No. 127670

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, First District,
Plaintiff-Appellant,	No. 1-17-2090
v.	There on Appeal from the Circuit Court of Cook County, No. 15 CR 19055
JASON CONWAY,	The Honorable Charles P. Burns,
Defendant-Appellee.	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Following a bench trial, defendant was convicted of armed habitual criminal based on eyewitness testimony from a police officer and corroborating physical evidence. In a 2-1 decision, the appellate court reversed, sua sponte ruling that the trial judge had a "pronounced bias in favor of police testimony" because he credited the officer's testimony that he could identify defendant. No issue is raised on the pleadings.

ISSUES PRESENTED

1. Whether the appellate majority erred by sua sponte reversing defendant's conviction based on an unbriefed theory of judicial bias.

2. Whether the appellate majority's conclusion that the trial judge was biased because he credited the officer's testimony is meritless.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 604(a). This Court allowed the People's petition for leave to appeal on November 24, 2021.

STATEMENT OF FACTS

A. Defendant's Arrest

On November 2, 2015, a Chicago police officer saw defendant shoot multiple times at a passing car in broad daylight. R66-70.[1] Defendant was apprehended a few minutes later and, due to his criminal history, was charged with armed habitual criminal. R63-69; C20.

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[1] The common law and report of proceedings are cited as "C_" and "R_"; defendant's appellate court opening brief is cited as "Def. App. Ct. Brief."

B. Defendant's Trial

Defendant waived his right to a jury trial. R61. At defendant's bench trial, the People presented the testimony of a Chicago police officer, a forensic scientist, and two evidence technicians.

Officer Donald Story, a member of the Narcotics Organized Crime Division, testified that he had been a police officer for over 15 years. R63, 77. On the day of the shooting, he and other officers in his unit were conducting surveillance in Chicago. R63-64. Story was parked on the street in a civilian car and dressed in civilian clothes. R64-65. Just before noon, in broad daylight, he heard seven gunshots. R65-66. After the initial shots, he turned toward the sound of the gunfire and saw defendant firing a handgun at a moving vehicle. R66.

Defendant was "approximately maybe" 150 feet away from Story at that time. *Id.* Nothing obstructed Story's view of defendant. R101-02. Story was able to see defendant's face and body. R66-67. Defendant was wearing a distinctive multi-colored sweatshirt and light-blue jeans. R70.

After the car he shot at drove away, defendant approached a Pontiac parked on the street, opened the door, reached inside and stepped away, and then approached and reached inside the Pontiac a second time before entering a nearby residence. R68. Story reported the shooting and, minutes later, several officers apprehended defendant inside that residence. R69.

Story entered the residence shortly thereafter. R70. There were several men and women inside, in addition to the officers. R97-98. Defendant was sitting on the floor, wearing a white t-shirt and light-blue jeans. R70-71. Story identified defendant as the shooter. *Id.* On the floor next to defendant lay the multi-colored sweatshirt Story had seen him wearing during the shooting. *Id.* During a pat down of defendant, police found the Pontiac's keys in defendant's possession. R72. Police also discovered a .40 caliber handgun hidden under a mattress in the residence; it looked like the gun Story had seen defendant shooting. R71-72.

A forensic scientist testified that gunshot residue was found on defendant's multi-colored sweatshirt. R129-30. And evidence technicians testified that (1) seven shell casings were found on the ground where Story had seen defendant firing his handgun, and (2) those shell casings were fired from the handgun that police recovered in the residence. R106, 139-40.

The parties stipulated that defendant had two prior Class 1 felony convictions. R143. Defendant did not testify or offer any evidence. R144-45.

In closing argument, the defense never argued that it was impossible to identify someone from 150 feet away. The defense expressly told the judge, "You can believe Story or you can doubt him. It's you, you're the trier of fact." R150. Instead, the defense argued that (1) the shooter would have been walking at an angle to Story, so Story would have seen his side profile only, and (2) the shooting was brief. R146-47. Defense counsel said, "Could he

have been the guy? Sure. I'm not an idiot. He could have been the guy," but counsel argued that the People could not prove defendant's guilt beyond a reasonable doubt "without a statement, without fingerprints, without DNA, without any other witness to corroborate what Mr. Story says, he saw in five seconds [*i.e.*, the approximate time it took to fire seven shots]." R150-51.

The People argued that Story testified clearly and convincingly that defendant was the shooter, and his testimony was corroborated by physical evidence, such as the distinctive sweatshirt found next to defendant immediately after the shooting that contained gunshot residue. R151-54.

The trial court announced its verdict in a ruling that spanned seven transcript pages. R154-60. The court began by discussing the physical evidence and concluded that (1) there was "no question" that the gun used in the shooting was recovered in the same residence where defendant was apprehended; and (2) it was "clear" that the distinctive sweatshirt worn by the shooter was recovered right next to defendant. R155.

The court then turned to Story's identification of defendant as the shooter. The court noted that the shooting occurred in the middle of the day, in "natural sunlight," and nothing obstructed Story's view. R156. The court next concluded that Story had sufficient time to view the shooter because he observed the shooter fire at the fleeing car, walk to the Pontiac and stay there a few moments, and then go into the residence, all of which would "lengthen the time that [Story] was able to see the shooter." R156-57.

As to Story's demeanor, the court noted that he "testified very clearly and unequivocally that defendant was in fact the shooter, that he was able to observe not only his side profile but also his face[.]" R157. The court again noted that Story's testimony was "corroborat[ed]" by police finding defendant next to the multi-colored sweatshirt that had gunshot residue on it. R157-58. And then the court stated:

> I do find that the officer did have a unique opportunity to view the shooter in this matter. I do find that the officer's testimony with regard to the identity of the shooter was in fact clear, credible, and convincing.
>
> I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning then with a police officer. That is not a general statement. That is specifically to this officer. I believe his testimony is clear, credible, and convincing with regard to this.
>
> The guns inside the place, the shooter went inside the place, the identity of this defendant I believe has been established beyond a reasonable doubt.

R158-59. Accordingly, the court found defendant guilty of armed habitual criminal. R160.

The defense filed a motion for a new trial, arguing that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt because the People had established only that defendant was present at the scene of a crime, not that he had committed the crime himself. C103-04. The motion did not allege that the trial judge showed any bias nor that it was impossible

for Story to identify defendant. *Id.* The court denied the motion, R184, and sentenced defendant to 14 years in prison, R206.

C. Defendant's Appeal

On appeal, defendant raised four claims: (1) the evidence was insufficient to prove his guilt beyond a reasonable doubt; (2) testimony from a forensic scientist regarding the results of the gunshot residue tests violated the Confrontation Clause because a different, non-testifying expert had conducted the tests; (3) the trial judge "misrecollect[ed]" the evidence by referring to the Story's training as a police officer in his verdict because no evidence of his training was presented at trial; and (4) defendant's pro se complaints about the attorney who represented him for a time before trial entitled him to a hearing under *People v. Krankel*, 102 Ill. 2d 181 (1984). *See* Def. App. Ct. Brief at 14-52.

Defendant did not assert a judicial bias claim or ask that the judge be replaced on remand. *See id.* Rather, defendant's opening brief emphasized that the record was "clear" that in crediting Story's account the judge "was *not* applying a 'general'" view of police officers but instead made "a finding that was 'specific to' Officer Story." *Id.* at 39-40 (emphasis by defendant).

The appellate court reversed defendant's conviction in a 2-1 decision and ordered that a new judge be assigned on remand. *People v. Conway*, 2021 IL App (1st) 172090, ¶¶ 1, 31. The majority began by denying defendant's sufficiency of the evidence claim because "the discovery of the

gun, [defendant's] proximity to the hoodie, and the testimony that the shooter reached into the car for which [defendant] held the keys suffices as corroboration of the eyewitness identification." *Id.* ¶ 20.

However, the majority remanded for a new trial because it found that the trial judge had a "pronounced" bias in favor of the police. *Id.* ¶ 31. According to the majority, only a person with a pronounced bias would credit Story's account because expert opinions provided in cases outside of Illinois (none of which was introduced in this trial) assert that the probability of accurately identifying someone decreases as distance increases and, according to one expert, is "essentially zero" at "about 150 feet away." *Id.* ¶ 23. Thus, the majority believed that Story's identification of defendant "belies the reality of human cognition." *Id.* ¶ 27. The majority asserted that the trial judge's decision to credit Story's testimony proved that the judge had a "pronounced bias in favor of police testimony" and believed that police officers have "special perceptual powers," which "led him to reject [the] defense without due consideration" and denied defendant "a fair and impartial trial." *Id.* ¶¶ 1, 28-31 (alterations in original).

The majority remanded for a new trial before a new judge due to "the trial judge's pronounced bias in favor of police testimony." *Id.* ¶ 29. Because of that sua sponte ruling, the court did not address defendant's other claims.

Justice Pierce dissented because nothing in the record suggested that the "experienced trial judge" was biased; instead, the majority's decision was

"an end-around on the axiom that, in a bench trial, the trial judge is in the best position to make credibility findings and is presumed to know the law." *Id.* ¶ 35 (Pierce, J., dissenting). Justice Pierce also noted that the majority erred by relying on expert opinions from out-of-state cases that were not introduced in this trial. *Id.* ¶ 43. And he further stated:

> [T]he trial judge gave a considered explanation for his credibility determination that was based on the evidence before him. The majority fails to point to even a single statement from the trial judge that evinced a "preconceived notion" in favor of the State or a "pro-police bias," other than the circuit court's observation that Officer Story was a police officer. . . . Rather than encouraging the circuit court to explain its decisions, this decision will cause trial judges to make conclusory credibility determinations to avoid unsubstantiated interpretations of its findings by a reviewing court.

Id. ¶ 46 (internal citations omitted).

STANDARD OF REVIEW

Whether the majority erred by reversing defendant's conviction based on a judicial bias claim that defendant never raised and whether that claim has merit present legal issues that are reviewed due novo. *People v. Givens*, 237 Ill. 2d 311, 323-30 (2010); *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002).

ARGUMENT

The appellate majority erred when it sua sponte reversed defendant's conviction based on an unbriefed theory of judicial bias. Further, the majority's conclusion that the trial judge was biased is meritless and will lead to negative consequences in future cases.

I. The Appellate Majority Erred by Sua Sponte Reversing Defendant's Conviction Based on a Claim that Defendant Did Not Raise.

According to the majority, the trial judge's decision to credit Story's testimony proved that the judge had a "pronounced bias" in favor of the police. *Conway*, 2021 IL App (1st) 172090, ¶¶ 29, 31. Judicial bias is structural error that automatically requires a new trial regardless of the strength of the evidence. *See, e.g., People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010). But defendant has never raised such a claim.

Indeed, at trial, the defense admitted that it was possible to credit Story's testimony. As defense counsel told the judge in closing argument: "You can believe Story or you can doubt him. It's you, you're the trier of fact." R150. And in his motion for a new trial, defendant did not argue that it was impossible to believe Story's account nor that the judge showed bias by crediting his testimony. *See* C103-04.

Likewise, on appeal, defendant argued that there was insufficient evidence to establish certain points at trial, not that the judge was biased. In particular, rather than raising a claim of judicial bias, defendant argued that the judge's decision to credit Story was "plain error" because it was based on a "misrecollection" of evidence, *i.e.*, the judge thought prosecutors had presented evidence that Story received training that would reduce the risk of misidentifications. Def. App. Ct. Brief at 39; *see also id.* at 38 (arguing that it is error where judge "fails to recall evidence that is crucial to the defense"). Defendant faulted prosecutors for not presenting evidence of Story's training

and noted, in passing, that prosecutors may not rely on "a witness's status as a police officer" to "bolster his or her credibility." *Id.* at 40. However, defendant did not claim that prosecutors improperly bolstered Story's testimony or that the trial judge had a pro-police bias. *Id.* at 38-40.

To the contrary, defendant's brief emphasized that it "was clear for the record" that when the trial judge credited Story's account, he "was *not* applying a 'general'" notion about police officers but instead was making "a finding that was 'specific to' Officer Story." *Id.* at 39-40 (emphasis by defendant). Again, defendant's claim was based on the judge's alleged "misrecollection" of the evidence, not bias — the word bias does not appear in his briefs. *Id.* at 39. And, notably, defendant did not ask that a new judge be appointed on remand. *See id.* Therefore, defendant's claim cannot be framed as alleging that his conviction was the result of structural error due to a judge who had a pro-police bias, as the appellate majority claimed. *See Conway*, 2021 IL App (1st) 172090, ¶ 22.

By sua sponte reversing defendant's conviction based on a claim that defendant did not raise, the majority contravened the "well settled" rule that "a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment." *People v. Givens*, 237 Ill. 2d 311, 323 (2010). As this Court has explained, reviewing courts should not reach unbriefed issues because "'[o]ur adversary system is designed around the premise that the parties know what is best for them, and are

responsible for advancing the facts and arguments entitling them to relief.'" *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008)); *see also People v. Colyar*, 2013 IL 111835, ¶¶ 58-59 (finding "no reason" to address unbriefed issues because courts "rely on the parties to frame the issues," and are the "neutral arbiter of matters the parties present").

The need for such restraint is especially evident in this case. As this Court has said, a finding that a judge is biased "is not, of course, a judgment to be lightly made." *E.g., Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002); *People v. Jackson*, 205 Ill. 2d 247, 276 (2001). To sua sponte hold that a judge is biased because of a credibility finding that he made after hearing live testimony, when even defendant raised no such bias claim, contradicts the rules of judicial restraint that this Court has consistently advised appellate courts to follow. *E.g., Eychaner*, 202 Ill. 2d at 280 (trial judges are "presumed to be impartial"); *People v. Vance*, 76 Ill. 2d 171, 181 (1979) ("Reviewing court judges should be chary of condemning as motivated by prejudice those actions of trial judges which may represent only a difference of opinion.").

Lastly, this case does not implicate the limited exception permitting courts to address an unbriefed issue if it is "clear and obvious error" that is "controlled by clear precedent." *Givens*, 247 Ill. 2d at 325-26. The majority did not identify, nor have the People found, precedent holding that a judge is biased because he credited a police officer's testimony. *Conway*, 2021 IL App (1st) 172090, ¶¶ 22-31. Instead, the majority's ruling is contrary to this

Court's precedent. *See infra* Part II. Therefore, the appellate court's opinion regarding the judicial bias claim should be vacated because it violates the longstanding rule that reviewing courts should not decide unbriefed issues.

II. The Appellate Majority's Conclusion That the Trial Judge Was Biased Is Also Meritless.

Even if a judicial bias claim were before the appellate court, its ruling must be reversed because the majority's conclusion that the trial judge was biased is plainly meritless. Although the majority failed to discuss the standards applicable to claims of judicial bias, the law is settled: trial judges are "presumed to be impartial even after extreme provocation." *Jackson*, 205 Ill. 2d at 276; *see also, e.g., Eychaner*, 202 Ill. 2d at 280. Therefore, the party alleging judicial bias "bears the burden of establishing actual prejudice, not just the possibility of prejudice." *People v. Jones*, 219 Ill. 2d 1, 18 (2006) (collecting cases); *see also, e.g., People v. Patterson*, 192 Ill. 2d 93, 131 (2000). This is a heavy burden because "'[o]nly under the most extreme cases would disqualification for bias or prejudice be constitutionally required.'" *Jackson*, 205 Ill. 2d at 276 (collecting cases). The movant must present "evidence of prejudicial trial conduct and evidence of the judge's personal bias," which would "make fair judgment impossible." *Eychaner*, 202 Ill. 2d at 280-81.

This Court has consistently held that "[a]llegedly erroneous findings and rulings by the trial court are insufficient reasons to believe that the court has a personal bias." *Id.* at 280; *see also Patterson*, 192 Ill. 2d at 131-32 (collecting cases). Most importantly, this Court has held that credibility

determinations "are clearly within the purview of the trial court," and, thus, cannot support a bias claim unless the record shows that the judge has "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Eychaner*, 202 Ill. 2d at 280 (rejecting claim that comments on witness's credibility established bias); *see also In re Estate of Wilson*, 238 Ill. 2d 519, 555 (2010) (same).

The appellate majority's conclusion that the judge had a "pronounced bias" because he credited Story's testimony does not acknowledge, and cannot be squared with, this longstanding authority. Indeed, the majority's ruling misreads the judge's verdict, fails to consider the context of the case, relies on inadmissible evidence not presented at trial, and is rebutted by scientific studies showing that eyewitness identification is possible from 150 feet.

A. The Majority Misreads the Verdict in Two Ways.

The appellate majority's conclusion that the trial judge was biased misreads the judge's verdict in two fundamental ways.

1. The trial judge made clear that he was making a finding about Story's credibility specifically, not police officers generally.

The appellate majority's assertion that the trial judge had a "pronounced bias in favor of police testimony" fails from the start because the judge credited Story's account for multiple reasons that were unrelated to his job as a police officer, and he expressly stated that his decision was based on Story "specifically" and was "not a general statement" about police officers. As the dissent noted, "[t]he majority isolates the trial judge's actual findings

to find bias where none is evident and without regard for context. As the record shows, the trial judge's findings were plainly based on the evidence before it." *Conway*, 2021 IL App (1st) 172090, ¶ 40 (Pierce, J., dissenting).

To begin, in his ruling, the trial judge emphasized several reasons why he found Story credible, and those reasons were unrelated to being a police officer. For example, the judge put significant stock in Story's demeanor under direct examination and cross-examination, finding that he "testified very clearly and unequivocally that this defendant was in fact the shooter, that he was able to observe not only his side profile but also his face." R157; *see also* R158-59 (noting Story's testimony was "clear" and "convincing"). The judge also noted that it was undisputed that the shooting occurred in the middle of the day, in broad daylight, and nothing obstructed Story's view, all of which supported Story's testimony that he could identify defendant. R156. And the judge further noted multiple times that there was "corroborative evidence" of Story's identification, such as the distinctive sweatshirt found next to defendant that contained gunshot residue and the gun used in the shooting that was recovered in the house. R154-58.

These reasons — which make up the bulk of the trial judge's ruling — are legitimate, well-accepted reasons to credit a witness's testimony, and they have nothing to do with Story being a police officer. *E.g.*, *People v. Reed*, 2020 IL 124940, ¶ 54 (trial courts are in "the best position" to determine credibility because they can observe the witness's "demeanor during examination");

People v. Davis, 205 Ill. 2d 349, 362 (2002) (reasonable for trial court to credit witnesses' testimony where it found "their demeanor" was "convincing" and some details were "corroborated by physical evidence"); *People v. McLaurin*, 2020 IL 124563, ¶ 36 (reasonable to credit testimony of witness who saw the defendant across the street "in plain daylight" with no obstructions).

The majority's conclusion that the trial judge had a "pronounced bias" in favor of the police fails to account for these statements and findings by the judge. Instead, the majority considered only a short passage near the end of the judge's seven-page ruling, where he said:

> I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. *He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning than with a police officer. That is not a general statement. That is specifically to this officer.* I believe his testimony is clear, credible, and convincing with regard to this.
>
> The guns inside the place, the shooter went inside the place, the identity of this defendant I believe has been established beyond a reasonable doubt.

R158-59 (emphasis added); *see Conway*, 2021 IL App (1st) 172090, ¶ 22.

The majority asserted that these comments prove that the judge "work[ed] under the principle that police officers are presumptively trustworthy" and "led him to reject [the] defense without due consideration." *Conway*, 2021 IL App (1st) 172090, ¶¶ 28-29 (internal quotations omitted). As noted, the majority's assertion cannot be squared with the trial judge's

emphasis on Story's demeanor during examination and the judge's careful consideration of the physical evidence, all of which are unrelated to Story being a police officer, and which show the judge did not "presumptively" find Story credible or carelessly reject defense theories.

Moreover, the majority's conclusion that the judge had a "pronounced bias" in favor of the police fails to consider what the judge actually said when referring to Story's credibility and occupation. In the passage cited by the majority, the judge expressly said that his decision was "not a general statement" about police officers, but instead was a finding that "is specifically to this officer." R159. The judge then immediately noted (once again) Story's demeanor — calling it "clear" and "convincing" — and (once again) noted that other evidence corroborated Story's account. *Id.*

Plainly, a judge's express statement that his finding is specific to a particular witness, and is not a general statement about all officers, and the judge's repeated emphasis on the witness's demeanor and the evidence corroborating his testimony, are signs of an impartial judge doing exactly what he is supposed to do: carefully evaluating a witness's credibility based on his demeanor during examination and the evidence produced at trial.

Indeed, as defendant said in his appellate brief, the trial court "went out of its way to make it clear for the record that it was *not* applying a 'general,' common-sense notion about police officers to the evidence, it was making a finding that was 'specific to' Officer Story." Def. App. Ct. Brief at

39-40 (emphasis by defendant); *see also, Conway*, 2021 IL App (1st) 172090, ¶ 46 (Pierce, J. dissenting: "the trial judge gave a considered explanation for his credibility determination that was based on the evidence before him."). Thus, there is no evidence that the judge was biased, let alone the strong evidence necessary to overcome the presumption of impartiality.

2. The trial judge did not say that Story's training gave him the ability to see farther than ordinary humans.

The majority misreads the trial judge's verdict in a second way: the majority incorrectly believed that the judge found that Story's training as a police officer gave him the physical ability to see farther than civilians. In particular, the majority cited expert testimony from an unpublished Indiana appellate court case opining that "'at about 150 feet away, a witness's ability to correctly identify somebody falls to essentially zero.'" *Conway*, 2021 IL App (1st) 172090, ¶ 23 (quoting *Benson v. State*, 88 N.E.3d 1078 (Ind. Ct. App. 2017) (table)).[2] According to the majority, that testimony — which was not offered in this trial — proves that "Story's identification belies the reality of human cognition." *Id.* ¶ 27. Thus, the majority reasoned, by crediting Story's testimony, the judge showed that he had a "pronounced bias" and believed police had "special perceptual powers." *Id.* ¶¶ 1, 26, 31.

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[2] The majority cited expert opinions from two other out-of-state cases, but only for the proposition that the accuracy of identifications tends to diminish as distance increases, not that it is *impossible* to identify someone at 150 feet. *See Conway*, 2021 IL App (1st) 172090, ¶ 23. Indeed, as discussed below, an expert opinion in one of those cases suggests it is possible to identify someone at 150 feet. *Infra* Part II.B.3.

In reaching that conclusion, the majority failed to consider a key fact: defendant did not argue at trial that it is impossible to identify someone from 150 feet away. To the contrary, the defense told the judge in closing argument it was possible to credit Story's account. R150 ("You can believe Story or you can doubt him. It's you, you're the trier of fact."). Rather than arguing that identification is impossible at that distance, defendant argued at trial that reasonable doubt existed because (1) the shooter would have been walking at an angle to Story, so Story would have only seen the side of his face, not the front; (2) no other evidence corroborated Story's account; and (3) the shooting lasted only about five seconds. R146-51.

Rejecting the first two points, the judge noted that Story "testified very clearly and unequivocally" that he saw "not only [defendant's] side profile but also his face," and that the identification was corroborated by the recovery of the gun inside the same residence as defendant and the uniquely colored sweatshirt with gunshot powder residue found next to defendant. R154-57.

As to the defense's third point — the brief nature of the shooting — the judge began by noting that the shooter fired seven shots, then walked to the Pontiac and stayed there a few moments, and then walked into the residence, all of which would "lengthen the time that [Story] was able to see the shooter" beyond the five seconds it took to fire seven shots. R156-57. Then, the judge referred to the degree of attention Story paid to defendant during that time, and in doing so referred to Story's occupation:

> I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning than with a police officer.

R159. Thus, when the trial judge referred to Story's job as a police officer, he did not imply that training gave Story a unique physical ability to see objects from 150 feet — after all, no one had argued it was impossible to identify someone from that distance. Rather, the judge meant that it was reasonable to believe that Story was paying attention, *i.e.*, he was not "startled" or "distracted," which decreased the risk of an incorrect identification.

Accordingly, the premise upon which the majority's ruling is built — that the judge thought police have the special ability to see at greater distances than other people — misreads the verdict. Instead, as the dissent correctly pointed out, (1) the record demonstrates that the trial judge found Story credible in part because "as a police officer performing his job, he was paying attention to what was happening," and (2) "[n]othing suggests that the trial judge believed Officer Story possessed enhanced perceptual powers by virtue of having been trained as a police officer." *Conway*, 2021 IL App (1st) 172090, ¶ 43 (Pierce, J., dissenting).

Lastly, it was reasonable for the judge to consider how Story's job as police officer affected the attention he paid to the shooter. It is settled that the reliability of eyewitness testimony depends in part on the witness's

degree of attention to the offense. *E.g., People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). For example, some people, when witnessing a crime, may duck down or try to get away for their own safety, may not want to get involved, or otherwise may not pay sufficient attention to reliably identify the offender. But the evidence showed that Story was a veteran police officer of 15 years who was working in a surveillance unit, and this context supports the conclusion that he paid sufficient attention to identify the shooter.

As the United States Supreme Court has explained, when judging the reliability of an eyewitness identification, it is reasonable to assume that a police officer witnessing a crime will "pay scrupulous attention to detail" because he knows that (1) "subsequently he would have to find and arrest" the offender, and (2) his observations "would be subject later to close scrutiny and examination in any trial." *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977); *see also United States v. Frink*, 328 Fed. Appx. 183, 192 (4th Cir. 2009) (crediting officer's eyewitness identification because "as a trained police officer, his degree of attention is presumed to be higher than that of a lay person"); *State v. Findlay*, 171 Vt. 594, 597 (Vt. 2000) (collecting cases). Again, this does not mean that an officer's testimony is inherently accurate, but simply recognizes that it is reasonable to infer that an officer may pay close attention because it is the officer's duty to apprehend the offender.

In sum, the majority misreads the verdict because the judge stated that his findings were specific to Story, not officers generally; he provided

multiple reasons for crediting Story's testimony that were unrelated to being a police officer; and his brief comment about Story's occupation is an accepted reason to infer that Story would pay attention during the shooting.

B. The Majority's Conclusion Fails for Four Additional Reasons.

Apart from misreading the verdict, the majority's conclusion that the trial judge was biased suffers from four additional fatal flaws.

1. The defense stated it was possible to credit Story.

First, as noted, defendant never argued at trial that it was impossible for Story to identify defendant from 150 feet away, but instead expressly told the trial judge that it was possible to credit Story's testimony. R150. Thus, even if the majority doubts Story's ability to see 150 feet, the judge's decision to credit Story's testimony did not reflect bias. That is to say, a trial judge cannot be said to have a "pronounced bias" against a defendant, and to have denied a defendant "a fair and impartial trial," because he credited a witness whom the defense expressly admitted it was possible to credit. *See In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004) (a reviewing court may not reverse the trial court's ruling based on an error that the defendant "induced the court to make or to which [defendant] consented"); *see also Wilson*, 238 Ill. 2d at 556 (judicial bias claim forfeited due to the defendant's acquiescence at trial).

2. The majority relied on inadmissible evidence not presented at trial.

It is settled that a reviewing court may not consider evidence that was not presented to the trial court. *E.g.*, *Webster v. Hartman*, 195 Ill. 2d 426,

434-36 (2001); *Lumbermen's Mut. Cas. Co. v. Indus. Comm'n*, 303 Ill. 364, 368 (1922); *see also People v. Peters*, 2018 IL App (2d) 150650, ¶ 51 (reviewing courts may not second guess credibility determinations based on evidence not presented at trial). Here, the appellate majority's holding rests on expert testimony that was not admitted at this trial but instead was described in an unrelated, out-of-state appellate opinion. *See Conway*, 2021 IL App (1st) 172090, ¶ 23 (quoting testimony from unrelated Indiana case). Thus, as the dissent correctly pointed out, the majority violated a basic rule of appellate review by relying on that testimony. *Id.*, ¶ 43 (Pierce, J., dissenting).

The majority's error is especially significant because the extra-record "evidence" goes to a key factual issue in this case — whether Story could identify defendant — without affording either the People the chance to cross-examine the expert or the trial judge the opportunity to weigh the expert's credibility. *See, e.g., People v. Magee*, 374 Ill. App. 3d 1024, 1030 (1st Dist. 2007) (striking the defendant's citation to expert studies not offered at trial that were critical of eyewitness reliability because, among other reasons, no cross-examination of those experts was possible); *People v. Clemons*, 2021 IL App (1st) 200507-U, ¶ 20 ("Since those [scientific] studies were not presented to the trial court, we decline to consider them.").

The result is that the majority treated the extra-record expert opinion as inherently credible without the normal testing of that opinion that is critical to the adversarial process. But experts are *not* inherently credible —

instead, it is for the factfinder to determine whether an expert is credible. *See, e.g., People v. Baez*, 241 Ill. 2d 44, 123 (2011) (even in absence of contrary expert, testimony from a defendant's expert does not necessarily establish a disputed fact because "the credibility and weight given to the testimony is determined by the trier of fact").

And the majority's error goes even further: not only was the expert testimony not admitted at trial, it *could not* be admitted at trial because it is inadmissible hearsay. Illinois Rule of Evidence 804(b)(1) provides that testimony given in another proceeding is inadmissible unless the party seeking to rely on the testimony proves that (1) the witness now is "unavailable" to testify, and (2) the party against whom the testimony is being offered had an adequate opportunity to cross-examine the witness in the prior proceeding. Ill. R. Evid. 804(b)(1); *People v. Rice*, 166 Ill. 2d 35, 40-42 (1995) (prior testimony of unavailable defense witness was inadmissible because prosecutors did not have sufficient opportunity to cross-examine him in the prior proceeding). The expert the majority relied on has not been proven to be "unavailable," and even if he were, the People had no prior opportunity to cross-examine him. Accordingly, the testimony is inadmissible and the majority should not have relied on it for this additional reason.

3. Scientific evidence shows that it is possible to identify someone from 150 feet away.

Not only was the majority wrong to consider the extra-record evidence, it misread that evidence and came to the incorrect conclusion that it is

scientifically established that it is impossible to make an identification from 150 feet. For example, the majority failed to consider that one of the cases it relied on contains an expert opinion suggesting that it is possible to make identifications at 150 feet. *See Conway*, 2021 IL App (1st) 172090, ¶ 23 (citing *State v. Holmes*, 2012 Del. Super. LEXIS 422 (Del. Tr. Ct. 2012)). As the majority noted, the expert in *Holmes* stated that "impairments and difficulty" in identifications are "apparent" when the offender is "at least" 90 feet from the eyewitness. *Holmes*, 2012 Del. Super. LEXIS 422, at *19-20. But the majority failed to note that the expert said that "distances greater than 50 yards" — *i.e.*, 150 feet — have only "a small effect on an eyewitness's identification accuracy," which implies that identifications are at least possible at that distance. *Id.*

Indeed, at least one study has found "evidence for an upper distance threshold at 100 m [*i.e.*, 328 feet] for correct identifications." *See* Thomas J. Nyman, et al., *The Distance Threshold of Reliable Eyewitness Identification*, 43 Law & Human Behavior (2019).[3] According to that study, previous reports finding that identifications are impossible at such distances were flawed because they relied on pictures rather than live subjects. *Id.* (until the current study, "no line-up study has, thus, systematically investigated identifications of live individuals observed at multiple distances"). Because

[3] Available at https://doi.apa.org/fulltext/2019-38765-001.html.

there is scientific evidence that accurate identifications are possible at 150 feet, the majority is incorrect that only a biased judge could credit Story.

4. The appellate court has found that it is possible to identify someone from 150 feet away.

The majority failed to consider another key fact: the appellate court itself has found it reasonable to believe that eyewitnesses can make correct identifications at 150 feet. *E.g., People v. Davis*, 2018 IL App (1st) 152413, ¶¶ 54-56 (reasonable to credit recanted identifications made by teenagers 150 feet away at dusk); *see also People v. Rodriguez*, 2019 IL App (1st) 172576-U, ¶ 25 ("[T]his court has not set a maximum range at which a witness must observe the perpetrator in order to make a credible identification, but we have found that a witness can make a proper identification at 150 feet.").[4] And even in this case, the majority rejected defendant's sufficiency challenge and credited Story's testimony because there was sufficient "corroboration of the eyewitness identification." *Conway*, 2021 IL App (1st) 172090, ¶ 20.

The appellate court has thus expressly stated in multiple cases that it is reasonable to credit eyewitness identifications made at 150 feet, *including in the present case*. The majority below, however, inexplicably declared, sua sponte, that the trial judge was biased because he made precisely that same

[4] This Court may take judicial notice of *Rodriguez* because the People are not citing it as persuasive legal authority but rather to provide relevant factual background and put the trial judge's verdict and the majority's conclusions in the proper context. *See Jackson*, 205 Ill. 2d at 277 ("Allegations of judicial bias must be viewed in context"); *Adames v. Sheahan*, 233 Ill. 2d 276, 310 (2009) (Court may take judicial notice of Rule 23 orders).

finding. Given that the defense conceded at trial that it was possible to credit Story, and the appellate court routinely finds that identifications are possible at 150 feet, the trial judge had no particular reason to believe that such identifications are impossible for ordinary people, which belies the majority's conclusion that the judge credited Story because he has a pro-police bias and believes police officers have "special perceptual powers."

In sum, the majority's conclusion that the judge had a "pronounced" bias is contrary to this Court's and the appellate court's own precedent, misreads the verdict, is based on inadmissible evidence not presented at trial, ignores the context of this case, and is rebutted by scientific evidence.

III. Allowing Credibility Decisions and Expert Reports to Establish Judicial Bias Will Lead to Negative Consequences.

The majority's finding of bias on this record sets a bad precedent that would cause problems in future cases. As noted, this Court has held that a trial judge's credibility finding cannot form the basis for a judicial bias claim except for the rare case where the record shows deep-seated favoritism that would make fair judgment impossible. *Supra* Part II. This is a sensible rule that is consistent with other settled legal principles, and should be expressly reaffirmed now to clarify any confusion in the lower courts.

For example, it is settled that trial courts are due significant deference when making credibility determinations because they have the benefit of observing live testimony while reviewing courts have only the cold record. *E.g., People v. Brown*, 2013 IL 114196, ¶ 48; *see also People v. Ramey*, 151 Ill.

2d 498, 550 (1992) ("Credibility determinations cannot be accurately made by simply referring to a cold, paper record"). Trial judges are also presumed to "know and follow the law," *In re Snapp*, 2021 IL 126176, ¶ 22, which would of course include the elementary rule of impartiality. And, indeed, it is settled that trial judges are "presumed to be impartial" even after "extreme provocation." *Jackson*, 205 Ill. 2d at 276. Therefore, any challenge to a trial court's credibility finding generally should be presented and resolved as a sufficiency of the evidence claim, rather than a judicial bias claim.

By declaring that the judge had a "pronounced bias," the majority not only ignored these sensible rules, it established precedent that would allow parties to succeed on a bias claim merely because they disagreed with a judge's credibility finding. Worse still, as noted above, the majority's decision is internally inconsistent and confusing because it found that the decision to believe Story evidenced "pronounced bias," yet it rejected defendant's sufficiency claim because the physical evidence "suffices as corroboration of the eyewitness identification." *Conway*, 2021 IL App (1st) 172090, ¶ 20. Thus, the opinion is illogical, provides no clear or sensible guidance for future cases, and suggests that the appellate court would benefit from this Court reaffirming its long-standing rules regarding judicial bias claims.

This is not to say that there can never be a case where a judge's credibility determination reflects a colorable claim of judicial bias. One can think of hypotheticals that might evidence deep-seated favoritism or

antagonism that precludes a fair trial, such as if a judge stated that he credited an officer's testimony because police officers "never make mistakes" or a minister's testimony because "a member of the clergy would never lie under oath." But the appellate majority's decision goes far beyond such rare cases and finds bias based on (1) the distance between an eyewitness and a suspect, and (2) an excerpt of expert testimony from an unrelated case. A finding of judicial bias should be based on much stronger evidence. *Supra* pp. 12-13 (collecting cases).

Moreover, basing a finding of judicial bias on the distance from which an eyewitness viewed the defendant would complicate bias inquiries in future cases. The majority held that crediting an identification from 150 feet away proved judicial bias, but what of shorter distances and different conditions? Would it reflect bias to believe an eyewitness could identify someone he saw from 135 feet away? Or 110 feet for a few seconds? What about 85 feet at dusk? The majority's opinion provides no workable rule or clear line, which are vital with a charge as serious as judicial bias. Instead, finding bias on the record here would encourage bias claims premised on an eyewitness's proximity to the offender and other dubious factors.

And permitting reviewing courts to rely on expert opinions (even if properly admitted at trial) to "prove" that a trial judge's credibility determination was biased would create even more problems. To begin, holding that a trial judge is biased because his decision to credit a fact

witness is inconsistent with an expert opinion is contrary to the rule that the factfinder is not obligated to accept an expert's opinion. *Supra* Part II.B.2. Moreover, it is in tension with the general rule that experts may not offer direct opinions on a fact witness's credibility. *People v. Becker*, 239 Ill. 2d 215, 236 (2010) (trial court properly excluded expert testimony that a particular fact witness could not provide a reliable account). All of which is to say that expert witnesses at most may only testify about factors that *could* affect human perception and identifications in general; they cannot definitively establish that a particular eyewitness is not credible.

As this Court has noted, "[a]n expert's opinion concerning the unreliability of eyewitness testimony is based on statistical averages. The eyewitness in a particular case may well not fit within the spectrum of these averages." *People v. Enis*, 139 Ill. 2d 264, 289-290 (1990); *see also People v. Lerma,* 2021 IL App (1st) 181480, ¶¶ 91, 93 (factfinders may discount expert testimony about the limits of human vision because scientific research "is 'probabilistic' — meaning that it cannot demonstrate that any specific witness is right or wrong, reliable or unreliable, in his or her identification."). Because expert opinions about identifications are necessarily probabilistic, they cannot definitively prove that Story (or any eyewitness) was not credible, let alone that the trial judge was per se biased to credit Story's testimony.

Accordingly, in addition to vacating the appellate court's finding of bias, the People respectfully request that this Court reiterate that (1) except for extreme cases clearly showing deep-seated bias, disagreements about a judge's credibility determinations should be resolved as sufficiency of the evidence claims, not judicial bias claims; (2) reviewing courts should not consider evidence that was not before the trial court; and (3) probabilistic expert opinions about factors that may affect identifications, even when properly admitted at trial, cannot definitively establish judicial bias.

CONCLUSION

This Court should vacate the appellate court's judgment that the trial judge was biased and remand for consideration of defendant's remaining claims.

March 25, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE

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 30 pages.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
Assistant Attorney General

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gun and that weapon.

Again, Officer Story, there was no significant impeachment at all in his testimony. He was clear that he did identify a blue-and-white sweatshirt in the report that he wrote.

Your Honor, there's no question as to everything that happened out there that day. There is no question as to this defendant's actions. His face was clear, the line of sight was clear for Officer Story. This defendant was arrested there minutes after the shooting took place and the defendant should be found guilty.

THE COURT: Okay. The Court will make the following findings of fact and conclusions of law:

Some things are clear. Number 1, an individual shooting at a car, fleeing. That car fled down the alley. Apparently the identity of the people inside that car or the person inside the car is not known, the person didn't come forward. I've heard no testimony about it.

It is clear that the shooter ran into the address where the defendant was found, and that is, I believe -- I don't want to get this wrong. I believe it's 3822 West Monroe.

The shooter is inside. The officer sees the shooter run inside that place and the police subsequently go into that location. Also it's clear the gun used in the shooting is inside that same residence at 3822 West Monroe. There's no question about that.

The seven casings on the scene match up with the gun that's found, the .40-caliber gun that's found inside the address.

It's also clear to me that a sweatshirt, which is marked as People's Exhibit Number, I believe it was, I don't know if you wrote it on here.

MR. KANTAS: 4.

THE COURT: But I believe it was Exhibit Number 4 was found inside the same address where the defendant was, where the gun was, where the shooter ran into. And on the right cuff there are tricomponent parts that are consistent with being in proximity with a recently fired gun, fired recently fired gun or an individual firing a particular weapon in this matter.

It boils down to an ID case. That's what this is. As Mr. Carroll argued as I know, single finger can be enough in particular circumstances where it's sufficient that the witness being credible and the witness has the ability and opportunity to observe the

occurrence and makes a identification that is credible and proof beyond a reasonable doubt.

A couple of things I want to note about this. Number 1, this is -- apparently at 11:45 a.m. on November 2nd. This is not a shooting that's occurred at night or at dusk or at dawn. It is not a shooting that illumination is helped by street lighting or any type of artificial lighting. It is natural sunlight. There's nothing to indicate that it was a dark and stormy day. And it does appear that the officer did not have any obstructions in the line from where he was to the -- where he observed the shooter shoot.

It is also clear that the officer being in a covert situation was sitting nearby. It was about 150 feet away. Obviously 150 feet is 50 yards, half of a football field.

The officer, who is a trained police officer, is not a civilian, testified that he was in a position to immediately react when the shots were fired and saw the shots being fired, the shooter moving towards the street, firing and also after seven gunshots, apparently lean in and lean out of a Pontiac. So it's not just the several seconds that boom, boom of the gun where the offender then flees into the house.

He also testifies that at some point in time for whatever reason the shooter leans in and leans out of the car, the Pontiac I believe he referred to it, which would also lengthen the time that he was able to see the shooter.

He also testified very clearly and unequivocally that this defendant was in fact the shooter, that he was able to observe not only his side profile but also his face and saw him run into the apartment -- or I should say into the house.

It appears that the defendant has some connection to a house across the street, but that does not necessarily mean one thing or another to me. It does appear that the shooter ran inside the house. And I would agree with Mr. Carroll that apparently there are some other male Blacks inside the home. Who they are, what they look like was not elicited.

What is elicited is that the defendant was in fact seated on the floor at the time the officer came in, at least Officer Story came in. By his feet was what is marked as People's Number 4, the sweatshirt. The sweatshirt that was identified with regard to whether it's white or blue or black, I will note that it's multi-colored. It does have white and blue in it,

some type of blue stripes, light-blue stripes or a pattern in it. The officer identified it specifically with regard to the sweatshirt, and apparently the sweatshirt does, as I stated earlier, have some tricomponent parts that are indicative of coming into contact with gunpowder residue.

There's a period of time between the time the shooting occurs and the time the defendant is placed under arrest. Apparently the officers hit the wrong house. Officer Story explained why he did not go in immediately because he did not have a radio with him. He just had the push-to-talk telephone. He did not have a radio that could contact OEMC.

And apparently while the officers hit the wrong house, at some point in time it appears that Officer Story was able to correct at least a couple of them, telling them that no, it's the house next door at which time they go in and find the defendant.

There is corroborative evidence of this, but essentially as argued, this is a single-finger case.

I do find that the officer did have a unique opportunity to view the shooter in this matter. I do find that the officer's testimony with regard to the identity of the shooter was in fact clear, credible, and

convincing.

I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning then with a police officer. That is not a general statement. That is specifically to this officer. I believe his testimony is clear, credible, and convincing with regard to this.

The guns inside the place, the shooter went inside the place, the identity of this defendant I believe has been established beyond a reasonable doubt.

The defendant -- it's been stipulated and introduced that the defendant has two prior convictions for possession of a controlled substance under case number 01 CR 23583 and delivery of a controlled substance under case number 09 11061.

I do believe the State has proven that count, that he knowingly or intentionally possessed a firearm while he was on the street in front of that address on West Monroe Street.

I do believe the State has proved that the defendant himself personally discharged a firearm in the direction of a vehicle, the vehicle that was fleeing down the alley where he knew or should have known was occupied by another person. Obviously a car, at least at this day and age, does not drive by itself.

I believe that there's an inference not only was it occupied by someone else but he knowingly discharged a firearm, knowing that a person had occupied that vehicle while that vehicle was in motion.

I do feel that the State has proven these charges, Count 1 and Count 2, beyond a reasonable doubt. The Court is going to find the defendant guilty of both offenses.

Where do we stand now.

MR. KANTAS: The People are making a motion to revoke bond.

THE COURT: Mr. Carroll?

MR. CARROLL: Judge, I have nothing to say on that. Judge, would October 5 be a good day or is that too short?

THE COURT: October 5 is a good day. I don't feel that that's too short as long as we get -- I assume you want to order a PSI?

Caution

As of: March 24, 2022 12:20 PM Z

People v. Conway

Appellate Court of Illinois, First District, First Division

April 26, 2021, Decided

No. 1-17-2090

Reporter

2021 IL App (1st) 172090 *; 177 N.E.3d 1148 **; 2021 Ill. App. LEXIS 204 ***; 448 Ill. Dec. 797 ****

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JASON CONWAY, Defendant-Appellant.

Subsequent History: Appeal granted by *People v. Conway, 2021 Ill. LEXIS 1115 (Ill., Nov. 24, 2021)*

Prior History: [*1]** Appeal from the Circuit Court of Cook County. No. 15 CR 19055. Honorable Charles P. Burns, Judge Presiding.

Disposition: Reversed and remanded with instructions.

Core Terms

shooter, credible, police officer, trial judge, feet, circuit court, hoodie, identification, training, shooting, gun, Street, witnesses, inside, bias, eyewitness, blue, comments, convincing, casings, fired, credibility determinations, false identification, preconceived notion, defense witness, gunshot residue, observations, distracted, sweatshirt, distance

Case Summary

Overview

HOLDINGS: [1]-Because of the trial judge's pronounced bias in favor of police testimony a new trial was proper, as the trial judge improperly relied on unsupported assertions about the effects of police training on the ability to identify a face seen for a few seconds from 150 feet away; [2]-The evidence was closely balanced but sufficient to support defendant's conviction for violating the armed habitual criminal statute. *720 ILCS 5/24-1.7* (2014), as the discovery of a gun, defendant's proximity to a hoodie, and the testimony that the shooter reached into the car for which defendant held the keys sufficed as corroboration of the eyewitness identification.

Outcome

Reversed and remanded with instructions.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN1[] **Procedural Due Process, Scope of Protection**

The right of a defendant to an unbiased, open-minded trier of fact is so fundamental to our system of jurisprudence that it should not require either citation or

explanation. It is rooted in the constitutional guaranty of due process of law citation, and entitles a defendant to a fair and impartial trial before a court which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial.

Criminal Law & Procedure > Counsel > Prosecutors

HN2[] **Counsel, Prosecutors**

Just as a prosecutor may not argue that a witness is more credible because of his status as a police officer a court cannot find a witness more credible solely because of his status as a police officer.

Criminal Law &
Procedure > Trials > Witnesses > Impeachment

HN3[] **Witnesses, Impeachment**

Reliability or unreliability hinges initially on witness's proximity to the perpetrator and the length and conditions for sound observation.

Criminal Law & Procedure > Counsel > Prosecutors

HN4[] **Counsel, Prosecutors**

Just as a prosecutor may not argue that a witness is more credible because of his or her status as a police officer, a trial judge cannot find a witness more credible solely because of his or her status as a police officer.

Counsel: James E. Chadd, Patricia Mysza, and Gavin J. Dow, of State Appellate Defender's Office, of Chicago, for appellant.

Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg and David H. Iskowich, Assistant State's Attorneys, of counsel, and Sandi Tanoue, law school graduate), for the People.

Judges: PRESIDING JUSTICE WALKER delivered the judgment of the court, with opinion. Justice Hyman concurred in the judgment and opinion. Justice Pierce dissented, with opinion.

Opinion by: WALKER

Opinion

[**798]** **[**1149]** PRESIDING JUSTICE WALKER delivered the judgment of the court, with opinion.

Justice Hyman concurred in the judgment and opinion.

Justice Pierce dissented, with opinion.

OPINION

[*P1] After a bench trial, the trial court found Jason Conway guilty of violating the armed habitual criminal statute. *720 ILCS 5/24-1.7* (West 2014). Conway challenges the sufficiency of the evidence, and he argues that the trial court erred by (1) giving a police officer's testimony greater weight solely because of the officer's job, (2) allowing one expert to testify about the results of another expert's test of a swab, and **[***2]** (3) failing to inquire sufficiently into **[****799]** **[**1150]** Conway's posttrial claim that he received ineffective assistance of counsel. We find the evidence sufficient to convict. However, we hold that the trial court's unsupported assertions about the special perceptual powers of police officers require reversal and remand for a new trial.

[*P2] I. BACKGROUND

[*P3] Around noon on November 2, 2015, Chicago

Police Officer Donald Story and several other officers entered a house on Monroe Street in Chicago. They encountered several Black men and women in the house. Officers arrested Conway on the first floor and found car keys in his pocket. Story went to the basement, where he saw a purse strap hanging between two mattresses. He pulled the strap and found two guns in the purse. Police charged Conway with violating the armed habitual criminal statute. *720 ILCS 5/24-1.7* (West 2014).

[*P4] Defense counsel filed a motion to suppress the evidence seized in the warrantless search of the house on Monroe Street. The trial court denied the motion, in part because Conway did not live in the house and therefore had no privacy rights there.

[*P5] At the bench trial, Story testified that on November 2, 2015, he stopped his car on Monroe Street, and from **[***3]** 150 feet away, he saw a man shoot at a moving car. After the car sped off, the shooter, who wore a blue hoodie, opened the door of a car on the street and reached inside before going into the house on Monroe Street. A number of officers responded to Story's call for backup. All went into the house the shooter had entered. Story saw the blue hoodie on the floor next to Conway. The car keys retrieved from Conway's pocket fit the car into which Story saw the shooter reach. Story identified Conway in court as the shooter.

[*P6] Police found seven spent shell casings on the ground in front of the house. A firearms expert testified that the casings came out of one of the guns found in the purse Story found in the basement of the house on Monroe Street.

[*P7] An officer swabbed Conway's hands and the blue hoodie and sent the swabs to the lab for testing. Scott Rochowicz, an expert on trace chemistry, testified that he did not test the swabs, but he reviewed the notes Robert Burke made when Burke tested the swabs. Burke had found gunshot residue in one sample labeled as coming from the hoodie and in the sample labeled as control, but not in the second sample from the hoodie and not in either sample from **[***4]** Conway's hands. Rochowicz testified:

> A. "[Burke] made notes that it looks like the left back sample along with the control sample were not used in the manner in which they were submitted.
>
> Q. And what does that mean?
>
> A. Basically it means he believes that those samples may have been switched during their use."

[*P8] Rochowicz agreed with Burke's conclusion that the hoodie bore gunshot residue and Conway's hands did not.

[*P9] Defense counsel did not object to testimony about the gunshot residue test. The court elicited Rochowicz's clarification that he did not test the samples, but in accord with standard peer review, he read Burke's notes regarding Burke's testing.

[*P10] The State presented evidence that Conway had two prior convictions for Class 1 felonies of possession and delivery of controlled substances.

[*P11] The court noted that the case rested largely on the credibility of Story's **[****800]** **[**1151]** eyewitness identification of Conway as the shooter. The court stated:

> "The officer, who is a trained police officer, is not a civilian, testified that he was in a position to immediately react when the shots were fired and saw the shots being fired. ***.
>
> ***
>
> *** The officer identified it specifically with regard to the sweatshirt, **[***5]** and apparently the sweatshirt does, as I stated earlier, have some tricomponent

parts that are indicative of coming into contact with gunpowder residue.***

***

I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning then with a police officer. That is not a general statement. That is specifically to this officer. I believe his testimony is clear, credible, and convincing with regard to this."

[*P12] The circuit court found Conway guilty of violating the armed habitual criminal statute. In allocution before sentencing, Conway said:

"[Defense counsel] lied to you, your Honor. *** [W]e supposed to be here to hear the motion to reconsider [the denial of the motion to suppress]. They made me go to trial. We wasn't even prepared for trial, your Honor.

***

*** I don't know the reason I was pushed into trial. I didn't get the chance to send nobody out to get **[***6]** anything done, your Honor."

[*P13] Conway said his attorney told him that the judge would reconsider the motion to suppress during the trial. Conway told his attorney the name of the owner of the house on Monroe Street. The court asked counsel what he did with the information, and the attorney answered: "Judge, the fact that some lady owned the house I did not think was relevant as to whether he was the gentleman that fired the gun outside the house and ran inside of the house."

[*P14] Conway explained that he expected that, on the motion for reconsideration of the denial of the motion to suppress, he could assert that he had a right to privacy as a guest in his friend's home. Counsel responded:

"I would rather consider it after a conviction because for all we know, we wouldn't have to do a motion to reconsider if the court found him not guilty. It would be moot.

So now we file it at the end, hoping the court changes his mind and vacates the guilty."

[*P15] The circuit court found that counsel had not provided deficient representation and the court would have denied the motion to reconsider if counsel had made such a motion. The court sentenced Conway to 14 years in prison. Conway now appeals.

[*P16] II. ANALYSIS **[***7]**

[*P17] Conway argues on appeal: (1) the evidence does not support the conviction, (2) the court showed bias and considered matters outside the record in assessing Story's credibility, (3) the court erred by allowing Rochowicz to testify to Burke's **[****801] [**1152]** conclusions, (4) counsel provided ineffective assistance, and (5) the court did not sufficiently inquire into Conway's posttrial allegations that he received ineffective assistance of counsel.

[*P18] A. Sufficiency of the Evidence

[*P19] Conway emphasizes that Story saw the shooter for only a few seconds from 150 feet away and, at that distance, Story could not have seen the shooter's face clearly. Story saw several Black men in the house the shooter entered. Story did not explain what distinguished those men from the shooter. Because of the time it took for back up to arrive, the shooter could have hidden the gun in the purse, taken off the hoodie,

and left by the back door without Story seeing him depart.

[*P20] Based on a distant eyewitness identification, the State presented a weak case, and the corroborating evidence presents some problems. According to the State, the shooter thought clearly enough to take off the hoodie, wash the gunshot residue off his hands, **[***8]** and hide the gun between mattresses in the basement, but he sat right next to the hoodie and failed to wash the gunshot residue off the hoodie. While we find the State's characterization of the shooter odd, we find that the discovery of the gun, Conway's proximity to the hoodie, and the testimony that the shooter reached into the car for which Conway held the keys suffices as corroboration of the eyewitness identification. We find the evidence closely balanced but sufficient to support the conviction.

[*P21] B. Officer's Credibility

[*P22] Conway argues that the trial judge's comments show that the judge harbored a pro-police bias and based his findings on assertions not supported by any evidence in the record. No evidence supports the assertion that police officers have any advantage over other witnesses in identifying strangers they have seen once or that officers are less prone to false identifications. See *United States v. Veal, 182 F.3d 902 (2d Cir. 1999)* (expert's proffered testimony that "police officers are not superior eye witnesses" properly excluded as a matter of common sense). The trial judge here stated, "He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's **[***9]** never had any such training and the dangers of false identification ***. That is not a general statement. That is specifically to this officer."

[*P23] We find that no evidence distinguished Story's ability to make identification from the abilities of any other officer. Story's emphasis on his unobstructed view of the shooter's face shows that he intended the court to rely on his ability to recognize facial features of a person he saw for five seconds from 150 feet. Courts have excluded expert testimony on the effect of distance on the ability to identify a person, reasoning that "all jurors know that certain factors, such as lighting, distance, and duration, may affect the accuracy of identifications." *United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)*; see *People v. Enis, 139 Ill. 2d 264, 564 N.E.2d 1155, 151 Ill. Dec. 493 (1990)*. When courts have considered testimony on the effect of distance, experts have stated that "for people with normal vision the ability to identify faces begins to diminish at approximately 25 feet" (*State v. Cabagbag, 127 Haw. 302, 277 P.3d 1027, 1036 n.11 (Haw. 2012)*); "impairments and difficulty in accuracy are apparent when the perpetrator is at least 30 yards away from the eyewitness." *State v. Holmes, 2012 Del. Super. LEXIS 422, 2012 WL 4097296, at *6-7 (Del. Super. Ct. Sept. 19, 2012)*; and "at about **[****802]** **[**1153]** 150 feet away, a witness's ability to correctly identify somebody falls to essentially zero." *Benson v. State, 88 N.E.3d 1078 (Ind. Ct. App. 2017)* (table).

[*P24] Story testified that he knew Conway shot the **[***10]** gun because he saw the shooter's face from 150 feet away for five seconds, and Conway, like the shooter, wore blue jeans. Conway also sat next to a blue hoodie which Story identified as the hoodie the shooter wore. Story did not notice any unique characteristics of the blue jeans the shooter wore.

[*P25] *HN1*[↑] The appellate court has outlined the relevant principles:

> "The right of a defendant to an unbiased, open-minded trier of fact is so fundamental to our system of jurisprudence that it should not require either

> citation or explanation. It is rooted in the constitutional guaranty of due process of law [citation], and entitles a defendant to a fair and impartial trial before a court which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial." (Internal quotation marks omitted.) *People v. McDaniels, 144 Ill. App. 3d 459, 462, 494 N.E.2d 1275, 98 Ill. Dec. 948 (1986)*.

[*P26] The judge here relied on his belief that the officer's training gave him the ability to identify facial characteristics from 150 feet away with only a few seconds to observe the face. The judge's comments show that the judge used "an underlying presumption favoring the exercise of government power," (Morgan Cloud, *The Dirty Little Secret*, *43 Emory L.J. 1311, 1340 [****803] [**1154] (1994)*), and "work[ed] under the principle **[***11]** that police officers are presumptively trustworthy." David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, *26 Am. J. Crim. L. 455, 472 (1999)*. *HN2*[] Just as "a prosecutor may not argue that a witness is more credible because of his status as a police officer" (*People v. Clark, 186 Ill. App. 3d 109, 115-16, 542 N.E.2d 138, 134 Ill. Dec. 138 (1989)*), a court cannot find a witness more credible solely because of his status as a police officer. No evidence supports the judge's finding that Story's training gave him a better ability than any other witness to identify a face he saw for a few seconds from 150 feet away.

[*P27] Hence, there was no evidence in the record supporting the trial judge's finding that this police officer was better equipped than lay witnesses to identify a stranger's face in seconds from 150 feet away. *HN3*[] Story's identification belies the reality of human cognition because reliability or unreliability hinges initially on witness's proximity to the perpetrator and the length and conditions for sound observation. See *People v. Tomei, 2013 IL App (1st) 112632, ¶ 40, 986 N.E.2d 158, 369 Ill. Dec. 209*.

[*P28] We find that the record shows the "judge harbored preconceived notions regarding the veracity of the [prosecution] witnesses which led him to reject [the] defense without due consideration. We also find that defendant was not afforded a fair and impartial trial." *People v. Kennedy, 191 Ill. App. 3d 86, 91, 547 N.E.2d 634, 138 Ill. Dec. 467 (1989)*. *HN4*[] Just as **[***12]** "a prosecutor may not argue that a witness is more credible because of his [or her] status as a police officer" (*Clark, 186 Ill. App. 3d at 115-16*), a trial judge cannot find a witness more credible solely because of his or her status as a police officer.

[*P29] The judge's comments show "an underlying presumption favoring the exercise of government power" (Morgan Cloud, *The Dirty Little Secret*, *43 Emory L.J. 1311, 1340 (1994)*), and "work[ed] under the principle that police officers are presumptively trustworthy." David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, *26 Am. J. Crim. L. 455, 472 (1999)*. Accordingly, we remand to the presiding judge of the criminal division for reassignment and a new trial. Under *Illinois Supreme Court Rule 366(a)(5)* (eff. Feb. 1, 1994), we may, in our discretion, direct that this case be reassigned to a new judge on remand. *People v. Serrano, 2016 IL App (1st) 133493, ¶ 45, 404 Ill. Dec. 189, 55 N.E.3d 285*. We exercise that discretion here because of the trial judge's pronounced bias in favor of police testimony. Because of our disposition on this issue, we do not address the remaining arguments on appeal.

[*P30] III. CONCLUSION

[*P31] The trial judge improperly relied on unsupported assertions about the effects of police training on the

ability to identify a face seen for a few seconds from 150 feet away. Because of the trial judge's pronounced bias in favor of police testimony, **[***13]** we remand the cause to the presiding judge of the criminal division of the circuit court, with instructions to assign this case to a different judge on remand.

[*P32] Reversed and remanded with instructions.

Dissent by: PIERCE

Dissent

[*P33] JUSTICE PIERCE, dissenting:

[*P34] This is essentially a one-witness identification case with circumstantial evidence in support of the identification. The eyewitness is a police officer who, while on a surveillance assignment, heard gunshots about 150 feet away. He looked in the direction of the gunshots and observed the front and side of the shooter's face; the clothing he was wearing, including a distinctive sweatshirt; and the type of weapon fired. He also observed that, after the shooting, the shooter reached into a car and then ran into a building. The officer called for assistance, promptly entered the building, and found the defendant on the floor with a sweatshirt similar to the one worn by the shooter lying at his feet. A firearm tied to shell casings found at the scene of the shooting was found in the building, and a search of defendant produced the keys to the car that the shooter reached into after the shooting.

[*P35] With no other witness to the shooting and no witness offering **[***14]** conflicting testimony, the majority finds this evidence sufficient to sustain a conviction. However, it orders a new trial based on a fanciful interpretation of the trial judge's credibility determination of the sole eyewitness. I can only conclude that, rather than giving the circuit court's credibility determination the deference to which it is entitled, the majority orders a retrial based on a finding, with no persuasive explanation, that an experienced trial judge is biased in favor of a police officer witnesses merely because the witness is a police officer. Either the single eyewitness was credible, or he was not. Either he saw what he testified to, or he did not. That the witness was a police officer was a fact from which a reasonable inference could be drawn that he was trained to make accurate observations under stressful circumstances. This does not mean that the observations made were *per se* credible; even a trained professional can be wrong. But the majority's outcome-determinative approach is not supported by the record and is simply an **[****804]** **[**1155]** end-around on the axiom that, in a bench trial, the trial judge is in the best position to make credibility findings and is presumed to **[***15]** know the law. The majority decision here is nothing more than a mechanism for the majority to replace the circuit court's judgment with its own. I cannot agree with the majority's reasoning or conclusions—except that there was sufficient evidence from which the trier of fact could conclude that defendant was guilty beyond a reasonable doubt. I respectfully dissent.

[*P36] To explain my reasoning, it is necessary to fully state the evidence at the bench trial. A review of the testimony shows that Officer Story testified that, at around 11:45 a.m. on November 2, 2015, he was working as a surveillance officer with a narcotics team when he saw defendant, from about 150 feet away, firing a handgun at a car. Officer Story had a clear and unobstructed view. He could see the front and left side of defendant's body and face. He testified regarding where defendant was in relation to him at time of the shooting and described the clothes that defendant was wearing: a multicolored light blue and "kind of greyish" hoodie and light blue jeans. Defendant approached a Pontiac parked in front of 3822 West Monroe Street,

opened the door, leaned inside, and stepped away. Defendant returned to the Pontiac, reached [***16] inside, and then entered 3822 West Monroe Street. Officer Story also described the gun that defendant was holding as a black semi-automatic handgun.

[*P37] When help arrived, Officer Story and the other officers first entered the wrong building but then entered 3822 West Monroe Street and saw defendant on the floor wearing a white t-shirt and the same jeans he was wearing earlier. The hoodie he was wearing earlier was on the floor near his feet. Defendant was arrested, and the keys to the Pontiac were found on defendant. In the basement, Officer Story found a purse containing two handguns. One was a .40-caliber pistol with an empty magazine that appeared to be the same weapon Officer Story saw defendant shooting. Officer Story recovered seven .40-caliber shell casings outside, which were later identified as having been fired from the .40-caliber weapon he recovered.

[*P38] A summary of the circuit court's finding is that

> "[i]t is clear that the shooter ran into the address where the defendant was found ***.
>
> * * *
>
> The shooter is inside. The officer sees the shooter run inside that place and the police subsequently go into that location. Also it's clear the gun used in the shooting is inside that same [***17] residence at 3822 West Monroe. There is no question about that.
>
> The seven casings on the scene match up with the gun that's found, the .40-caliber gun that's found inside the address.
>
> It's also clear to me that a sweatshirt *** was found inside the same address where the defendant was, where the gun was, where the shooter ran into."

[*P39] The court then stated that "it boils down to an ID case" that occurred at 11:45 a.m., during "natural sunlight," and "it does appear that the officer did not have any obstructions in the line from where he was to the—where he observed the shooter shoot." The officer was "about 150 feet away," a "half of a football field." The court found that:

> "There is corroborative evidence of this, but essentially as argued, this is a single-finger case.
>
> [****805] [**1156] I do find that the officer did have a unique opportunity to view the shooter in this matter. I do find that the officer's testimony with regard to the identity of the shooter was in fact clear, credible, and convincing.
>
> I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement [***18] official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning then [*sic*] with a police officer. That is not a general statement. That is specifically to this officer. I believe his testimony is clear, credible, and convincing with regard to this."

[*P40] Contrary to the majority's opinion, the trial judge did not make "unsupported assertions about the special perceptual powers of police officers" (*supra* ¶ 1) or find "that Story's training gave him a better ability than any other witness to identify a face he saw for a few seconds from 150 feet away" (*supra* ¶ 26). These unsupported characterizations of the circuit court's comments form the basis of the majority's thinly reasoned conclusion that the "'[trial] judge harbored preconceived notions regarding the veracity of the [prosecution] witnesses which led him to reject [the] defense without due consideration.'" *Supra* ¶ 27

(quoting *People v. Kennedy, 191 Ill. App. 3d 86, 91, 547 N.E.2d 634, 138 Ill. Dec. 467 (1989)*). The majority isolates the trial judge's actual findings to find bias where none is evident and without regard for context. As the record shows, the trial judge's findings were **[***19]** plainly based on the evidence before it: that Officer Story was "not startled, he was not in a situation where his perception might have been affected or that he might have been distracted."

[*P41] When considering identification testimony, all the circumstances should be considered, including the opportunity to observe the offender at the time of the crime, the witness's degree of attention at the time of the crime, the accuracy of the witness's prior description of the offender, the level of certainty at the identification confrontation, and the time between the observation and the confrontation. *People v. Slim, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 130 Ill. Dec. 250 (1989)*.

[*P42] Here, the trial judge found that Officer Story's testimony was "clear, credible, and convincing." In doing so, the circuit court found that Officer Story—who was a trained police officer on a surveillance assignment—looked toward the gunshots and observed the shooter, his characteristics, his clothing, and his movements during and after the shooting. In other words, the circuit court found that Officer Story was paying attention, a factor that is entirely appropriate to consider when evaluating identification testimony. *Id.* The circuit court did not find that Officer Story is better at observing **[***20]** events than a civilian because he is a police officer or that a civilian would be unable to make the same observations. The circuit court credited Officer Story's testimony because he observed the shooting while it was happening and testified as to what he saw. The circuit court considered Officer Story's testimony that he saw defendant's face from the front and left side during the shooting and found that testimony—along with the remainder of Officer Story's identification testimony—to be "clear, credible, and convincing."

[*P43] The majority implies that it would be improbable for a person to recognize **[****806]** **[**1157]** another person from a distance of 150 feet but does little to substantiate that belief, other than relying on quotes from expert testimony proffered in different cases from other states. *Supra* ¶ 23. I fully agree with the State that evidence concerning the reliability of eyewitness testimony was not presented for the circuit court's consideration here or that this argument was fully developed in the record and, therefore, should not be considered by this court on appeal. See *People v. Mehlberg, 249 Ill. App. 3d 499, 531-33, 618 N.E.2d 1168, 188 Ill. Dec. 598 (1993)* ("A reviewing court must determine the issues before it on appeal solely on the basis of the record made in the trial **[***21]** court."). We are a court of review and should generally refrain from considering evidence that the circuit court did not have an opportunity to consider when making its judgment. Officer Story was fully cross-examined on his identification testimony, and the circuit court, having considered all of the evidence, found the testimony "clear, credible, and convincing." There was nothing arbitrary, capricious, or improbable about Officer Story's testimony, and certainly nothing in the record supports a finding of bias on the part of the circuit court in finding that the testimony was credible. The majority implies that the circuit court's finding that Officer Story, a police officer, testified credibly is the same thing as finding Officer Story's testimony credible because he is a police officer. The record reflects that the circuit court found Officer Story's testimony was credible because, as a police officer performing his job, he was paying attention to what was happening, he was not distracted, and his perception was not affected. Nothing suggests that the trial judge believed Officer Story possessed enhanced perceptual powers by virtue of having been trained as a police officer.

[*P44] The **[***22]** majority attempts to make a significant point when it states "[n]o evidence supports the judge's finding that Story's training gave him a better ability than any other witness to identify a face he saw for a few seconds from 150 feet away." *Supra* ¶ 26. That is not what the trial judge found. The trial judge commented that Officer Story "was not in a situation where his perception might have been affected or that he might have been distracted" and that, because he was paying attention to what was happening, "the dangers of false identification" were diminished in this case. Furthermore, if the majority means to say that, in a situation where there are two differing witness accounts, the trial judge should not elevate a police officer's testimony over that of a civilian, that is fine. But how is that relevant here, where the focus is solely on the trial judge's assessment of Officer Story's credibility? The majority sidesteps the issue of whether the trial judge's finding that Officer Story's testimony was credible was against the manifest weight of the evidence. Instead, the majority finds judicial bias where there is none. The majority allows its skepticism of Officer Story's testimony **[***23]** to override our obligation, as a court of review, to pay considerable deference to the circuit court's credibility findings when those findings are based on the evidence presented in the circuit court. The fact that the circuit court did not share the majority's unsubstantiated skepticism is not a valid basis for overturning the circuit court's finding because the circuit court's finding is not against the manifest weight of the evidence.

[*P45] The majority agrees with defendant "that the record shows the 'judge harbored preconceived notions regarding the veracity of the [prosecution] witnesses which led him to reject [the] defense without due **[****807]** **[**1158]** consideration.'" Supra ¶ 28 (quoting *Kennedy, 191 Ill. App. 3d at 91*). But the trial judge's comments here bear little resemblance to the comments in *Kennedy*, where we faulted the trial judge for being biased and relying on matters outside of the record in making his credibility determinations regarding defense witnesses. *Kennedy, 191 Ill. App. 3d at 90-91*. We found:

> "The trial judge classified the defense witnesses as thieves, drug addicts, fornicators and welfare recipients. However, nothing in the record supports these classifications. The trial judge must have guessed from the witnesses' clothing and mien that **[***24]** they were thieves, drug users, welfare recipients and fornicators. Alternatively, he must have relied on information outside of the record in evaluating the witnesses. The trial judge also seemed unwilling to believe the testimony of the defense witnesses because of their living arrangements and employment status. The defense witnesses apparently lacked credibility because the trial judge believed that they were unemployed drug addicts and welfare recipients. Also, the witnesses lacked credibility because the trial judge believed that their children were born out of wedlock. We are of the opinion that the trial judge harbored preconceived notions regarding the veracity of the defense witnesses which led him to reject defendant's alibi defense without due consideration. We also believe that defendant was not afforded a fair and impartial trial." *Id. at 91*.

[*P46] Here, unlike in *Kennedy*, the trial judge gave a considered explanation for his credibility determination that was based on the evidence before him. The majority fails to point to even a single statement from the trial judge that evinced a "preconceived notion" in favor of the State or a "pro-police bias," other than the circuit court's observation **[***25]** that Officer Story was a police officer. I do not agree with the majority that the record supports a finding that the trial judge exhibited any bias. Therefore, I would find that defendant is not

entitled to a new trial on this basis. Rather than encouraging the circuit court to explain its decisions, this decision will cause trial judges to make conclusory credibility determinations to avoid unsubstantiated interpretations of its findings by a reviewing court.

[*P47] For the foregoing reasons, I respectfully dissent.

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People v. Clemons

Appellate Court of Illinois, First District, First Division

November 1, 2021, Order Filed

No. 1-20-0507

Reporter

2021 IL App (1st) 200507-U *; 2021 Ill. App. Unpub. LEXIS 1892 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHILS CLEMONS, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Prior History: **[**1]** Appeal from the Circuit Court of Cook County. No. 18 CR 9705. Honorable Joan Margaret O'Brien, Judge Presiding.

Disposition: Affirmed.

Core Terms

sentence, rehabilitation, home invasion, sentencing guidelines, predicate offense, guidelines, mitigating, depart, sentencing court, factors

Judges: JUSTICE COGHLAN delivered the judgment of the court. Justices Pucinski and Walker concurred in the judgment.

Opinion by: COGHLAN

Opinion

ORDER

[*P1] *Held*: The trial court did not abuse its discretion in declining to sentence defendant below the statutory guidelines.

[*P2] Following a bench trial, defendant Chils Clemons was found guilty of unlawful use or possession of a weapon by a felon (UUWF) (*720 ILCS 5/24-1.1(a)* (West 2018)) and sentenced to eight years' imprisonment. On appeal, defendant argues that the trial court erred in declining to sentence him below the statutory guidelines. We affirm.

[*P3] At trial, Chicago police officer Wood testified that she and a partner, Officer Ewing, were on patrol around 12:02 p.m. on June 13, 2018, near the 13000 block of South Bishop Ford Expressway, in Chicago. Ewing drove them in an unmarked vehicle, and Wood randomly checked license plates, including the license plate of a white 2018 Chevrolet Impala, which she learned had been reported stolen. The officers activated their lights, pulled in front of the Impala, and Wood exited the police vehicle. The Impala attempted to drive around **[**2]** the police vehicle. Wood drew her weapon and ordered the Impala's occupants to raise their hands. The driver complied, and the rear passenger placed an object, later determined to be a cell phone, on the seat and raised his hands. The front passenger, whom Wood identified as defendant, moved his arms "around his

waistband." Wood again ordered defendant to raise his hands, and defendant leaned towards the floorboard. Wood approached the passenger side of the Impala, and defendant raised his hands.

[*P4] Wood removed defendant from the vehicle and recovered a semiautomatic Ruger P89 handgun which was loaded and "partially stove piped" (meaning it could accidentally discharge) from the same area where she observed defendant reaching down in the vehicle. Officer Wood's testimony was consistent with her body camera footage.

[*P5] The parties stipulated that defendant had previously been convicted of the predicate felony offense of home invasion. Defendant was found guilty of the offense of UUWF.

[*P6] At the sentencing hearing, the parties amended the PSI to reflect that defendant's father was murdered in defendant's presence when defendant was four years old. The court noted that defendant had received **[**3]** a 21-year sentence for the home invasion conviction, including a 15-year firearm enhancement. Regarding the facts of that case, the court was advised that on April 14, 2005, defendant and a co-offender approached the victim as she was leaving her house to take her two children to school. After defendant "put a gun into her back," the victim told her children to get in her vehicle. She was led back into her home by the offenders and held at gunpoint while they "ransacked the entire place." Eventually, the children came to the door of the house and were ordered into a closet. The offenders fled in the victim's vehicle with "bags of the victim's things out of the home."

[*P7] Lisa Weaver-Hill, defendant's girlfriend, testified at the sentencing hearing that defendant lived with her and her two daughters. Defendant serviced vehicles with his stepfather and "would go through temp agencies." Prior to moving in with Weaver-Hill, defendant was the primary caregiver for his sick mother. Weaver-Hill explained that she and her daughters were negatively affected by defendant's incarceration.

[*P8] In aggravation, the State argued that defendant had possessed a loaded semiautomatic firearm while on parole **[**4]** for the offense of home invasion (which also involved a firearm). Noting that defendant faced a mandatory sentence between the range of seven to fourteen years, the State requested a sentence "in the higher end of the range."

[*P9] In mitigation, defense counsel argued that defendant was 16 when he committed the home invasion; that the law had changed concerning discretionary transfers to juvenile court since the date of that conviction;[1] that he did not cause or threaten physical harm in the instant offense; and that his incarceration had negatively affected the well-being of his girlfriend and her children. He urged the court to depart from the statutory sentencing guidelines based on (1) defendant's age, immaturity, or limited mental capacity at the time of the home invasion, and that the co-offender in the home invasion was older than defendant, was the "ringleader," and did most of the ransacking; (2) the amount of time that had elapsed between the two offenses; (3) the absence of any bodily harm or threats; and (4) defendant's potential for rehabilitation.

[*P10] In allocution, defendant reiterated that he was only 16 and "easily influenced" when he committed the home invasion and that a lengthy **[**5]** sentence had been imposed for that offense. He requested leniency

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[1] Counsel argued that under the current law, "he could have been a discretionary transfer," so there was a chance that the home invasion conviction "would not have been a qualifying predicate offense under the statute."

on behalf of himself and his family.

[*P11] The court stated that it had considered the PSI and letter from defendant's sister, his girlfriend's testimony, the arguments of counsel, and all other factors presented in aggravation and mitigation, both statutory and non-statutory. Although concluding that there was not a "substantial compelling justification" to depart from the sentencing guidelines, the court determined that it would be inappropriate to sentence defendant "at the high end of the scale" based on his rehabilitative potential.

[*P12] On appeal, defendant argues that the court abused its discretion by not departing from the statutory sentencing guidelines. He asserts that he was eligible for a downward departure given his youth at the time the predicate offense was committed, his educational and vocational potential, the non-violent nature of the instant offense, and his family ties.

[*P13] Initially, we note that the record does not indicate that defendant filed a motion to reconsider sentence. See *People v. Hillier, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 342 Ill. Dec. 1 (2010)* ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing **[**6]** motion raising the issue are required."). Nevertheless, as the State has not raised the issue of forfeiture, we will consider the merits of defendant's claims. See *People v. Jones, 2018 IL App (1st) 151307, ¶ 47, 422 Ill. Dec. 627, 103 N.E.3d 991* ("The State may forfeit a claim of forfeiture by failing to raise it."). Since defendant's PSI is not in the record, any doubts arising from the incompleteness of the record will be construed against the defendant. *People v. Resendiz, 2020 IL App (1st) 180821, ¶ 35* (appellant has burden to provide complete record, and doubts arising from incomplete record are construed against appellant).

[*P14] In imposing sentence, the court must balance the seriousness of the offense with the objective of restoring the defendant to useful citizenship. *Ill. Const. 1970, art. I, § 11*. Substantial deference is afforded the sentencing court, as the court is better positioned to consider the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age. *People v. Snyder, 2011 IL 111382, ¶ 36, 959 N.E.2d 656, 355 Ill. Dec. 242*. On review, we will not modify a sentence absent an abuse of discretion. *Id.*

[*P15] A sentence within statutorily-mandated guidelines is presumptively proper, and will not be overturned or reduced unless it is affirmatively shown to greatly depart from the spirit or purpose of the law, or is manifestly contrary to constitutional guidelines. *People v. Jackson, 2014 IL App (1st) 123258, ¶ 50, 387 Ill. Dec. 738, 23 N.E.3d 430*. We will **[**7]** not substitute our judgment for the sentencing court's merely because we would have balanced the sentencing factors differently (*People v. Alexander, 239 Ill. 2d 205, 213, 940 N.E.2d 1062, 346 Ill. Dec. 458 (2010)*), and absent evidence to the contrary, we presume the sentencing court considered the mitigating factors before it (*People v. Flores, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 343 Ill. Dec. 923 (2010)*). The seriousness of the offense is the most important factor in determining sentence, and a sentencing court need not weigh that factor less than the defendant's rehabilitative potential. *Jackson, 2014 IL App (1st) 123258, ¶ 53, 387 Ill. Dec. 738, 23 N.E.3d 430*.

[*P16] Defendant was found guilty of UUWF (*720 ILCS 5/24-1.1(a)* (West 2018)). He does not dispute that he was subject to a sentencing range of 7 to 14 years or that home invasion is a qualifying predicate offense under *section 5-4.5-110* of the Unified Code of Corrections (Code) (*730 ILCS 5/5-4.5-110(a)(L), (c)(1)* (West 2018)). Therefore, defendant's eight-year

sentence is presumptively proper. *Jackson, 2014 IL App (1st) 123258, ¶ 50, 387 Ill. Dec. 738, 23 N.E.3d 430*.

[*P17] As defendant notes, *section 5-4.5-110* of the Code allows a departure from the sentencing guidelines if the court finds substantial and compelling justification a sentence within guidelines would be unduly harsh and a sentence below guidelines would not jeopardize public safety or deprecate the seriousness of the offense. *730 ILCS 5/5-4.5-110(d)(1)* (West 2018). The court should consider, *inter alia*: the defendant's age, immaturity, or limited mental capacity at the time of the predicate **[**8]** offense; the nature and circumstances of the predicate offense and current offense; the time elapsed since the predicate offense; and whether departure is in the interest of the defendant's rehabilitation, including his employment, education, or vocational training, after accounting for past rehabilitation efforts, dispositions of probation or supervision, and cooperation or response to rehabilitation. *730 ILCS 5/5-4.5-110(d)(2)(A)*, *(B)*, *(C)*, *(D)*, *(H)* (West 2018).

[*P18] In the instant case, in response to the State's request for a sentence at the higher end of the sentencing range, defense counsel argued that the predicate offense was committed 13 years earlier, when defendant was only 16 and more susceptible to negative influences, that defendant's co-offender was more culpable, and that although defendant was tried as an adult, he would have been eligible for a discretionary transfer to juvenile court under the current state of the law. Counsel also argued that the defendant's crime did not cause or threaten physical harm, his employment and education history indicated rehabilitative potential, and that his family had been negatively impacted by his incarceration.

[*P19] The record establishes that the court considered defendant's PSI, **[**9]** the letter from his sister, his girlfriend's testimony, the arguments of counsel and all other factors in aggravation and mitigation presented at the sentencing hearing. The court did not find substantial and compelling justification to depart from the sentencing guidelines. However, the court imposed a sentence at the lower end of the sentencing range based on its belief that defendant had rehabilitative potential. Nothing in the record suggests that the court failed to consider the mitigating evidence introduced at the sentencing hearing. See *Flores, 404 Ill. App. 3d at 158* (absent evidence to the contrary, reviewing court presumes sentencing court considered mitigating evidence before it).

[*P20] Defendant notes that the legislative history of *section 5-4.5-110* of the Code, including a sunset clause, shows concern for potentially "draconian" sentences and cites studies to argue that lengthy sentences, especially for young offenders, do not provide rehabilitation or deterrence. Since those studies were not presented to the trial court, we decline to consider them. See *People v. Magee, 374 Ill. App. 3d 1024, 1030, 872 N.E.2d 63, 313 Ill. Dec. 303 (2007)* (striking portion of defendant's brief which discussed psychological studies because they were not presented at trial or part of record on appeal); *People v. Mehlberg, 249 Ill. App. 3d 499, 531-32, 618 N.E.2d 1168, 188 Ill. Dec. 598 (1993)* (declining to take **[**10]** judicial notice of evidentiary material not presented below).

[*P21] The sentencing court "may depart from the sentencing guidelines" when, "after considering any factor *** relevant to the nature and circumstances of the crime and to the history and character of the defendant," it finds on the record "substantial and compelling justification." *730 ILCS 5/5-4.5-110(d)(1)* (West 2018). Here, the court did not find such justification, and defendant's contentions amount to a request that we reweigh the sentencing factors, which we may not do. *Alexander, 239 Ill. 2d at 213*.

[*P22] For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

[*P23] Affirmed.

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People v. Rodriguez

Appellate Court of Illinois, First District, Sixth Division

December 13, 2019, Decided

No. 1-17-2576

Reporter

2019 IL App (1st) 172576-U *; 2019 Ill. App. Unpub. LEXIS 2263 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERIC RODRIGUEZ, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Subsequent History: Appeal denied by *People v. Rodriguez, 2020 Ill. LEXIS 226 (Ill., Mar. 25, 2020)*

Prior History: **[**1]** Appeal from the Circuit Court of Cook County. No. 15 CR 18900. Honorable Maura Slattery-Boyle, Ursula Walowski, Judges Presiding.

Disposition: Affirmed.

Core Terms

sentence, identification, counts, shooting, aggravated, aggravated battery, photo array, reasonable doubt, credible, factors, impose sentence, trial court, daughter's, mitigation, arrived, firearm, alley, shot

Judges: JUSTICE CUNNINGHAM delivered the judgment of the court. Presiding Justice Mikva and Justice Harris concurred in the judgment.

Opinion by: CUNNINGHAM

Opinion

ORDER

[*P1] *Held*: Defendant's conviction and sentence for aggravated battery are affirmed where he was proven guilty beyond a reasonable doubt and where the trial court did not abuse its discretion in imposing sentence.

[*P2] Following a bench trial, the defendant Eric Rodriguez was found guilty of aggravated battery (*720 ILCS 5/12-3.05(e)(1)* (West 2014)) and sentenced to $10^1/_2$ years' imprisonment. On appeal, the defendant argues that the State failed to prove him guilty beyond a reasonable doubt because the testimony of the State's eyewitness was not credible. He also contends that the trial court abused its discretion in sentencing because the court misunderstood the crimes of which he was convicted. Finding no error, we affirm the judgement of the circuit court of Cook County.

[*P3] BACKGROUND

[*P4] The defendant was charged by indictment with

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[1] Detectives Reyes' and Goduto's first names do not appear in the record.

11 counts of attempted first degree murder (counts 1-11), 1 count of aggravated battery (count 12), and 2 counts of aggravated [**2] discharge of a firearm (counts 13-14). The State proceeded to trial on five counts of attempted murder and one count of aggravated battery. The State did not make a formal entry of *nolle prosequi* on the remaining charges.

[*P5] The evidence at trial revealed that Carmen Rivera, the victim in this case, lived at 3627 North Oleander Avenue in Chicago with her daughter, Manasty Mercado, and her son, Eli Mercado, Jr. Upon arriving home the morning of April 12, 2015, she observed that the house was in disarray. Manasty informed her that she and Eli Jr. had people over the previous night. The defendant arrived uninvited to Manasty's gathering, along with Manasty's ex-boyfriend's mother, Migdalia, and another woman. (Manasty knew the defendant through her ex-boyfriend, Armani. She and Armani did not end their relationship on good terms.) Manasty told her mother that the defendant and Migdalia "put their hands" on her, and the woman who was with them flipped over a table. The defendant punched Manasty in the face. The defendant, Migdalia, and the other woman left the house after the police were called.

[*P6] After Manasty relayed this information to her mother, Carmen called Migdalia. While she was on [**3] the phone, her husband, Eli Mercado, Sr., who had arrived in the interim and been apprised of the situation, took the phone and had a conversation. When the call ended at around 2 p.m., Eli Sr. made another call and told someone to come to the house. Manasty testified that her father said to the person on the phone "come to [me] like a man."

[*P7] After overhearing that conversation, Manasty went outside to the front of the house with her little brother and sister. There, she observed the defendant, who was in the passenger seat of a black sports utility vehicle with the window rolled down, drive by the house. The defendant motioned with his arm and directed Manasty to the back of the house. Manasty went back inside the house with "the kids" and told Carmen and her father that the defendant had driven by and beckoned her out back. Her parents, along with Eli Jr., went to the alley behind the house. She stayed inside and called the police. Shortly thereafter, Manasty heard the sound of gunshots. She ran outside and saw that Carmen's arm was bleeding. When police arrived, Manasty provided them with screen shots of the defendant from his Facebook page. Manasty later met with detectives who [**4] presented her with a photo array. She was unable to identify the defendant because she did not see anyone with a tattoo on the center of his neck.

[*P8] For her part, Carmen testified that 15 to 20 minutes after Eli Sr.'s phone call, she was outside and saw the defendant, whom she identified in court and who she had seen twice before, drive by the house two times. The defendant, who was wearing a black sweater, was seated in the front passenger seat of a black car. Carmen testified that she, Eli Sr., Eli Jr., and Jesse Rivera all went to the alley behind the house. Then, about five minutes after seeing the defendant first pass by the house, Carmen saw the defendant at the "T" intersection of the alley, which was four houses away—approximately 120 to 150 feet—from where she was standing. Nothing blocked Carmen's view of the defendant. She saw the defendant stick half of his body, from the waist up, out of the car and point a gun at her. The defendant fired four or five times in her direction. Prior to firing, the defendant said "Nine Kings," a name of a street gang.

[*P9] After the shooting, Carmen "was in shock" and realized she was shot in her left arm. About 10 minutes later, she ran inside [**5] the house. Paramedics

arrived, and she told them that the incident was her daughter's fault for going out with Armani. She went on to say that Armani and another person "had to do with all this," but clarified that Armani was not at her house or in the alley the day of the shooting.

[*P10] Carmen was eventually transported to a hospital for treatment, where she spoke with Chicago police detective Daniel Gillespie. After returning to her house, Carmen spoke with Chicago police detectives Reyes and Goduto, who showed her a photo array at approximately 9:10 p.m.[1] She identified the defendant in the photo array as the person who shot her that day. At trial, Carmen repeatedly denied that anybody besides the police showed her a picture of the defendant before the photo array. However, Manasty testified that she showed Carmen a picture of the defendant on Facebook after Carmen returned home from the hospital.

[*P11] Gillespie testified that he investigated the shooting on April 12, 2015. He spoke with Carmen at the hospital and later went to her house. There, Manasty showed him the defendant's photograph from Facebook. Gillespie also obtained a photo of the defendant and compiled a photo array. The photo **[**6]** array was administered by Reyes and Goduto.

[*P12] The parties stipulated that, if called by the defense, John Franta, an emergency medical technician (EMT) for the Chicago Fire Department, would testify that Carmen said to him, during her treatment in the alley, that "her daughter's ex-boyfriend and another individual known to her opened fire on her and her children."

[*P13] The court found the defendant guilty of one count of aggravated battery (count 12) and two counts of aggravated discharge of a firearm (counts 13-14), and not guilty of attempted first degree murder. The defendant moved for a new trial, questioning the accuracy of Carmen's identification. In denying the motion, the court noted that the testimony of the witnesses "was absolutely credible."

[*P14] At sentencing, the court heard arguments in aggravation and mitigation. In aggravation, the State pointed out the specific harm the defendant caused, other facts surrounding the case and the defendant's prior criminal history. The State also highlighted that at the time of the shooting the defendant was on bail. In mitigation, defense counsel noted the large support network surrounding the defendant, his history of employment, and his education. **[**7]**

[*P15] The court sentenced the defendant to $10^1/_2$ years' imprisonment to be served concurrently on counts 12-14. In announcing sentence, the court recited the defendant's lengthy criminal history, the defendant's lack of accountability, risk to the community and the particular circumstances of the case.

[*P16] The defendant filed a motion to reconsider sentence and an amended motion for new trial. In the motion for a new trial, he informed the court that the State nol-prossed counts 13 and 14, aggravated discharge of a firearm, and argued that the court erroneously considered these counts in imposing sentence.[2] The State agreed that counts 13 and 14 were not brought forward at trial and therefore nol-prossed. The court entered a *nunc pro tunc* order on motion of the State to nol-pros counts 13 and 14. The court then reviewed the motion to reconsider. The court found that the trial judge had appropriately considered the aggravating and mitigating factors and stayed on the lower end of the sentencing range of 6 to 30 years. The

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[2] A different judge than the one who presided over trial and at the defendant's initial sentencing ruled on the defendant's motion to reconsider sentence and amended motion for new trial.

court denied the defendant's motion to reconsider, and the defendant timely appealed.

[*P17] ANALYSIS

[*P18] We note that we have jurisdiction to review this matter, as the defendant filed **[**8]** a timely notice of appeal following sentencing. *Ill. S. Ct. R. 603* (eff. Feb. 6, 2013); *Ill. S. Ct. R. 606* (eff. July 1, 2017).

[*P19] On appeal, the defendant first contends there was insufficient evidence to prove him guilty beyond a reasonable doubt. Specifically, he argues that Carmen's identification of him as the shooter was unreliable and inconsistent with her prior statements as well as the statements of another witness.

[*P20] On a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the required elements beyond a reasonable doubt. *People v. Newton, 2018 IL 122958, ¶ 24, 427 Ill. Dec. 881, 120 N.E.3d 948*. In doing so, we will not retry the defendant. *Id.; People v. Evans, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 283 Ill. Dec. 651 (2004)*. Indeed, as a reviewing court, we may not substitute our judgment for the fact finder's "on questions involving the weight of the evidence or the credibility of the witnesses." *People v. Jackson, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 328 Ill. Dec. 1 (2009)*. A conviction will not be reversed unless the evidence is "unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Campbell, 146 Ill. 2d 363, 375, 586 N.E.2d 1261, 166 Ill. Dec. 932 (1992)*.

[*P21] Where, as here, identification is the central issue, the State has the burden to prove beyond a reasonable doubt the identity of the person accused of committing the charged offense. **[**9]** *People v. White, 2017 IL App (1st) 142358, ¶ 15, 412 Ill. Dec. 25, 74 N.E.3d 492*. A single witness's identification is sufficient to support a finding of guilt "if the witness viewed the accused under circumstances permitting a positive identification." *People v. Slim, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 130 Ill. Dec. 250 (1989)* Illinois courts have adopted the five-factor test used in *Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)*, in assessing identification testimony. *White, 2017 IL App (1st) 142358, ¶ 15*. The factors are:

> "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Slim, 127 Ill. 2d at 307-08*.

[*P22] Applying the *Biggers* factors here leads us to conclude that they support the accuracy of Carmen's identification of the defendant as the man who shot her. First, Carmen had ample opportunity to observe the defendant. She saw the defendant circle the house twice immediately prior to the shooting, and she had seen him on two prior occasions with her daughter. During the shooting, the defendant was approximately 120 to 150 feet away, in daylight hours, and nothing obscured Carmen's view of him. Second, Carmen exhibited a high degree of attention **[**10]** considering she was able to recall that the defendant said "Nine Kings" before the shooting. Moreover, the shooting itself provided sufficient reason for Carmen to intently focus on him (*People v. Davis, 2018 IL App (1st) 152413, ¶ 56, 424 Ill. Dec. 521, 109 N.E.3d 281* (noting that witnesses have reason to "intently focus" even if briefly on individuals trying to shoot them)), and she was able to recall the reactions of the others around her. Neither

the third nor fourth factors are relevant to our analysis since Carmen did not provide a prior description of the offender and the record does not indicate the level of certainty with which Carmen made her identification. However, the fifth factor also supports the accuracy of the identification. The record reflects that Carmen identified the defendant from a photo array and in person at trial. She also made her original identification of the defendant from the photo array less than eight hours after the shooting. *See* People v. Simmons, 2016 IL App (1st) 131300, ¶¶ 97-98, 408 Ill. Dec. 568, 66 N.E.3d 360 (calling line-up identification two weeks after offense a "relatively short time" that weighed in favor of the State and noting that the supreme court has upheld identifications after delays of as much as 18 months up to two years).

[*P23] The defendant nevertheless argues that Carmen's identification is unreliable **[**11]** because: (1) there was insufficient time for Carmen to observe the shooter particularly given the distance between her and the shooter; (2) she lacked composure after the shooting; (3) she told an EMT that her daughter's ex-boyfriend and another individual had shot her; and (4) Manasty tainted Carmen's identification by showing her a Facebook photo of the defendant after she returned from the hospital. The defendant maintains these details and contradictions in Carmen's testimony undermine her credibility.

[*P24] But these alleged inconsistencies were fully explored at trial during cross-examination. It was the responsibility of the trier of fact to resolve the inconsistencies and conflicts in Carmen's testimony and determine the weight to be given the evidence in light of those conflicts. People v. Sutherland, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 307 Ill. Dec. 524 (2006). The court's ruling and its express finding that Carmen was a credible witness reveals that, in this case, the court resolved these inconsistencies in favor of the State. In doing so, the court "is not required to disregard inferences that flow from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." People v. Alvarez, 2012 IL App (1st) 092119, ¶51, 970 N.E.2d 516, 361 Ill. Dec. 150 (quoting **[**12]** People v. McDonald, 168 Ill. 2d 420, 447, 660 N.E.2d 832, 214 Ill. Dec. 125 (1995)). We will not substitute our judgment for that of the trier of fact on these matters. Jackson, 232 Ill. 2d at 280-81.

[*P25] In any event, we note that this court has previously found that a few seconds viewing time may be all that is needed for a credible identification. See People v. Macklin, 2019 IL App (1st) 161165, ¶30, 430 Ill. Dec. 228, 125 N.E.3d 1246 (a few seconds was sufficient opportunity for the victim to observe the defendant). Additionally, this court has not set a maximum range at which a witness must observe the perpetrator in order to make a credible identification, but we have found that a witness can make a proper identification at 150 feet. Davis, 2018 IL App (1st) 152413, 424 Ill. Dec. 521, 109 N.E.3d 281, ¶¶54-56.

[*P26] The defendant next argues that the trial court abused its discretion in imposing sentence because it found him guilty on charges that were nol-prossed by the State prior to trial. According to the defendant, this guilty finding caused the court to impose a higher sentence than it otherwise would have.

[*P27] The Illinois Constitution states that both the "seriousness of the offense" and the rehabilitation of the defendant must be considered in determining a sentence. Ill. Const. 1970, art. I, § 11; People v. Wilson, 2012 IL App (1st) 101038, ¶61, 966 N.E.2d 1215, 359 Ill. Dec. 527. The trial court has broad discretionary powers in imposing a sentence and its decision is entitled to great deference. People v. Stacey, 193 Ill. 2d 203, 209, 737 N.E.2d 626, 250 Ill. Dec. 4 (2000).

Significantly, a sentence within statutory guidelines **[**13]** is presumptively proper. *People v. Knox, 2014 IL App (1st) 120349, ¶46, 385 Ill. Dec. 874, 19 N.E.3d 1070*. We will not disturb a trial court's sentencing determination absent an abuse of discretion. *People v. Jones, 168 Ill. 2d 367, 373-74, 659 N.E.2d 1306, 213 Ill. Dec. 659 (1995)*.

[*P28] In this case, the defendant was convicted of aggravated battery, a Class X felony, punishable by a sentence of not less than 6 years and not more than 30 years. *720 ILCS 5/12-3.05(h)* (West 2014); *730 ILCS 5/5-4.5-25(a)* (West 2014). The defendant's $10^1/_2$ year sentence is therefore presumptively proper as it is well within the statutory range. See *Knox, 2014 IL App (1st) 120349, ¶ 46*. It is the defendant's burden to make an affirmative showing that the court considered improper factors in imposing sentence. *People v. Burnette, 325 Ill. App. 3d 792, 809, 758 N.E.2d 391, 259 Ill. Dec. 268 (2001)*. The defendant has failed to meet this burden here.

[*P29] The defendant does not cite to any part of the record to show that his sentence of $10^1/_2$ years' imprisonment for aggravated battery was based on the court's finding of guilt for aggravated discharge of a firearm. To the contrary, the record shows that the court considered the defendant's criminal history and the relevant circumstances surrounding the case coupled with the mitigating factors proffered by the defendant. The defendant fired his gun multiple times in a residential neighborhood in the middle of the afternoon into a crowd of four people, **[**14]** injuring one. This was a serious offense deserving of serious punishment.

[*P30] While the court may have been laboring under the mistaken belief that the defendant was guilty of aggravated discharge of a firearm (counts the State had nol prossed), the fact remains that a different judge reviewed the sentence on the defendant's motion to reconsider after learning that the State had elected *not* to proceed to trial on those counts. That court again considered all the factors in mitigation and aggravation in light of a finding of guilt on only the count of aggravated battery and nevertheless found the sentence appropriate. Given this record, the defendant has failed to show that the court erred in imposing sentence or that his sentence is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 243 Ill. Dec. 175 (1999)*. Therefore, we conclude that the trial court did not abuse its discretion and affirm the defendant's $10^1/_2$-year sentence.

[*P31] CONCLUSION

[*P32] For the reasons stated, we affirm the judgment of the circuit court of Cook County.

[*P33] Affirmed.

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***People v. Jason Conway*,**
No. 2015 CR 1905501 (Cir. Ct. Cook Cnty.)

Common Law Record

Report of Proceedings

PROOF OF 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 March 25, 2022, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Michael L. Cebula

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