No. 126715

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. TWIQWON FANE, Defendant-Appellee	)	Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-18-0151 There on Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Stephenson County, Illinois, Nos. 16 CF 283 & 16 CM 1034 The Honorable Val Gunnarson Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

Drean McGee testified as a witness for defendant and did not implicate him in the home invasion and attempted robbery of 92-year-old Voncile Modlinger. The court instructed the jury with a modified version of Illinois Pattern Jury Instruction 3.17, the so-called accomplice witness instruction. The People's opening brief established that it was proper to give the accomplice witness instruction in this case because the propriety of the instruction turns on McGee's status as an accomplice, not the substance of his testimony. This Court already held as much in *People v. Rivera*, 166 Ill. 2d 279, 292 (1995). There the Court reaffirmed a principle that dates back nearly a century to *People v. Touhy*, 361 Ill. 332, 343 (1935) (accomplice testimony should be carefully scrutinized "no matter on which side of the case he testified").

Moreover, the People's opening brief demonstrated that even if the trial court erred in giving a modified version of IPI 3.17, any error was harmless. Defendant's jury had ample reason to doubt McGee's testimony regardless of whether it received an accomplice witness instruction.

Nothing in defendant's brief suggests a contrary outcome.

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I. Abuse of Discretion Is the Proper Standard in This Case.

There is no merit to defendant's argument that the People's brief looked to inapposite legal principles and standards to analyze the question presented in this case. First, he argues that "[a]lthough the giving of jury instructions is generally reviewed for an abuse of discretion, when the question is whether the jury instructions accurately conveyed to the jury the law applicable to the case, our review is de novo." Def. Br. 16 (citing *People v. Pierce*, 226 Ill.2d 470, 475 (2007)). But there is no debate here about the *law* applicable to defendant's case. Unlike *Pierce*, the parties do not disagree about the elements of defendant's offense. *Cf. Pierce*, 226 Ill. 2d at 475 (asking whether jury instruction accurately stated the law where it defined theft from a person to include theft from the "presence" of a person). Nor is there any conflict over the definition of any legal term applicable to defendant's case, such as "causation," *see People v. Nere*, 2018 IL 122566, ¶ 29 (reviewing de novo court's instruction defining "causation"), or "reasonable doubt," *see People v. Downs*, 2015 IL 117934, ¶ 15 (reviewing de novo court's instructions defining "reasonable doubt"). Given the absence of such a disagreement, the question here is whether the jury instructions were clear enough to avoid misleading the jury, and that inquiry is reviewed for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 66 (2008).

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Nevertheless, defendant argues that de novo review should apply because the trial court "rejected" IPI 3.17 in favor of a modified version of the instruction. Def. Br. 15. As defendant concedes, courts have discretion to give non-pattern jury instructions. *Id.* (citing *People v. Pollock*, 202 Ill. 2d 189, 211-12 (2002)). But, defendant insists, where an IPI instruction exists on a subject upon which the trial court has determined the jury should be instructed, the IPI instruction must be used, unless it does not accurately state the law. *Id.* at 15-16 (citing *Pollock*, 202 Ill. 2d at 212; *People v. Bannister*, 232 Ill. 2d 52, 81 (2008)). It is this question that defendant argues requires de novo review. But even if defendant accurately stated the standard of review for such circumstances (which the People do not concede), he does not describe the situation here.

On the contrary, as defendant concedes, "IPI 3.17 was not applicable" to his case. Def. Br. 14. It would have been nonsensical to give the pattern accomplice witness instruction that applies to a different scenario than the one presented. That does not mean, however, that no accomplice witness instruction should have been given at all. The trial court had discretion to give a non-IPI accomplice witness instruction germane to the factual scenario before the jury so long as that instruction was not misleading. As the People's opening brief explained, Peo. Br. 6-11, the court did not abuse its

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discretion in instructing the jury with the modified version of IPI 3.17. None of defendant's arguments suggests a different result.

II. The Court Did Not Abuse Its Discretion by Giving an Accomplice Witness Instruction.

In *Rivera*, this Court held that it is appropriate to give an accomplice witness instruction in a case like this one, noting that "an accomplice's testimony should be cautiously scrutinized regardless of which side he testifies for." 166 Ill. 2d at 292. Defendant thus is incorrect to assert that "[h]istorically, the purpose of the accomplice instruction is to warn the jury that an accomplice may have a strong motive to provide false testimony for the State in exchange for immunity or some other lenient treatment." Def. Br. 17. While that is one possible reason to view an accomplice's testimony with skepticism, it is not the only reason. If the sole purpose of the accomplice witness instruction were to caution against the possibility of false testimony given in exchange for leniency when an accomplice testifies for the People, then it would make no sense that the accomplice witness instruction should also be given when an accomplice testifies for the defense. But it was the clear holding of this Court in *Rivera* that the instruction be given regardless of whether an accomplice testifies for the People or the defense. 166 Ill. 2d at 292.

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This holding is sound because an accomplice witness always has a potential for bias, regardless of whether inculpatory or exculpatory testimony is provided. "When an accomplice testifies for the prosecution he may have an interest in prevaricating in favor of the prosecution to obtain favors or even immunity," but "[o]n the other hand, when one accomplice testifies for another, there is always the chance that each will try to 'swear the other out of the charge.'" *United States v. Nolte*, 440 F.2d 1124, 1126 (5th Cir. 1971) (quoting *Washington v. Texas*, 338 U.S. 14, 21-23 (1967)).

Furthermore, while defendant is correct that IPI 3.17 is properly given as written "'[w]hen a witness says he was involved in the commission of a crime with the defendant,'" Def. Br. 19 (quoting IPI 3.17), that does not mean that it is incorrect to give a modified accomplice witness instruction when the People allege that a witness was the defendant's accomplice, but the witness denies they committed the crime together. Indeed, in *Rivera*, the accomplice witness testified that the "defendant left the apartment" before the crime and "had no involvement in the victim's murder." 166 Ill. 2d at 290.

In other words, it is irrelevant that IPI 3.17 is a correct articulation of the law and is properly given as written in some cases involving accomplice testimony. It is simply inapplicable to the nature of the alleged accomplice's testimony in this case. The dispositive question is whether the instruction

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given is an accurate articulation of the law as it relates to the case before the jury. And *Rivera* makes clear that the modified instruction given here was appropriate.[1]

Defendant's efforts to distinguish *Rivera* are unavailing. First, he points out that the defense witness in *Rivera* had implicated that defendant in prior proceedings. Def. Br. 21. But at trial, the witness explicitly exonerated the defendant. *Rivera*, 166 Ill. 2d at 290. Nor did this Court rely on that prior inculpatory testimony to justify application of the accomplice witness instruction to the defense witness. *Id.* at 293. Instead, the *Rivera* Court reaffirmed the principles first articulated in *People v. Touhy*, 361 Ill. 332 (1935). *Rivera*, 166 Ill. 2d at 292-93 (discussing *Touhy*). *Touhy* upheld an accomplice witness instruction for a defense witness who denied any involvement in the crime and never implicated the defendant. 361 Ill. at 335, 343. The *Touhy* Court reasoned that "[a]lthough the term 'accomplice' is generally applied to those testifying against their fellow criminals, an

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[1] Defendant points out that the People did not cite appellate court cases following *Rivera*'s holding that an accomplice witness instruction is appropriate in a case like this one. Def. Br. 28. Though unpublished, such opinions exist. *See, e.g.*, *People v. Cruz*, 2014 IL App (1st) 122924-U, ¶¶ 64-68. In any event, no appellate court decision can change the import of this Court's clear holding in *Rivera*.

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accomplice is one who is in some way concerned in or associated with another in the commission of a crime." *Id.* (internal citations omitted). The Court then held: "No reason is advanced, and none is apparent, why one who is in fact an accomplice should not have his testimony scrutinized carefully before it is relied on, no matter on which side of the case he testified." *Id.* So, the inculpatory nature of the witness's prior testimony in *Rivera* is not a meaningful distinction.

Second, defendant argues that *Rivera* is distinguishable because "both the State and the defense called accomplices as witnesses in *Rivera*." Def. Br. 22. Under those circumstances, defendant contends, the trial court was forced to give an accomplice witness instruction for the defense witness because "had the trial court given the accomplice instruction for the State's witnesses and not for the defense accomplice witness, it would have essentially bolstered the credibility of the defense witness by telling the jury to consider the accomplice testimony for the State with caution and suspicion while not putting such a limitation on the accomplice testimony for the defense." *Id.* But this is exactly what defendant seems to be arguing should happen as a rule: accomplice witnesses for the People should be considered with caution and suspicion, while accomplice witnesses for the defense should

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not. To the extent defendant suggests that would be inappropriate, the People agree.

Indeed, this case is the perfect example of why defense-side accomplice witnesses must also be treated with suspicion. As other jurisdictions have noted, defense-side accomplice witnesses often have an incentive "to 'swear [the defendant] out of the charge.'" *Nolte*, 440 F.2d at 1126 (quoting *Washington*, 338 U.S. at 21-23); *see also, e.g.*, *United States v. Tirouda*, 394 F.3d 683, 687 (9th Cir. 2005); *United States v. Bolin*, 35 F.3d 306, 308 (7th Cir. 1994). Here, McGee had a longstanding prior relationship with defendant, R562, 685, 704; therefore, his testimony warranted careful scrutiny, and the trial court did not abuse its discretion in giving the accomplice witness instruction.

III. Any Error Was Harmless.

In any event, as the People's opening brief demonstrated, even if this Court were to conclude that the trial court erred in instructing the jury with a modified version of IPI 3.17, any error was harmless. Peo. Br. 11-13; *see People v. Johnson*, 146 Ill. 2d 109, 137 (1991) ("An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different if the proper instruction had been given.").

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Defendant argues that the People failed to "fully develop [their] harmless error argument" because they failed to "set forth what burden [they] ha[ve] in order to prove that the error is harmless." Def. Br. 34. Not so. The People cited *Johnson* for the correct harmless error standard, which is to demonstrate that the result would have been the same had the proper instruction been given. Peo. Br. 11-12. Nor is defendant correct when he contends that the People overlooked "a significant fact"— that both McGee's and defendant's DNA was found on the t-shirt defendant was holding when arrested — in their argument and statement of facts. Def. Br. 34-35. At trial, a forensic scientist testified for the People that neither McGee nor defendant could be excluded from the mixture of DNA samples on the t-shirt. R627-28. Defendant claims that this "fact" proves that McGee's version of events was true because he testified that he handed the t-shirt to defendant when he encountered defendant after the robbery. Def. Br. 36-37. This argument stretches the value of McGee's testimony to the breaking point. McGee could just as likely have handed the t-shirt to defendant before the two men committed the robbery, or he could have merely brushed up against it at some point during the crime. Far from trying to skirt their obligation to fairly state the facts necessary to an understanding of the case, *see* Sup. Ct. Rule 341(h)(6), the People omitted this fact from their opening brief because

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it did not seem relevant to defendant's guilt or innocence. Indeed, this testimony was not even mentioned in the appellate court's harmless error analysis, which opined that "McGee's testimony represented defendant's entire defense." A19-20.

And, as the People's opening brief explained, Peo. Br. 11-13, there was substantial reason to doubt McGee's testimony with or without the accomplice witness instruction. McGee considered defendant his cousin and he was a friend of 15-17 years. R562, 685, 704; *see also People v. Brown*, 55 Ill. App. 3d 724, 729 (5th Dist. 1977) (Jones, J., specially concurring) ("It is unrealistic to expect a fellow accused to be a stranger or an enemy of the accessory; more likely it is one with whom the accessory has a close and intimate relationship, and the impulse to help such persons would in some circumstances be as natural as to help themselves."). Moreover, McGee's account — that he encountered defendant after running to the Provena parking lot — was contradicted by Corporal Johnson, who observed *two* individuals sprint across the field directly to the west of Provena. R470, 694-95. Indeed, McGee's entire account — that he had driven with defendant to the area of the crime, dropped defendant off before committing the home invasion with someone else, and then coincidentally crossed paths with defendant again just prior to his arrest — strains credulity. McGee and

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defendant were caught together approximately four blocks from the victim's home, a mere five minutes after police saw McGee flee the scene. R451-52. Defendant was arrested in possession of a white t-shirt like the one McGee's accomplice had over his face. R485-86, 541-42. And there is no explanation for why McGee, who did not cover his face during the crime, would have been holding the t-shirt before handing it to defendant just before police arrested them. R456-57, 680. Nor is there any explanation for why the keys to defendant's girlfriend's car were found at the victim's home, R562, 566, 569, when defendant told police, unprompted and inconsistent with McGee's version of events, that the car had been stolen, R496.

It is true, as defendant observes, that the People did not include a harmless error argument in their petition for leave to appeal (PLA). Def. Br. 33-34. However, the failure to raise an issue in a PLA is not a jurisdictional bar to this Court's ability to review a matter but, rather, "a principle of administrative convenience." *In re Rolandis G*, 232 Ill. 2d 13, 37 (2008) (quoting *Dineen v. City of Chicago,* 125 Ill. 2d 248, 265-66 (Ill. 1988)). Review of an issue not specifically mentioned in a PLA is appropriate when that issue is "inextricably intertwined" with other matters properly before the court. *Id.* (*citing Hansen v. Baxter Healthcare Corp.,* 198 Ill. 2d 420, 430 (2002)). It is thus entirely appropriate for this Court to consider whether the

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instruction, if error, was harmless because the question is inextricably intertwined with the determination of whether the error that occurred requires reversal. *Id.* (considering forfeited harmless error argument).

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CONCLUSION

For these reasons, and those stated in the People's opening brief, this Court should reverse the appellate court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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. 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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.

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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. The undersigned certifies that on June 29, 2021, the foregoing **Reply Brief of Plaintiff-Appellant** was electronically filed with the Clerk, Illinois Supreme Court, through the Odyssey eFileIL system, which will serve the following, counsel for defendant:

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