recanting that statement, and it determined that [the witness] was telling the truth in his original written statement, as apparent from its verdict"); *Thompson*, 2020 IL App (1st) 171265, ¶ 57 (where an eyewitness recanted at trial, the court found that "a rational juror could certainly have found [the eyewitness's] trial testimony less credible than his pretrial statement," reasoning that "[t]he jury had an

opportunity to weigh his denial against the testimony of an ASA and two detectives who testified to witnessing [the eyewitness] make his statement and sign every page of it"). The majority's rejection of Thomas's pretrial statements invades the province of the jury.

¶ 124 Deangelo Mixon, a victim of the shooting and the State's second eyewitness, also identified Johnson as the shooter on the night of the shooting. He spoke with detectives at the hospital after he and Tyler were shot and told the detectives what happened. After he named Johnson as the shooter, detectives prepared a six-person photo array, which included Johnson, and showed it to him. Mixon "immediately" identified Johnson as the shooter. On the photo advisory form Mixon signed, detectives summarized his statements. Mixon said that he "grew up with [Johnson]," had known him for years, and saw Johnson point a gun and shoot Tyler. Mixon also spoke with the ASA around 12:40 pm, the day after the shooting. The ASA determined from Mixon's nurse that Mixon last took medication around "4:30 in the morning" and then asked Mixon if the pain he was in would prevent him from recounting what happened. Mixon said it would not and consented to have their conversation video recorded. Clips of the ASA's videotaped conversation with Mixon were admitted as substantive evidence and played for the jury. During this conversation, the ASA asked Mixon, "[W]hen you looked back, what did you see?" Mixon responded, "I seen Antrell Johnson." He told the ASA that Johnson then ran back north on Honore Street and got in a black car. After Mixon positively identified Johnson in a photo array, the ASA asked him, "Are you indicating that this is the person that shot you?" Mixon immediately responded, "Yes." Mixon also told the ASA that after he was shot and Thomas came to help him, he told Thomas that "Trell [Johnson] shot me."

¶ 125 Mixon recanted at trial, however, and said he "didn't know who it was holding the gun." He claimed that when he turned around, "all I seen was the gun, shots went off and I blinked out." When he was confronted with the video recording of his pretrial statements confirming that Johnson was the shooter, he claimed he "d[id] not remember" or "could not recall" making those statements. He admitted that he and Johnson had been friends, that their families were friends, and that his sister and Johnson's brother were dating and have a child together. Although he denied that this was the reason he "didn't remember" what happened two years before, he admitted that he was "scared" and "traumatized" and that he was "worried about [his] safety." During closing arguments, the prosecution and the defense both commented on Mixon's demeanor on the stand. After noting the jury's ability to observe Mixon's "demeanor and watch his body language," the State said, "[Y]ou could just see him broken. He was scared. It was as if he wanted to cry. He did everything he could, not to identify the Defendant in open court, because he is scared; and that is the reality." Defense counsel made a similar comment, noting that Mixon "had a demeanor that was a bit sheepish. He had a demeanor where he seemed afraid of something."

¶ 126 The totality of the *Biggers* factors support the reliability of Mixon's identification of Johnson as the shooter as well. First, Mixon had an adequate opportunity to view the shooter. He told the ASA that he was within feet of the shooter and that when he turned around, he saw Johnson point a gun at Tyler's back. Although the whole incident lasted less than a minute, courts have found identifications reliable when witnesses have viewed the suspect for only seconds. See *supra* ¶ 119.

¶ 127 In addition, Mixon told police that he "grew up" with Johnson and knew him for 10 years before the shooting. He testified that he and Johnson had been friends, that their families were friends, and that his sister and Johnson's brother were dating and have a child together.

Mixon's familiarity with Johnson is another factor the jury could consider when evaluating the reliability of his testimony. See *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 89 (noting that in addition to the *Biggers* factors, "[o]ur courts also consider whether the witness was acquainted with the suspect before the crime"); *Thompson*, 2016 IL App (1st) 133648, ¶ 35 (finding "the familiarity of two eyewitnesses with [the defendant] personally, support the conclusion that the evidence was sufficient"); *Commonwealth v. Johnson*, 45 N.E.3d 83, 91 (Mass. 2016) (considering "the witness's prior familiarity with the person identified, where that person is a witness's family member, friend, or long-time acquaintance" as a "factor" in assessing whether an identification is reliable).

¶ 128 Yet another factor that supports the reliability of Mixon's identification of Johnson as the shooter is that he immediately identified him. After Mixon was shot and Thomas ran over to him, Mixon said to Thomas, "Trell [Johnson] shot me." After he was taken to the hospital, Mixon named Johnson as the shooter to police and "immediately" identified him when he was presented with a photo array, which supports the reliability of his identification as well. See *Macklin*, 2019 IL App (1st) 161165, ¶ 32 ("expressions of certainty at the time of initial identification are a relevant indicator of accuracy").

¶ 129 The majority tries to undercut Mixon's ability to observe at the time of the shooting and to discredit his positive identification of Johnson by suggesting that he was under the influence of drugs or alcohol, both at the time of the shooting and when he gave his statements to police and to the ASA hours later. First, the majority highlights Mixon's testimony that he was smoking "a lot" of marijuana back in 2017 to imply that he was under the influence of marijuana at the time of the shooting, stating "the record establishes Mixon's impairment at the scene and does not clear that cloud by the time of the hospital interview." *Supra* ¶ 36. However, Mixon was asked if he was both drinking and smoking marijuana before the shooting, and he expressly denied that he had been smoking. While he admitted he had been drinking on the day of the shooting, Mixon never said he was intoxicated or impaired by alcohol in any way, and nothing in the record suggests otherwise. Thus, the majority's conclusion that Mixon was impaired by either drugs or alcohol on the date of the shooting based solely on Mixon's admission that that he was drinking and smoking marijuana "a lot" in 2017 is simply innuendo. Second, the majority says, "[w]e do not know what medications [Mixon] had been administered for his injury before he spoke with investigators," as if to suggest he was impaired by these medications at the time he gave his statement to the ASA. *Supra* ¶ 36. While we do not know what medications Mixon may have been given, we do know that the ASA confirmed with Mixon's nurse that Mixon was last given medications more than eight hours before he gave his videotaped statement. Moreover, Mixon's videotaped conversation with the ASA was admitted into evidence, so the jury was able to observe Mixon at the time this statement was made and to look for any signs of impairment. *Armstrong*, 2013 IL App (3d) 110388, ¶ 27 ("[t]he fact that the statement was videotaped allowed the jury to see [the witness's] demeanor and compare it to that he exhibited on the stand at trial"). I reviewed the videotaped statement as well and saw no visible signs of impairment. The majority's implication that Mixon was impaired when he gave his statement is unfounded.

¶ 130 Next, the majority suggests that the reliability of Mixon's identification is undermined by the fact that he did not provide the police with a prior description of the shooter. *Supra* ¶ 47. However, there was no need for him to do so because he "grew up" with Johnson, had known him for 10 years, immediately recognized him as the shooter, identified him by name, and then

"immediately" identified him when he was presented with a photo array. This court has repeatedly held that descriptions of the offender are unnecessary when the eyewitness knows the suspect and can identify him by name. See, *e.g.*, *People v. Luellen*, 2019 IL App (1st) 172019, ¶ 73 (stating that "concern about a witness's physical description of the offenders disappears when the witness knows the suspect" and reasoning that because the witness knew the defendant and identified him by name, "[i]t would have been unnecessary and redundant for [the witness] to give the police a physical description" and that "[t]he absence of an initial description of the offender does not diminish the reliability of [the witness's] identification"); *Thompson*, 2016 IL App (1st) 133648, ¶ 37 (noting that "[w]hen an eyewitness is asked to select a suspect from a lineup and that suspect was previously unknown to them, then we look to whether the physical description the eyewitness gave police before the lineup squares with the actual suspect's physical features" but finding it unnecessary to rely on a prior description because the defendant was put into a lineup based on the witness's identification of defendant by name).

¶ 131 The majority places a great deal of weight on Mixon's recanted trial testimony to argue that his "account conveys a justifiable risk of misidentification." *Supra* ¶ 40. It claims that "inferring that Mixon recognized Johnson remains improbable, *** considering the weapon focus effect (recall that Mixon said he 'blinked out')" and because of Mixon's "unequivocal[ ]" testimony at trial "that he did not see the shooter and Johnson was not the shooter." *Supra* ¶¶ 55, 65. But this assumes that the jury found Mixon's trial testimony credible. The jury was also presented with Mixon's statements to the police and to the ASA, and it was up to the jury to determine whether his trial testimony or pretrial statements were more credible. *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999). The jury was able to witness Mixon's demeanor at trial as well as his demeanor during the videotaped conversation he had with the ASA the day after the shooting, where he told the ASA that Johnson was the person that "ran up" and "put the gun on [Tyler's] back" and that Johnson was the one who shot him and Tyler. By its verdict, the jury determined that Mixon was truthful when he made his statement to the ASA and that he was untruthful at trial. *Davis*, 2018 IL App (1st) 152413, ¶ 46. It was the jury's prerogative to do so, and it could have reasonably believed that Mixon recanted at trial due to his familial ties to Johnson's family, or because it believed, based on his demeanor at trial, that he was scared to identify Johnson. "[I]t is the task of the trier of fact to determine if and when a witness testified truthfully" (*Macklin*, 2019 IL App (1st) 161165, ¶ 17), and we defer to its credibility assessments because "a court of review is not in a position to observe the witness as he testifies." *People v. Harris*, 297 Ill. App. 3d 1073, 1083 (1998); *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007) ("The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the *** jury that saw and heard the witnesses."). As the trier of fact, it was within the purview of the jury to "accept or reject all or part" of Mixon's testimony. *People v. Corral*, 2019 IL App (1st) 171501, ¶ 85. The majority's decision to credit Mixon's trial testimony over the statements he gave to the police and the ASA shortly after the shooting improperly invades the province of the jury.

¶ 132 The majority also hones in on the medical examiner's testimony and claims that her testimony—that none of the bullets were fired from close range—"contradicts Mixon." *Supra* ¶ 42. To find this contradiction, however, the majority again relies on Mixon's trial testimony where he described the shooter as "about a foot" away. However, the jury obviously disregarded this testimony entirely. In Mixon's pretrial statement to the ASA, he described the

shooter as "about two to three feet" away. This distance is perfectly consistent with the medical examiner's findings and does not undercut the reliability of Mixon's testimony in any way.

¶ 133 The testimony of the State's third eyewitness, Janeese Washington, remained consistent throughout. At trial, defense counsel conceded as much, referring to her identification of Johnson as "unimpeached evidence." Washington testified that she was sitting in the rear passenger seat of a parked car waiting for her church choir practice to start. She was facing south on Honore Street, very close to where the shooting occurred. She testified that it was "pretty much daylight," that she was looking through the front driver's window and the windshield of the car parked at "Honore and the alleyway" and that nothing was blocking her view. She said she saw two boys walking down the middle of the street when "another boy kind of running behind them *** pulled out a gun and *** shot the boys" in the middle of the street. The State's exhibit No. 24, a photograph which is reproduced below, was admitted during Washington's testimony.

¶ 134 Exhibit No. 24 depicts Honore Street in the foreground; the church parking lot, which is the grassy area located just south of the red church building; and the alley just south of 69th Street. Washington wrote a red X on the exhibit to show where she was parked at the time of the shooting, wrote the word "boys" to show where she first saw Mixon and Tyler walking south on Honore Street, wrote the letter "S" to show where she first saw the shooter, and wrote the letter "B" to show where Mixon and Tyler were located when they were shot.

¶ 135 Washington testified that the shooter was wearing white pants and a baseball cap. She said she saw him shoot "more than four" times, saw the boys fall to the ground, then saw the shooter "r[u]n back northbound on Honore" Street in her direction before he passed her, and she lost sight of him. She said she "kind of scooted" down in her seat after the shooting because she was trying not to be seen by the shooter, but also testified that she never lost sight of the shooter when she did so.

¶ 136 After the shooting, Washington described the suspect to police as a black male, "medium brown complected between the age of 16 and 25, about five, six, five, 9, between 125, 150 pounds with black hair in a faded type of haircut." The description of Johnson taken from his arrest report indicates that he is a 21-year-old black male, 5 feet, 10 inches tall, and 170 pounds with brown eyes, black hair, a "short hair style," and a "medium brown complexion."

¶ 137 Nine days after the shooting, Washington was shown a six-person photo array and positively identified Johnson as the shooter. When police specifically asked her what she noticed about the shooter's face, she said, "I noticed that he was like kind of caramel skin, his nose was big and his lips were big, I couldn't really see his eyes because he had the cap on, but I noticed his nose and lips." She explained that she "was pretty sure that that was the person" and testified that she "wouldn't have picked someone unless [she] was certain." When she was asked at trial if she was "certain that the person [she] identified is the same person [she] saw out on the street shooting on April 24, 2017," she responded that she was.

¶ 138 All five of the *Biggers* factors support the reliability of Washington's identification. First, Washington was " 'close enough to the accused for a sufficient period of time under conditions adequate for observation.' " *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40 (quoting *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979)). Washington testified that it was "pretty much daylight" and that nothing was blocking her view when she witnessed the shooting. Testimony from her husband, Robert Laster, who was seated in the car next to her, as well as photographs admitted into evidence, confirm that Washington was approximately 30 feet from where the shooting occurred. This court has rejected challenges to the reliability of identifications made from much greater distances. See, *e.g.*, *People v. Houston*, 185 Ill. App. 3d 828, 833-34 (1989) (finding the evidence sufficient to convict even though a witness observed the defendant from at least 70 feet away); *People v. Thomas*, 49 Ill. App. 3d 961, 968 (1977) (finding a witness had an "ample opportunity" to make an identification from approximately 50 feet); *People v. Hardy*, 2020 IL App (1st) 172485, ¶ 52 (finding identifications made from 20 to 60 feet sufficiently reliable). Although the shooting lasted "maybe a minute," this gave Washington sufficient time to observe the shooter. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 32 (identification found reliable even though "the entire incident took less than a minute"); *Macklin*, 2019 IL App (1st) 161165, ¶ 30; *Brooks*, 187 Ill. 2d at 130.

¶ 139 Second, Washington was focused on the shooter. She testified that she observed two young men walking down the street and that she continued to observe them when she saw another young man running toward them. She said that she witnessed the shooting and then saw the shooter "r[u]n back northbound on Honore" Street past her car before she lost sight of him. When he ran north past the car she was in, even as she had "scooted" down after the shooting, she never lost sight of him until he ran past her.

¶ 140 Third, the initial description of the shooter that Washington gave to police is consistent with the physical description of Johnson in his arrest report. The majority claims that Washington "recalled [only] generalities" (*supra* ¶ 43), but this is inaccurate. Washington accurately described Johnson's age, race, hair color, hair style, and skin color, which is listed as "medium brown complexion" on his arrest report. Only the height and weight were slightly off. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 22 (finding a witness's description of the defendant to be "accurate" when she described him as a "5-foot-7-inch, 200- or 210-pound, dark-skinned black male between 20 and 25 years old" even though the arrest report described a "24-year old 'male black,' '5'8",' '156 lbs' with 'Dark Brown Complexion' "). The majority

also claims that Washington's descriptions of the shooter's skin color were "conflicting" (*supra* ¶ 49), but her initial description—medium brown complexion—and the description she gave to police nine days after the shooting—"caramel" colored skin—are perfectly consistent. In addition, the majority claims that, "[a]t the photo array, Washington justified her choice with new revelations." *Supra* ¶ 49. However, these "new revelations" the majority references were merely additional details Washington provided in response to express questioning from police, who asked her what she "noticed about the shooter's face." Washington said she "couldn't really see [the shooter's] eyes because he had the cap on," but that she recognized Johnson as the shooter because she "noticed that he was like kind of caramel skin, his nose was big and his lips were big." The fact that Washington was unable to describe Johnson's eyes or the upper part of his face because of the hat he was wearing does not undermine the reliability of her identification. See *People v. Slim*, 127 Ill. 2d 302, 308-09 (1989) ("It has consistently been held that a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness'[s] positive identification can be sufficient, even though the witness gives only a general description based on the total impression the accused's appearance made."); *Tomei*, 2013 IL App (1st) 112632, ¶¶ 50-52 (finding a witness's description of "two white males wearing dark jackets and dark hats" sufficient to sustain defendant's conviction because the owner made a positive identification and testified that he recognized defendant's face); *In re N.A.*, 2018 IL App (1st) 181332, ¶¶ 27-28 (finding a witness's identification of the defendant reliable, even though she described the suspect as a "nondescript, 20-year-old who stood between 5 feet, 10 to 11 inches, in height"); *Williams*, 2015 IL App (1st) 131103, ¶ 75 ("Where the witness makes a positive identification, precise accuracy in the preliminary description is not necessary.").

¶ 141 The last two *Biggers* factors weigh in favor of reliability as well. Washington positively identified Johnson as the shooter from a six-person photo array just nine days after the shooting, and courts have found identifications sufficiently reliable when far more time has passed. See, *e.g.*, *Green*, 2017 IL App (1st) 152513, ¶¶ 113-14 (finding an eyewitness identification sufficiently reliable even though it occurred three months after the shooting); *Daniel*, 2014 IL App (1st) 121171, ¶ 22 (affirming defendant's conviction where the witness made an identification within three months of the crime). Finally, Washington identified Johnson with sufficient certainty, telling police she was "pretty sure" he was the shooter when she picked him out of a photo array; testifying that she "wouldn't have picked someone unless [she] was certain"; and then, after identifying Johnson in court, testifying that she was "certain that the person [she] identified is the same person [she] saw out on the street shooting on April 24, 2017."

¶ 142 The majority takes issue with the fact that Washington did not identify Johnson in an in-person lineup. *Supra* ¶ 68. But when Washington was initially called to the police station on May 3, 2017, to see if she could identify the shooter, Johnson was not yet in custody, so it was not even possible for her to view him in an in-person lineup. Then, after she had positively identified Johnson in a photo array, there was no need—or requirement—for her to identify him in an in-person lineup as well. See 725 ILCS 5/107A-2(c) (West 2014) (stating that "there is no preference as to whether a law enforcement agency conducts a live lineup or a photo lineup"). The majority cites no evidence or case law to indicate that repeated lineups are necessary or that live lineups are better than photo lineups for identification purposes. Following the " 'well-settled principle' " that all " 'five [*Biggers*] factors *** should be

considered in determining the reliability of identification evidence' " (*People v. Herron*, 215 Ill. 2d 167, 191 (2005) (quoting *People v. Jackson*, 348 Ill. App. 3d 719, 739 (2004))), Washington's identification was sufficiently reliable.

¶ 143 Turning to the testimony of Robert Laster, the majority places heavy emphasis on his inability to identify Johnson as the shooter to undercut the reliability of the identifications made by Washington, Mixon, and Thomas. The majority claims Laster was "the State's most certain witness" and that he had "the next-best view of the shooter" after Mixon (*supra* ¶¶ 35, 54), but neither statement is supported by the record. As the photos in the record reflect, Thomas had a better view than Laster did. He was in closer proximity to the shooter than Laster, testifying that he was standing on his front porch, looking right at Tyler and Mixon, when he saw someone run in his direction and shoot Tyler from behind. Unlike Laster, he told the police he "had a view of [the shooter's] face." The majority's characterization of Laster as the "most certain witness" is equally unfounded. Although Laster initially told police he "got a pretty good look at the guy" and "thought [he] would be able to [identify]" the shooter, he was unable to make a positive identification of Johnson, either from a photo array or in a live lineup. However, the jury heard Laster testify that on the evening of the shooting his focus was not on the shooter; rather, his "focus was just mainly just to keep everybody else calm, *** and just to make sure we weren't, you know, casualties." At no point did Laster say with any certainty that he could identify the shooter. This is in stark contrast to the testimony of Mixon—who told Thomas seconds after the shooting, "Trell [Johnson] shot me" and who "immediately" identified Johnson's photo in a photo array—as well as the testimony of Thomas—who identified Johnson the day after the shooting and told police that Johnson was "the person who fired shots at the victims"—and the testimony of Washington—who said she was "certain" that Johnson was "the same person [she] saw out on the street shooting on April 24, 2017." In sum, the eyewitness identification evidence in this case was more than sufficient to convict Johnson.

¶ 144 The majority's analysis is flawed in other ways, chief among them its *sua sponte* reliance on social science eyewitness identification research studies to overturn Johnson's conviction. For example, relying on this research, the majority contends that familiarity does not eliminate misidentification problems and can instead contribute to wrongful convictions. *Supra* ¶ 91. As a result, the majority concludes that even though Thomas and Mixon both knew Johnson, they could not reliably identify him. But Johnson did not call an expert to testify about the science behind eyewitness identification. Thus, the studies that the majority invokes are not part of the trial record, and the jury had no occasion to consider them. Nor did Johnson cite these studies in his appeal. Instead, the majority quotes selective language from social science journals it found on its own to justify its conclusion that the eyewitness identifications were unreliable in this case. But judges are not social scientists, and, more importantly, the State never had an opportunity to refute or explain the nuances of the studies the majority now vouches for, either through cross examination or through its own expert.

¶ 145 Scientific evidence is based on principles that are not within the knowledge or experience of the average juror. *People v. Heineman*, 2023 IL 127854, ¶ 74. Such evidence is meaningless to an average juror unless it is accompanied by an explanation provided by an expert witness. *Id.* The social science research studies on eyewitness identification the majority invokes are not within the knowledge or experience of a layperson. Had Johnson offered an expert to testify about the effect of familiarity on the reliability of eyewitness identifications, the State would

have had an opportunity to cross examine the expert and the research upon which he relied and to counter with its own expert. In doing so, the State's expert could have cited its own studies, including one that concludes identifications "can be very accurate, especially where an eyewitness has had extensive and/or meaningful prior exposure to a personally familiar perpetrator." Jonathan P. Vallano *et al.*, *Familiar Eyewitness Identifications: the Current State of Affairs*, 25 Psychol. Pub. Pol'y & L. 128, 133 (2019). The State's expert could have also introduced additional studies, which indicate that "eyewitness identification errors are made rarely when the perpetrator is someone that is already known to a witness." Andrew J. Russ *et al.*, *Individual Differences in Eyewitness Accuracy Across Multiple Lineups of Faces*, 3 Cognitive Res.: Principles & Implications 1, 2 (2018). This principle is so widely accepted that a number of states have expanded upon the *Biggers* factors to include a witness's familiarity with the perpetrator in their jury instructions. See, *e.g.*, *Commonwealth v. Gomes*, 22 N.E.3d 897, 906, 908 (Mass. 2015) (noting that "jury instructions are intended to provide the jury with the guidance they need to capably evaluate the accuracy of an eyewitness identification" and discussing an instruction which includes "the witness's prior familiarity with the offender" as a factor for the jury to consider when evaluating an eyewitness identification); *State v. Allen*, 494 P.3d 939, 948 (Or. Ct. App. 2021) (noting that the "effect the witness's familiarity with the suspect has on the reliability of the identification *** is simply one of the many factors to consider in assessing the reliability of the eyewitness identification"); *State v. Booth-Harris*, 942 N.W.2d 562, 578 (Iowa 2020) (discussing its criminal jury instruction that the jury consider "whether the witness had known or seen the person in the past" when evaluating the identification testimony).

¶ 146 Thus, the majority's contention that "familiarity does not eliminate misidentification problems" (internal quotation marks omitted) (*supra* ¶ 91) and its suggestion that Thomas's and Mixon's familiarity with Johnson did not support the reliability of their identifications is directly refuted by social science research that the State's expert could have presented had Johnson offered expert testimony regarding familiarity at trial. The majority also ignores cases from Illinois and other jurisdictions, holding that a witness's familiarity with the defendant supports the reliability of his or her identification. See *State v. Lerma*, 2021 IL App (1st) 181480, ¶¶ 94-95 (finding "ample reason for [a witness] to be able to recognize [defendant]" when evidence established that the defendant was "frequently on [the witness's] block," reasoning that "recognizing someone, especially someone with whom one has some familiarity rather than a stranger, 90 feet away in daylight does not strike us as improbable"); *Luellen*, 2019 IL App (1st) 172019, ¶¶ 68-69 (finding the fact that a witness "did not simply look at two people running past him" but "watched as two people that he had known for a significant period of time ran past him at close proximity" supported the reliability of his identification); *Sullivan*, 366 Ill. App. 3d at 783 (finding a witness's identification of defendant reliable when the witness testified that he "had seen defendant 'plenty of times' before the night of the shooting and could have recognized him easily"); *State v. Outing*, 3 A.3d 1, 42 n.8 (Conn. 2010) (Palmer, J., concurring, joined by Norcott and Vertefeuille, JJ.) (noting that the dangers of eyewitness misidentification "are generally limited to eyewitness identifications of strangers or persons with whom the eyewitness is not very familiar" and that "the identification of a person who is well known to the eyewitness does not give rise to the same risk of misidentification as the identification of a person who is not well known to the eyewitness"); *People v. Hicks*, No. 298126, 2011 WL 6376014, at *2 (Mich. Ct. App. Dec. 20, 2011)

(upholding defendant's conviction where the eyewitness testified that he had known defendant for 10 to 12 years and specifically recognized defendant as the shooter, gave defendant's name to the investigating officers, and then identified defendant in a photographic lineup, reasoning that "[e]yewitness identification by someone well-acquainted with the defendant is especially reliable and more likely to be accurate").

¶ 147 The majority relies upon another social science study to bolster its contention that a witness's "level of certainty should be applied cautiously so as not to overshadow other critical aspects of the identification process because a witness's confidence alone does not determine accuracy." *Supra* ¶ 53. Had the defense presented this study through an expert at trial, however, the State would have had an opportunity to refute it with testimony from its own expert, who could have presented a study saying just the opposite. See, *e.g.*, John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 10, 55 (2017) (concluding that "[a]ccording to the available data, the relationship between confidence and accuracy for an initial [identification] from an appropriately administered lineup is sufficiently impressive that it calls into question the very notion that eyewitness memory is generally unreliable" and finding that "an initial [identification] made with high confidence is highly indicative of accuracy").

¶ 148 Yet another social science theorem the majority invokes to support its conclusion that Mixon's and Tyler's identifications of Johnson as the shooter were unreliable is the "weapon focus" effect, claiming that the presence of a weapon "compromised [their] attention" and "distorted Mixon's perception and memory." *Supra* ¶¶ 33, 39, 42. Again, however, the majority bases its conclusion not on the testimony of an expert presented at trial, but on a study it found through its own research that was never presented to the jury. See *People v. Tisdel*, 338 Ill. App. 3d 465, 467 (2003) (noting that expert testimony is used to "dispel[ ] myths or attack[ ] commonsense misconceptions about eyewitness identifications, such as the effects of stress and weapon focus on the accuracy of identifications" and "provide[ ] the jury with useful information about the kinds of mental factors involved in the identification process, such as the effect of time on the reliability of identifications, the forgetting curve, and problems with cross-racial identifications"); *People v. Allen*, 376 Ill. App. 3d 511, 526 (2007) (noting that the role of an expert witness on eyewitness identification is to "supply relevant data"); *Lerma*, 2016 IL 118496, ¶¶ 24, 26 (affirming the appellate court's decision to reverse and remand for a new trial with directions to allow expert testimony on eyewitness identification, reasoning that, in appropriate cases, social science research is "a perfectly proper subject for expert testimony," especially in cases where "the State's case against defendant hangs 100% on the reliability of its eyewitness identifications"); *Macklin*, 2019 IL App (1st) 161165, ¶ 81 (Hyman, J., dissenting) ("The entire point of presenting expert testimony on the science related to eyewitness fallibility is to aid the jury in their consideration of a defendant's guilt beyond a reasonable doubt ***."). Johnson chose not to call an expert to present this social science research at trial, however, leaving the jury no opportunity to consider it. *Cf. People v. Blankenship*, 2019 IL App (1st) 171494, ¶ 32 (finding defendant's argument that social science research suggests a weak correlation between confidence and accuracy of an identification "unpersuasive" where he presented no such evidence at trial to support a finding that the witness's certainty should be given little weight); *Tomei*, 2013 IL App (1st) 112632, ¶¶ 55-56 (reasoning that because the defendant failed to present the testimony of an expert on eyewitness

identification research, it was not persuaded that "defendant's argument *** that the fourth factor, the witness's level of certainty, should be given little weight").

¶ 149 To justify its *sua sponte* reliance on social science research, the majority claims it is simply following our supreme court's lead in "regular reference to academic works to inform a deeper understanding of issues." *Supra* ¶ 77. However, the decisions the majority cites (*supra* ¶ 77) do not support its *sua sponte* reliance on social science research here. In *In re Marriage of Cotton*, 103 Ill. 2d 346, 359 (1984), the court relied upon case law as well as two law review articles to support its conclusion that the evidence was sufficient to justify the trial court's view that it was in the child's best interests to modify the custody decree. And in *People v. Bush*, 2023 IL 128747, ¶ 61, the court did not directly rely on any "academic works"; instead, it relied on a Nevada case that quoted from a law journal article to justify its finding that the trial court's decision was "arbitrary because it was based on the purported platform of the statements, a rap video, as opposed to the substance of the statements."

¶ 150 The majority then justifies its *sua sponte* introduction of the social science research as a matter of "procedural fairness." *Supra* ¶ 79. However, procedural fairness works both ways, undermining the majority's introduction of and reliance upon social science research that the State had no opportunity to test or refute.

¶ 151 The majority's next misstep is its repeated reference to the jury's split verdict to suggest that the evidence was insufficient to support the jury's verdict on the first degree murder count. *Supra* ¶¶ 2, 6, 26, 69, 83, 98, 99. However, sufficiency of the evidence review "involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt," a review which "should be independent of the jury's determination that evidence on another count was insufficient." *United States v. Powell*, 469 U.S. 57, 67 (1984); *People v. Brown*, 2017 IL App (3d) 140514, ¶ 18. Therefore, the jury's split verdict should not factor into our analysis in any way. What is more, "[i]t is inappropriate for us to speculate into the reasons behind a jury's split verdicts." *People v. Martinez*, 2019 IL App (2d) 170793, ¶ 110. However, because the majority encourages speculation about the reasons behind the jury's decision to split its verdict, calls its decision "inexplicabl[e]" (*supra* ¶ 2), and suggests that the jury's split verdict was due to the weakness of the State's case, I find it important to point out that the record provides a reasonable explanation. The record reflects that the jury was stuck on one of the elements of the attempt first degree murder count, which required the State to prove that Johnson "personally discharged a firearm that proximately caused great bodily harm to another person." While the jury heard evidence that Mixon was shot once in the left buttocks, no additional evidence about the extent of his injuries was presented. During deliberations, the jury asked the court, "May we have a definition of great bodily harm?" However, the court declined to provide one, merely responding, "You have all the evidence and instructions in this case. Please, continue to deliberate." This suggests that the jury acquitted Johnson of the attempt count, not because of any doubts about the reliability of the testimony of the State's three eyewitnesses who positively identified Johnson as the shooter, but due to a lack of agreement about whether Mixon's injuries rose to the level of "great bodily harm."

¶ 152 The majority highlights the lack of physical evidence or motive here and suggests that, without additional evidence to corroborate the eyewitness identifications of Johnson, "the State's case unravels." *Supra* ¶¶ 103-07. Not so. Our role, as a court of review, is to determine whether the evidence, when viewed in the light most favorable to the prosecution, is sufficient

to support the jury's verdict, not to go searching for corroboration. See *Davis*, 2018 IL App (1st) 152413, ¶ 48 (finding defendant's "argument, that no scientific or physical evidence links them to the crime and they did not confess, *** fails because 'corroboration is not required and we are not to engage in looking for corroboration' " (quoting *People v. Craig*, 334 Ill. App. 3d 426, 440 (2002))); see also *Morrow*, 303 Ill. App. 3d at 677 (" '[o]nce a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was "substantially corroborated" or "clear and convincing," but it may *not* engage in any such analysis' " (emphasis in original) (quoting *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998))). Because of the strength of the eyewitness testimony here, physical evidence tying Johnson to the shooting or motive evidence was unnecessary. See *Corral*, 2019 IL App (1st) 171501, ¶ 91 (noting that "physical evidence and a motive for the shooting were unnecessary to corroborate an eyewitness account"); *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23 ("[b]ecause the trial court found [the witness's] identification and testimony to be credible, the lack of physical evidence had no bearing on [the defendant's] conviction"); *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 55 ("The State is not required to prove motive in order to convict the defendant of first degree murder."). Our courts have repeatedly held that eyewitness statements, even prior inconsistent ones, are sufficient to prove a defendant guilty beyond a reasonable doubt. See *Davis*, 2018 IL App (1st) 152413, ¶ 48 (finding the "fact the witnesses recanted their identifications at trial and the convictions rest primarily on the witnesses' properly admitted prior inconsistent statements without corroboration d[id] not warrant reversal"); *Morrow*, 303 Ill. App. 3d at 677 (finding an eyewitness's "previous inconsistent statements alone *** sufficient to prove [the] defendant's guilt beyond a reasonable doubt").

¶ 153 Turning to the special concurrence, it criticizes my inclusion of two trial exhibit photographs, citing privacy rights and safety concerns for the individuals who reside in the neighborhood pictured. But the location of the shooting is mentioned by the majority (*supra* ¶ 16), and a quick Internet search would produce a photograph similar to the ones at issue here. In fact, a photo of the red church building pictured above and the surrounding streets was published in a newspaper article about this very case the day after the shooting. See Elvia Malagon *et al*., *Chicago Passes 1,000 Gunshot Victims for the Year, Pace of Violence Close to 2016*, Chi. Trib., April 25, 2017, https://www.chicagotribune.com/2017/04/25/chicago-passes-1000-gunshot-victims-for-the-year-pace-of-violence-close-to-2016/ [https://perma.cc/V6RA-TDMC]. Moreover, because this photograph was already published to a jury, in a courtroom that was open to the public, I do not see how its inclusion here implicates any additional privacy or safety concerns, particularly where no individuals are shown. This court routinely publishes opinions that include the locations of shootings and the addresses of witnesses in its decisions. See, *e.g.*, *Sullivan*, 366 Ill. App. 3d at 771; *Thompson*, 2016 IL App (1st) 133648, ¶ 10; *Anderson*, 2017 IL App (1st) 122640, ¶ 31. And the inclusion of visuals in judicial opinions is not uncommon; even the United States Supreme Court has a "longstanding practice" of doing so. Nancy S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 Chi.-Kent L. Rev. 331, 331, 336 (2013) (noting that the "use of images in judicial opinions is as a tool to support an argument" and that "those in dissent made use of images slightly more often than those in the majority" "need[ing] to use whatever tools are available to try to persuade the other justices to see the case their way").

¶ 154 Although the special concurrence claims that the photographs do not "particularly bolster[ ]" my dissent (*supra* ¶ 112), they are critically important because they are the only record evidence of Thomas's and Washington's proximity to the shooter at the time of the shooting. The majority overturns Johnson's first degree murder conviction based on its conclusion that the eyewitness identifications of Johnson were unreliable. It asserts that "[t]he first *Biggers* factor—the witness's ability to view the offender at the time of the offense—is the most critical" and that "distance *** can directly affect the reliability of what the witnesses claim to have seen." *Supra* ¶ 32. It describes Thomas's location at the time of the shooting as "on his porch, an unspecified distance away," and claims that due to Thomas's "poor eyesight," he lacked an adequate opportunity to view the shooter. *Supra* ¶¶ 14, 34, 64. While Thomas did not testify about his distance from the shooting, the State's exhibit No. 4 shows Thomas's close proximity, which supports the reliability of his identification of Johnson as the shooter. The majority also claims that Washington lacked an adequate opportunity to view the shooter, claiming that she was approximately 30 feet from the shooter. *Supra* ¶¶ 8, 35. Although Washington's husband, Robert Laster, testified that he was about 30 feet from the shooting, Washington provided no testimony about her distance from the shooter and, instead, was asked to mark her location and her proximity to the shooting on the State's exhibit No. 24. This photograph is the best and only evidence from Washington about her distance from the shooter. We can assume that the jury reached its conclusion—that Washington was close enough to make a reliable identification of Johnson as the shooter—based in part on this photo.

¶ 155 In this case, the jury was responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). As a reviewing court, it is not our role to reweigh the evidence or to substitute our judgment for that of the jury but, instead, to determine, after considering the evidence in the light most favorable to the prosecution, " 'whether the record evidence *could* reasonably support a finding of guilt beyond a reasonable doubt.' " (Emphasis added.) *Wheeler*, 226 Ill. 2d at 114 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). "A single, reliable eyewitness may be enough to sustain a conviction." *Daniel*, 2014 IL App (1st) 121171, ¶ 28.

¶ 156 After viewing the evidence in the light most favorable to the prosecution, as we must, the State's evidence was more than sufficient for a rational jury to find beyond a reasonable doubt that Johnson was the shooter. The State presented not one, but three eyewitnesses, and all three positively identified Johnson as the shooter shortly after the shooting occurred. See *Macklin*, 2019 IL App (1st) 161165, ¶ 33 (the fact that both witnesses separately identified the defendant "enhances and corroborates the accuracy of their respective identifications"). And two of the eyewitnesses knew Johnson to boot. The majority concludes that none of the eyewitnesses had an "adequate" opportunity to view the shooter because their "view [was] hindered by obstructions" and because "each eyewitness caught a fleeting glimpse of the shooter, mainly from behind, amid an extremely stressful situation." (Internal quotation marks omitted.) *Supra* ¶¶ 33, 84, 88. However, when the evidence is viewed in the light most favorable to the prosecution, it supports a finding that all three witnesses had a clear, unobstructed view of the shooter, as well as enough time to identify Johnson as the shooter with certainty. Mixon—who was only a couple feet away from the shooter—told Thomas, "Trell [Johnson] shot me" just seconds after he was shot and "immediately" identified Johnson in the photo array. Thomas told police that he "had a view of [the shooter's] face" and that he saw Johnson shooting at his

friends. Washington testified that she never lost sight of the shooter as he ran back northbound on Honore Street and that she was "certain" that Johnson was the person she "saw out on the street shooting on April 24, 2017." Their descriptions of the incident sufficiently corroborate one another. Moreover, Robert Laster testified that the shooter was wearing "white pants, black bomber jacket, and I believe a black hat," and video footage showed an individual wearing white pants and a black jacket running north on Honore Street just after the shooting occurred. The testimony and video are consistent with the descriptions of the shooter's clothing and direction of flight given by Washington, Mixon, and Thomas and provide further support for the State's case. See *In re J.J.*, 2016 IL App (1st) 160379, ¶ 38 (finding a "video [that] corroborated [an eyewitness's] description of both the events and defendant's hat *** len[t] additional credibility to her testimony"). Based on this evidence, a rational trier of fact could have found, beyond a reasonable doubt, that Johnson was the shooter.

¶ 157 Although the majority contends that "the rapid shooting's compressed timeframe left little room for [the eyewitnesses] to observe or process" and that "this, in turn, left little for the jury to sift, weigh, and assess before drawing inferences" (*supra* ¶ 61), it reaches this conclusion by repeatedly discounting the evidence most favorable to the prosecution. Again, "our role is not to reweigh the evidence or to substitute our judgment for that of the jury" but, instead, to determine " 'whether the record evidence *could* reasonably support a finding of guilt beyond a reasonable doubt.' " (Emphasis added.) *Wheeler*, 226 Ill. 2d at 114 (quoting *Jackson*, 443 U.S. at 318). Because the evidence presented by the State was more than sufficient to support the jury's verdict, Johnson's challenge to the sufficiency of the evidence should be rejected.

¶ 158 Johnson's ineffective assistance of counsel argument should be rejected as well. Johnson contends that he is entitled to a new trial because his trial counsel failed to call Vernon Johnson "who would have lent crucial support to [his] alibi defense."

¶ 159 At trial, Johnson presented a single alibi witness, Kennedi Myles, who claimed she was with Johnson at the time of the shooting. Myles testified that she and Johnson were dating in April 2017 and that, on the day of the shooting, she met Johnson at his grandmother's house, which is located at West 67th Street and South Winchester Avenue in Chicago. She said that she arrived in the "afternoon," and that Johnson was there with his daughter, Johnson's cousin Siya, Johnson's cousin Vernon Johnson, Vernon's girlfriend, and others. Myles said that Johnson was on the porch with Vernon and that she was in the living room when she heard gunshots go off and saw Johnson pulling his daughter inside the house.

¶ 160 On cross-examination, Myles testified that she stayed at the house with Johnson for "a few hours," but she could not recall what time they left. She could not remember the exact time she heard the gunshots either, but estimated that it was "maybe, 30, 40 minutes" after she arrived. She admitted that she had previously spoken with an investigator from the ASA's office, but did not remember telling him she got to 67th Street and South Winchester Avenue around 2 or 3 p.m. or telling him that she and Johnson went to her house afterwards, which was about an hour away, and arrived at her house "between 7:00 and 7:30 p.m."

¶ 161 After Johnson was convicted, he filed a motion for a new trial, arguing, in part, that trial counsel was ineffective for failing to call Vernon as an alibi witness. The court set the case for a hearing, where it heard testimony from Vernon.

¶ 162 Vernon testified that Johnson was his cousin, that they were "close," that they hung out outside of family events, and "talk[ed] daily." He said that he lived at 67th Street and South Winchester Avenue and that he saw Johnson at his house "[a]round six" on the day of the

shooting. Vernon said he was home with his son and his "[b]aby mother" Briana when Johnson arrived with his daughter. Vernon said that he and Johnson "sat on the porch, talking" after Johnson arrived, and that Briana and his son were also on the porch. Vernon said that "[a]round, like, six" they "heard gunshots" and then went into his room. He said Johnson stayed at his house "like, 3, 4 hours."

¶ 163 On cross examination, Vernon was asked whether he remembered speaking with lawyers for Johnson in 2017. He was asked if he "told them that [he was] with [Johnson] on April 24, 2017." Vernon responded, "Was it '17? I don't know what year it was. I think it was April. He had his daughter with. He was sitting on the front porch." He admitted, however, that he neither contacted the police to let them know they arrested the wrong person, nor contacted the state's attorney's office to tell them that they brought charges against the wrong person.

¶ 164 After hearing this testimony, the court denied Johnson's motion for a new trial, including his claim of ineffective assistance of counsel. On appeal, Johnson again argues that his trial counsel was ineffective for failing to call Vernon as a second alibi witness. He claims that Vernon's testimony "would have provided crucial details supporting Johnson's first alibi witness, Kennedi Myles, thus substantially strengthening Johnson's alibi defense."

¶ 165 To establish ineffective assistance of counsel, a defendant must prove that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). "The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 166 When assessing an ineffective assistance claim, the defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). "[T]rial counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel." *People v. King*, 316 Ill. App. 3d 901, 913 (2000); see *People v. Fuller*, 205 Ill. 2d 308, 331 (2002) ("Counsel's strategic choices are virtually unchallengeable. Thus, the fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel.").

¶ 167 Johnson's ineffective assistance of counsel claim fails because the record supports a finding that defense counsel's decision not to call Vernon as an alibi witness was a tactical one. See *People v. Whittaker*, 199 Ill. App. 3d 621, 629 (1990) (finding that defense counsel's decision not to call witnesses was a matter of trial strategy, reasoning that "[t]he fact that counsel knew what [the two witnesses'] testimony would be before he made his decision lends support to the inference that his decision to not call defendant's uncle or mother was simply a tactical one" and that "[s]uch a decision, unlike one made after an inadequate investigation [citation] is presumed to be one made as a matter of trial strategy").

¶ 168 The record reflects that Johnson's attorneys spoke with Vernon sometime in 2017 to ask him what happened and that Vernon said he told them what he "knew about Mr. Antrell Johnson's whereabouts on the evening hours that day," yet they failed to call him as a witness at trial. They may have strategically chosen not to call him because they determined the jury

would not have believed his testimony due to his "close" ties to Johnson, he was unable to recall specifics, or his testimony would have conflicted with the testimony of Kennedi Myles and undercut their defense. Critically, even though Myles claimed she was with Johnson on the day of the shooting, Vernon never mentioned her name when he identified the individuals who were present at his home that day. In addition, Vernon's testimony—that the shooting occurred "[a]round, like, six"—directly contradicts the State's eyewitnesses, who confirmed that the shooting occurred around 7:30 pm, as well as the testimony of Myles, who said she and Johnson arrived at Vernon's house in "the afternoon" and that the shooting occurred "maybe 30, 40 minutes" after they got there. Based on this record, defense counsel's decision not to call Vernon was the "product of sound trial strategy and not of incompetence." *Coleman*, 183 Ill. 2d at 397.

¶ 169 Therefore, Johnson's sufficiency and ineffective assistance claims should be rejected and his jury conviction upheld. I respectfully dissent.

This form is approved by the Illinois Supreme Court and is required to be accepted in all Illinois Appellate Courts.

Instructions

Check the box to the right if your case involves parental responsibility or parenting time (custody/visitation rights) or relocation of a child.

Just below "Appeal to the Appellate Court of Illinois," enter the number of the appellate district that will hear the appeal and the county of the trial court.

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To the far right, enter the trial court case number, the trial judge's name, and the Supreme Court Rule that allows the appellate court to hear the appeal.

☐ **THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).**

FILED
APR 01 2022
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

APPEAL TO THE APPELLATE COURT OF ILLINOIS

FIRST District

from the Circuit Court of

Cook County

In re People of the State of Illinois

Plaintiffs/Petitioners *(First, middle, last names)*

☐ Appellants ☐ Appellees

v.

ANTRELL JOHNSON

Defendants/Respondents *(First, middle, last names)*

☑ Appellants ☐ Appellees

Trial Court Case No.: 17CR0869801

Honorable Thaddeus Wilson **Judge, Presiding**

Supreme Court Rule: 603

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☑ Appeal
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☐ Joining Prior Appeal
☐ Separate Appeal
☐ Cross Appeal

In 2, list the name of each person filing the appeal and check the proper box for each person.

2. Name of Each Person Appealing:

Name: Antrell (First) Johnson (Middle) (Last)

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☑ Defendant-Appellant ☐ Respondent-Appellant

Name: _____
First Middle Last

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

In 3, identify every order or judgment you want to appeal by listing the date the trial court entered it.

3. List the date of every order or judgment you want to appeal:

February 13, 2020
Date

Date

Date

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☑ reverse the trial court's judgment *(change the judgment in favor of the other party into a judgment in your favor)* and ☑ send the case back to the trial court for any hearings that are still required;

☐ vacate the trial court's judgment *(erase the judgment in favor of the other party)* and ☐ send the case back to the trial court for a new hearing and a new judgment;

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Antrell Johnson
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Additional Appellant Signature

All appellants must sign this form. Have each additional appellant sign the form here and enter their complete name, address, telephone number, and email address, if they have one.

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Time

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