

Nos. 1-11-3778 & 1-12-1521 (cons.)

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 9023 (03)
)	
MICHAEL MINNIFIELD,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court did not abuse its discretion in finding that the State laid a proper foundation for admission of a rap song which was not unduly prejudicial, not improperly referenced during closing arguments, and whose lyrics were properly interpreted by a lay witness; additionally, the evidence was sufficient to find defendant guilty beyond a reasonable doubt when the jury was aware of and given instructions on the witnesses' infirmities and the witnesses' testimony was consistent in all respects including as to the identification of defendant.

¶ 2 Defendant Michael Minnifield appeals his convictions for first degree murder and aggravated battery with a firearm arguing that the trial court erred in admitting a rap song and that the evidence failed to prove him guilty beyond a reasonable doubt.

¶ 3 **I. BACKGROUND**

¶ 4 On the night of April 20, 2009 Renault Darling (Darling) was shot and killed as he returned to his house at 63rd and Ellis in Chicago. Darling was accompanied by several other people at the time he was shot, two of whom, Cherelle Bailey (Bailey) and Theodis Cook-Mims (Mims), were also injured in the shooting.

¶ 5 Shortly after the incident, Chicago police were informed that the shots were fired from a blue Dodge Charger. Officers in the area of the shooting saw a blue Dodge Charger, followed it, ran its plates, and pulled it over. At that time, Angelo Straight (Straight) was the driver of that vehicle, Kerry Williams (Williams) was the front-seat passenger, and defendant was the rear-seat passenger. When the three occupants were removed from the car, officers noticed and recovered one shell casing from inside the car and four shell casings from outside the car belonging to .40- and .45-caliber guns. Defendant, Williams, and Straight were charged with multiple counts of first degree murder, attempt murder, and aggravated battery with a firearm. In May 2010, Straight pled guilty to conspiracy to commit murder in exchange for a 15-year day-for-day sentence and his truthful testimony against Williams and defendant.

¶ 6 Before his trial began, defendant filed a *motion in limine* to exclude, in relevant part, two rap songs. The trial court denied the motion and stated it would allow wide latitude in defense counsel's cross-examination.¹

¶ 7 At defendant's jury trial, Mims testified for the State. He explained that he had been a member in the Gangster Disciples (GD) gang, had several prior convictions on his record, and although he had left the gang life in 2008 and moved to Louisville, Kentucky, he had come back to Chicago to go to a funeral and to visit his very good friend, Darling, when the incident at issue occurred. On that day, April 20, 2009, Mims met up with his girlfriend, Bailey, and they both went to Darling's house. From there, Bailey, Mims, Darling and another friend left to buy liquor. When they returned to Darling's house after a second stop at the liquor store with a few more people, Mims testified that he saw a dark blue Dodge Charger heading in his direction and that he saw a beam on his shirt that was coming from the rear of the car just before the occupants started shooting at his group. Mims further testified that he heard someone yell "[W]ait wait. Stop stop. Stop, stop. Wait, wait" before the shooting started again. Finally, the Charger pulled away slowly. Mims testified he had been shot twice, Bailey had been hit in the face and ankle, and Darling had been shot in his neck.

¹ While the State sought to admit two rap songs attributed to defendant, the trial court ultimately admitted only one.

¶ 8 Following the shooting, Mims and Bailey drove to a hospital for their gunshot wounds and, at the hospital, Mims told officers that he could describe the shooters. However, he did not tell the police who shot at him because he wanted to "get away and go back to Kentucky." Mims testified that he went to the police station after the hospital and identified the two passengers from the day of the shooting. Mims identified defendant as the rear occupant and testified that he recognized defendant from high school but did not know him personally. Mims testified that he could not definitively identify the driver at that time because the man next to him in the lineup looked similar. Finally, he testified that he told an officer at the hospital that the shooters had lasers on their guns.

¶ 9 On cross-examination, defense counsel elicited that Mims bought some marijuana on the night in question, had just smoked a blunt, and was high before the shooting. Defense counsel also emphasized Mims's grand jury testimony in which he said that he was not paying attention to the front seat passenger and did not know if that passenger had a gun. In contrast, Mims testified at trial that he saw the front-seat passenger with a gun on the night of the shooting.

¶ 10 Straight next testified for the State. At the time of trial, he had known defendant for eleven years, that he had become a member of the Black P Stones gang at age 17, and knew defendant to be in the same gang. He told the jury that defendant was with him when he was shot a few years earlier, and that in 2008, defendant was one of his closest friends in the Black P Stones. He testified that the Black P Stones believed that the GDs, who commanded the area of

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Dro City, were responsible for the deaths of the two Black P Stones members, Sergio Dukes and Tommy Williams.

¶ 11 The State questioned Straight about the rap song called "Fuck Dro City." Straight testified that he recognized defendant's voice as the singer, he previously heard the song while he was in the presence of defendant, and had helped the State prepare a transcript of the song. Straight also testified that "RIP Serge, Tommy" referred to the deceased Black P Stones members Sergio Dukes and Tommy Williams; that certain phrases in the song meant that defendant was making up the lyrics as he went along; that the song mentioned two GDs and several members of the Black P Stones by their nicknames. He also testified to the interpretation of the following phrases: "you better be totting your gun and real recognize real so don't be faking" meant that if you do not have a gun then you should not act like you have one; "get interrogation like a show seat. You fold up quick" meant that you will tell if you're interrogated by the police; "your heart gone to stop, that is a flat line" meant a flat line; and that the letters "GDK" stood for Gangster Disciple Killer. On cross-examination, Straight said that he had been to the recording studio with defendant before, that defendant records all the time, and that the song talks about something that the singer thought about "real quick" without writing anything down beforehand, that defendant sang about the Black P Stones members, and that he did not remember the rest of the lyrics. On re-direct, the State elicited more testimony about the particular lyrics "post up on Kimbark," "I got the chrome," and "fuck carone."

¶ 12 Straight also recounted the night of the incident, testifying that he first picked up Williams, who was carrying a .40-caliber Glock that he put in the back door panel, and then defendant. In Straight's blue Charger, the three men went to a liquor store, gas station, studio, to the house of Williams' relative for an hour or two, and back to a liquor store. Straight testified that defendant took the .40 Glock from the back door panel and they travelled to Dro City to see if they could "catch" GDs who were not paying attention and shoot at them. Straight testified that, when they were not able to find anyone between 65th and Cottage Grove and 65th and Kimbark, defendant suggested that they drive to an area called the Quads to shoot at the man who shot Serge, a deceased Black P Stone member. Straight further testified that defendant collected a .45-caliber gun from a nearby house before they drove to the Quads. Straight recounted that, after waiting 30 minutes without seeing Serge's shooter in the Quads, the three of them returned to Dro City.

¶ 13 While there, Straight explained that the three of them were traveling north on Ellis toward 63rd street when they saw approximately seven individuals on the right side of the street. When Straight pulled the car parallel to the group, Williams and defendant started shooting at the group out the windows of the car. Straight explained that he slammed on the brakes and stopped the car to "make sure people got shot" and then hit the gas, at which time defendant immediately told him to stop, and both defendant and Williams continued to shoot. Straight testified that they then drove away, dropped off the two guns with a man called "Fuzzy," and as they were headed to get something to eat, they were pulled over by police officers.

¶ 14 Straight testified that he told officers the following day that he had not been present for the shooting, but that defendant and Williams had "gone on a caper" or a shooting, and that the gunshot residue on his hands was from a gun he had touched earlier on the previous day. Straight then led officers to a house on 61st and Champlain where he told them he had been at the time of the shooting. Upon returning to the police station, he admitted to officers that he was lying about the whole incident.

¶ 15 Straight further testified that in January 2010, he and his lawyer had a conversation with an assistant State's Attorney about the shooting and on May 13, 2010, he pled guilty to conspiracy to commit murder. Straight was given a sentence of fifteen years day-for-day in exchange for his complete and truthful testimony against defendant, Williams, and others involved in the shooting.

¶ 16 Straight acknowledged that in August 2011, after the plea agreement was in place but before this trial, the State visited him in jail and confronted him with the fact that a .40-caliber Glock from the shooting had been recovered and that the purchaser of that gun was Straight's mother. Straight testified that he did not tell the State about the gun earlier because he "didn't want to bring no harm" to his mother, and that she had purchased the gun for him in Iowa. During that visit, he told the State that his mother also purchased the .45-caliber Springfield gun in Iowa. Straight testified that he knew his plea agreement could have been impacted because he had not told the State about the guns before the jail visit. The State also asked Straight about his prior convictions for unlawful use of a weapon and a felony drug offense.

¶ 17 At this point of the trial, defense counsel made a motion for a mistrial because of the State's direct examination of Straight that included "going through lines [of the rap song] that [were] so prejudicial and not probative" with the result that defendant could no longer have a fair trial. The trial court denied the motion.

¶ 18 On cross-examination, defense counsel confirmed that Straight was facing a possible sentence of 90 years for his role in the shooting at issue but that, in exchange for his testimony, his sentence got "whittled down" to 15 years of which he would serve 7 ½. Defense counsel elicited that Straight had two prior felony convictions, was worried about having a murder conviction on his record, and that he had been looking for a deal from the State. Counsel questioned Straight's ability to tell the truth given his track record of lies to police officers and prosecutors about the origin of the guns used in the shooting even after he had signed the plea agreement. Straight admitted that he had brought two guns to Illinois, had specifically requested a gun with a laser, and that he jeopardized his plea agreement by lying about the guns. Straight maintained that on the night in question he did not fire any shots and that he intended to harm, but not kill, GDs to avenge the deaths of two Black P Stone members, Serge and Tommy. He also testified that the "best place to go to knock off" a GD was Dro City. Straight answered "no" when defense counsel asked the following questions: if Straight and Williams were the only ones who did the shooting; if only he and Williams had guns that night; and if he picked up defendant only after the shooting. Straight recounted that he, Williams, and defendant dropped off two

empty guns to Fuzzy and that he did not tell the prosecutor about the location of the guns until six months or a year later.

¶ 19 Defense counsel then questioned Straight about the rap song, eliciting that Straight believed defendant to have a good voice, that Straight had listened to the rap song at issue before trial, that defendant was a rap artist who recorded all the time, that he and defendant had gone to a recording studio both on the night in question and on one other occasion, and that the rap song at issue included lyrics that implied that the song was not written down before it was recorded. Defense counsel asked "he's singing about what you as a [Black P Stone] want to do to [GDs] and think of [GDs], correct?", to which Straight testified he could not remember the exact words.

¶ 20 Subsequently, an FBI agent with training in cell phone analysis testified that a cell phone registered to Straight's mother was within the general area Straight described in his testimony on the night of the shooting. A firearm expert and evidence technician connected 9 shell casings from a .40-caliber gun and 10 shell casings from a .45-caliber gun from the area of the shooting to the same .40- and .45-caliber guns that expended the shell casings found in the vehicle. A Cook County medical examiner testified that Darling's body had three bullet wounds and that there was no evidence of close-range firing. An evidence analyst testified that all three of the individuals, Straight, Williams, and defendant, had gunshot residue and concluded that each of them either discharged a firearm, had contacted an item that had primer gunshot residue on it, or had a hand in the environment of a discharged firearm. After explaining what activities might eliminate gunshot residue on skin, the analyst testified that defendant had the least gunshot

residue of all three individuals and that those particles were mostly on defendant's non-dominant hand.

¶ 21 Darling's sister testified that as she heard Darling come up the porch steps on the night of the shooting, she saw red dots in her window and then heard about 10 gunshots before a pause, followed by more shots. Decedent's sister saw that Darling had been shot and, after putting him on the couch, she called an ambulance.

¶ 22 In its closing arguments, the State argued in the following manner to the jury: "GDK. Gangster Disciples Killer. You heard those words. You heard the rap song explaining exactly what he was going to do when he encountered some Gangster Disciples ***. Words of a man who will go to any length to seek revenge for the death of a fallen colleague. *** Gangster Disciple Killer. *** Defendant's own words, his rap song, uttering his disdain for the Gangster Disciples, telling what he's gonna do with his 45 and his Glock until someone is dead. His intent to kill came from his own mouth. *** But when you sing about something and when you have some song planned to sing about, that's more than just talk. That's something you put your heart into."

¶ 23 The jury found defendant guilty of first degree murder and aggravated battery with a firearm. Defendant was sentenced to consecutive 48- and 6-year terms in prison.

¶ 24

II. ARGUMENTS ON APPEAL

¶ 25 On appeal, defendant first argues that the court committed reversible error in admitting the rap song. Defendant contends the State failed to lay a proper foundation, the song was

inadmissible hearsay as a statement against interest, and Straight provided an improper lay opinion about the meaning of several lyrics of the song. Defendant further argues that the State heavily relied on the lyrics in its closing arguments, which prejudiced defendant. In response, the State maintains that the trial court properly admitted the rap song because the State laid a proper foundation through Straight's testimony. The State further contends that the song is a party admission, as the lyrics substantiate Straight's testimony of the events leading up to the murder, and that the lyrics are indicative of defendant's motive and are not unduly prejudicial. Finally, the State argues that Straight did not offer an improper lay opinion about the meaning of the lyrics because he has special knowledge and familiarity with the song and his opinion would aid the jury in understanding the rap song.

¶ 26 Second, defendant argues that the State's evidence was insufficient to prove him guilty of the charged offenses because neither Mims nor Straight was a credible witness. Defendant asserts that Mims was a member of a rival gang, was high on drugs at the time of the shooting, and had five prior convictions. Defendant also asserts that Straight was a former co-defendant and accomplice who got a generous plea deal, lied to officers and the prosecution about the facts of the case, and also had multiple felony convictions. Additionally, defendant argues that no physical evidence directly linked him to the shooting. In response, the State argues that the jury was fully aware of Straight's plea deal, lies to police and prosecutors, and prior convictions, as they were similarly aware of Mims's gang affiliation, prior convictions, drug use at the time of the shooting, and the fact that Mims did not name defendant as a shooter at the hospital. The

State contends that because the jury was aware of these facts and was given instructions on accomplice testimony and on how to consider a witness's prior convictions and identification testimony, the witnesses' credibility was a question for the jury.

¶ 27

III. ANALYSIS - RAP SONG

¶ 28

A. Foundation of the Rap Song

¶ 29 We turn first to defendant's argument that the State failed to lay a proper foundation for the rap song. We review a trial court's evidentiary ruling on proper foundation for a clear abuse of discretion. *People v. Montes*, 2013 IL App (2d) 111132, ¶ 63-64. Sound recordings which are otherwise competent and material are admissible if a proper foundation is laid to assure the reliability and authenticity of the recording. *People v. Melchor*, 136 Ill. App. 3d 708, 711 (1985). Generally, a sound or audio recording is authenticated by a witness who can testify to the fact that the recording accurately portrays what that witness heard. *People v. Williams*, 109 Ill. 2d 327, 338 (1985). If there is no witness to testify, a recording may be admitted if there is sufficient proof of the reliability of the process that produced the recording. *People v. Dennis*, 2011 IL App (5th) 090346, ¶ 23 (citing *People v. Vaden*, 336 Ill. App. 3d 893, 898 (2003)). The requirement of reliability is concerned with the clarity of a recording. *People v. McCommon*, 79 Ill. App. 3d 853, 867 (1979). Because there were no allegations that the rap song was unreliable, we only address the requirement of authenticity.

¶ 30 Both parties cite *People v. Williams*, 109 Ill. 2d 327, 338 (1985), for the proposition that an adequate foundation is established when a witness to a conversation testifies that the tape

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accurately portrays the conversation in question. We do not dispute that proposition. We do, however, believe that it is not necessarily an inadequate foundation if there is no witness to a recording as long as the elements of reliability and authenticity are clearly established. *People v. Estrada*, 91 Ill. App. 3d 228, 239 (1980). In *Estrada*, the court left open the possibility that the prosecution may lay a proper foundation for recordings of a non-testifying witness and a defendant through evidence of the capabilities of the recording machine and evidence of a chain of custody. *Id.* However, the court went on to note that because the defendant was alleged to have been part of those recordings, he would be able to attack the recordings' authenticity. *Id.* See also *People v. Dixon*, 228 Ill. App. 3d 29, 38 (1992) (citing *People v. Judkins*, 10 Ill. 2d 445, 447 (1957) for the proposition that the more authentication is genuinely in issue, the greater the need to negate the possibility of alteration, substitution, or change of condition).

¶ 31 It cannot be said that the trial court abused its discretion in finding that the State properly authenticated the rap song. Straight recognized defendant's voice as the singer on "Fuck Dro City" based on years of prior personal contact with defendant, having heard the song before the night of the shooting, and having visited the recording studio with defendant before the incident at issue as well as on the night of the shooting. Furthermore, defendant did not attack the recording or deny that it was his voice on the recording. In fact, during defense counsel's cross-examination of Straight, he began with the premise that defendant was the singer saying, after the rap song was played, "You just heard, did you not, [defendant's] voice?" In closing

arguments, defense counsel restated the defendant's authorship: "Well, the song, these are words of Mr. Minnifield."

¶ 32 With a deferential standard of review, we conclude that the trial court did not abuse its discretion in finding a proper foundation for the rap song given Straight's testimony of his 11 years of personal knowledge of defendant's voice and the fact that defendant did not attack the authenticity of the voice on the recording. We need not address whether the foundation issue was waived or properly preserved.

¶ 33 **B. Admissibility of the Rap Song**

¶ 34 The parties dispute whether the rap song was hearsay and whether its probative value was substantially outweighed by its prejudicial value. We agree with the trial court that the rap song was not inadmissible hearsay and that its prejudicial value was not outweighed by its probative value.

¶ 35 The court did not abuse its discretion in finding that the rap song is not hearsay under Illinois Rule of Evidence 801(d)(2) as a statement "offered against a party and is [] the party's own statement." Ill. R. Evid. 801(d)(2)(A) (eff. Jan. 1, 2011). We note that throughout the trial, defendant maintained that he had never admitted to membership in the Black P Stones. Therefore, indications of gang membership in the lyrics of the rap song were inconsistent and unfavorable to defendant's position at trial. Straight was an adverse witness who implicated defendant as the author of the rap song's lyrics *and* as a member of the Black P Stones. *Zaragoza v. Ebenroth*, 331 Ill. App. 3d 139, 142 (2002) (finding former co-defendants adverse parties).

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The rap song contained inculpatory statements about defendant's animosity toward GDs in Dro City, a view that the Black P Stones gang also held according to Straight's testimony.

Furthermore, the rap song was a voluntary recording, testimony attributed the song to defendant, and the song may have revealed a gang-rivalry motive for the shooting. Because of these factors, the rap song can be considered a party admission. 18 Ill. Law and Prac. Evidence § 135; *U.S. v. Foster*, 939 F.2d 445, 454 n.13 (1991) (suggesting that the federal rule of evidence governing party admissions would be an alternative way to categorize rap lyrics). Moreover, the rap song is relevant. The song makes two facts more probable than they would be without the evidence of the rap song: the existence of defendant's membership in the Black P Stones and that defendant may have shared that gang's belief that the GDs were responsible for the deaths of two Black P Stones members. See Ill. R. Evid. 401 (eff. Jan. 1, 2011). Because the rap song is not hearsay and is relevant, we decline defendant's invitation to find that it is inadmissible hearsay as a "statement against interests." Ill. R. Evid. 804(b)(3) (eff. Jan. 1, 2011).

¶ 36 We also agree with the trial court's finding that the song's probative value was not substantially outweighed by its prejudicial value. The probative value of all admissible evidence must not be substantially outweighed by the danger of unfair prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011); *Smith*, 141 Ill. 2d at 58. While the rap song was vulgar, violent, threatening, and had profane language, it was not more inflammatory than the crimes alleged against defendant. Additionally, only one of the two songs credited to defendant was played for the jury and the

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evidence was not cumulative of defendant's animosity toward the GDs within the area of Dro City. Thus, the song's probative value was not substantially outweighed by its prejudicial effects.

¶ 37 We acknowledge that the issue of admissibility of rap lyrics or rap songs composed by defendants is a timely issue in state and federal courts alike. See *U.S. v. Herron*, No. 10–CR–0615 slip op. (E.D.N.Y. May 8, 2014); *Elonis v. United States*, 730 F.3d 321 (3rd Cir. 2013), cert. granted, 82 U.S.L.W. 3538 (No. 13-983); *U.S. v. Foster*, 939 F.2d 445 (1991); *U.S. v. Wilson*, 493 F. Supp. 2d 460 (2006); *People v. Zepeda*, 167 Cal. App. 4th 25 (2008); *Joynes v. State*, 797 A.2d 673 (Del. 2002); *People v. Oduwole*, 2013 IL App (5th) 120039; *Byrant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004); *Hannah v. State*, 23 A.3d 192 (Md. 2011); *State v. Skinner*, 95 A.3d 236 (N.J. 2014); *People v. Wallace*, 59 A.D.3d 1069 (N.Y. App. Div. 2009); *Holmes v. State*, 306 P.3d 415 (Nev. 2013); *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

¶ 38 Some courts—both federal and state—have undertaken an analysis of the issue of rap song admissibility under the Federal Rule of Evidence (FRE) 404(b)² about other crimes evidence or the corresponding state rule of evidence. See *U.S. v. Stuckey*, 253 Fed. Appx. 468 (2007); *U.S. v. Foster*, 939 F.2d 445 (1991); *Joynes v. State*, 797 A.2d 673 (Del. 2002); *Byrant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004); *State v. Skinner*, 95 A.3d 236 (N.J. 2014); *State v.*

² The FRE 404(b) prohibits "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but states that the same "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(1), (2) (eff. Dec. 1, 2011).

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Koskovich, 776 A.2d 144 (N.J. 2001). Before adopting the 404(b) analysis, New Jersey's Supreme Court explored whether artistic expression—including rap songs—about "crimes or bad acts should be evaluated under [New Jersey's equivalent of federal rule of evidence] 404(b) at all" or if artistic expression should be analyzed solely for relevance under New Jersey's state-equivalent of FRE 401. *State v. Skinner*, 95 A.3d 236, 248-49 (N.J. 2014). Importantly, the court acknowledged that writing rap lyrics, however disturbing or grotesque, is not a crime in and of itself. *Id.* at 249. It further reasoned that a 404(b) approach has been employed where evidence is not overtly criminal in nature and 404(b) generally "serves as a safeguard against propensity evidence that may poison the jury against a defendant" as one who is "prone to commit crimes." *Id.* New Jersey's Supreme Court concluded that the purpose of 404(b) is advanced by its application to the question of admissibility of rap lyrics. *Id.* We are unaware of any Illinois cases that analyze the admissibility of rap songs attributable to a defendant under Illinois Rule of Evidence 404(b)³, and we decline to do so here.

¶ 39 Finally, defendant complains that there was no limiting instruction for the admission of the rap song. Admittedly, Illinois Rule of Evidence 105, as does its federal counterpart, indicates that parties should request that the trial court provide an instruction to the jury when evidence is

³ That rule states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure *** [but] [s]uch evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

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admissible for one purpose—motive, in this case—but not admissible for another purpose—namely, defendant's propensity for violence. Ill. R. Evid. 105 (eff. Jan. 1, 2011); see also *U.S. v. Foster*, 939 F.2d 445, 455 (1991); *People v. Montes*, 2013 IL App (2d) 111132, ¶ 45; *State v. Skinner*, 95 A.3d 236, 248 (N.J. 2014); *Holmes v. State*, 306 P.3d 415, 418 (Nev. 2013).

However, Illinois Supreme Court Rule 366 provides that, in jury cases, no party may raise the failure to give an instruction on appeal "unless the party shall have tendered it." Ill. S. Ct. R. 366 (eff. Feb. 1, 1994). The burden to request a cautionary instruction rests on defendant. *People v. Hairston*, 46 Ill. 2d 348, 373 (1970) (citing *People v. Gratton*, 28 Ill. 2d 450, 455-56 (1963)).

¶ 40 In this case, the State proffered Illinois Pattern Instruction (IPI) 3.14 to "show that [the rap song] was being admitted for intent, knowledge, as well as motive" and substituted the word "conduct" in place of "offense" in the instruction. Defense counsel objected to this instruction on the basis that it is generally employed for proof of other crimes. Because defendant did not tender an instruction with respect to the rap song below, defendant cannot raise the lack of an instruction on appeal. See also *People v. James*, 348 Ill. App. 3d 498, 509 (2004) (finding that the defendant had waived for appeal the issue of whether he was entitled to a limiting instruction stating that his co-defendant's tattoo was only admissible as to that co-defendant where the defendant failed to request the limiting instruction).

¶ 41 **C. Straight's Testimony About the Meaning of Rap Lyrics**

¶ 42 In response to defendant's argument that Straight gave an improper lay opinion, the State acknowledges the general rule that a lay witness may not offer an opinion as to the meaning of

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another's out-of-court statement. *Williams*, 264 Ill. App. 3d at 286-87. But, the State contends that Straight's special knowledge and familiarity with the slang terminology in the rap song is an exception to that general rule. We agree.

¶ 43 Lay witness opinion testimony is admissible where the facts could not otherwise be adequately presented or described to the fact finder in such a way as to enable the fact finder to form an opinion or reach an intelligent conclusion. *People v. Novak*, 163 Ill. 2d 93, 102 (1994) *abrogated on other grounds by People v. Kolton*, 219 Ill. 2d 353 (2006). Illinois Rule of Evidence 701 limits a lay witness's testimony to opinions or inferences which are "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702" governing the testimony of witnesses qualified as experts. Ill. R. Evid. 701 (eff. Jan. 1, 2011).

¶ 44 A narrow exception to Rule 701 exists when a non-expert witness "has special knowledge and familiarity with a subject, and his opinion may aid the jury in its deliberations." *Williams*, 264 Ill. App. 3d at 287. This exception applies here. In *Williams*, the court held it was improper to allow four witnesses to testify to the meaning of defendant's statement that the victim "died like a bitch" because there was "no showing that the witnesses had special knowledge that would permit them to explain [the] defendant's comment, or that any assistance to the jury in interpreting his words was necessary." *Id.*

¶ 45 While the lyrics were displayed for the jury, the State asked Straight to identify the nicknames in the song and their gang affiliation. Straight testified that he and nine other Black P Stones members were mentioned in the song as were two GDs. He testified to the interpretation of the following phrases: "you better be totting your gun and real recognize real so don't be faking" meant that if you do not have a gun then you should not act like you have one; "get interrogation like a show seat. You fold up quick" meant that you will tell if you're interrogated by the police; "your heart gone to stop, that is a flat line" meant a flat line; and the letters "GDK" stood for Gangster Disciple Killer. Straight also testified that at several points in the song, the singer confessed that he was making up the lyrics as he went along.

¶ 46 Straight testified to the meaning of the lyrics as someone who was familiar with defendant having known him for more than 10 years. Straight's familiarity with terminology used among his peers assisted the jury in interpreting the words. Unlike the four witnesses in *Williams* who testified to what that *defendant* meant by the phrase "died like a bitch", it is a reasonable inference that Straight testified to the meaning of certain phrases as they were used by his peers and perhaps as they would have been understood among Straight's fellow gang members in the Black P Stones. At least two cases from other jurisdictions have found that a witness's knowledge of slang does not exceed the bounds of a lay witness opinion. *King v. United States*, 74 A.3d 678, 682-83 (D.C. 2013); *United States v. Saulter*, 60 F.3d 270, 276 (1995). Finally, the trial court explained to the jury that the lyrics were not evidence ("Ladies and gentlemen, the only evidence that is here is the song itself. The transcript may aid you but it's not evidence in

and of itself. Okay. You depend on what you hear on the audio.") and the lyrics were not permitted in the jury room during deliberations. Having reviewed the rap song as it was played for the jury, we find that Straight had specialized knowledge of the terminology in the song that did not exceed the scope of lay witness opinion testimony.

¶ 47 **D. State's Reliance on Rap Lyrics in Closing Arguments**

¶ 48 Defendant complains that the prosecutors' remarks in closing arguments were prejudicial. The prosecutors argued "you heard the rap song explaining exactly what he was going to do when he encountered some Gangster Disciples, who will go to any length to seek revenge for the death of a fallen colleague"; "His intent to kill came from his own mouth"; "when you have some song planned to sing about, that's more than just talk. That's something you put your heart into".

¶ 49 Although prosecutors are permitted wide latitude in their closing arguments, the arguments must be based upon the evidence or reasonable inferences from it. *People v. Smith*, 199 Ill. App. 3d 839, 854 (1990). Even where prosecutor's comments or remarks are found to be improper, an appellate court will not reverse the trial court unless the remarks or comments resulted in substantial prejudice to defendant that affected the defendant's rights to a fair and impartial trial. *People v. Turner*, 128 Ill. 2d 540, 560 (1989). In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in their proper context. *People v. Nemke*, 46 Ill. 2d 49, 59 (1970).

¶ 50 Viewing the closing argument in its proper context, we find that the prosecutors' remarks did not result in substantial prejudice to defendant, but rather that the State made reasonable inferences from the testimony to support its theory of the case—namely, that defendant articulated his motive for shooting at GDs in the rap song. In a murder case such as this one, evidence of motive is undoubtedly prejudicial to defendant. But here, prosecutors' arguments reasonably inferred that defendant felt hostility toward GDs from Straight's testimony and the prosecutors relied on the lyrics to demonstrate that inference and indicate a possible motive. See *People v. Dee*, 26 Ill. App. 3d 691, 702 (1975) (finding that the prosecution's closing argument regarding a sexual assault was an "implied connection" that had a valid purpose even though defendants were not charged with such an assault). The prosecutors' closing argument directly responded to defendant's contention that the lyrics were typical of rap songs. Finally, the closing arguments did not appeal to jurors' emotions and instead only characterized the song and its lyrics to support their theory of the case. See generally *People v. Hope*, 116 Ill. 2d 265, 277 (1986) (prosecutor improperly appealed to the emotions of jurors by presenting the fact that the murder victim left behind a family during closing arguments).

¶ 51 **IV. ANALYSIS - SUFFICIENCY OF THE EVIDENCE**

¶ 52 The second issue raised on appeal is that the State failed to prove defendant guilty beyond a reasonable doubt. Defendant complains that Straight's "generous" plea deal coupled with Straight's initial lie before the plea deal was in place, as well as the lie about the origins of the guns after the plea deal, discredits his testimony. Similarly, defendant argues that Mims's

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rival gang affiliation, drug use on the day in question, and both witnesses' prior convictions require reversal. We disagree.

¶ 53 In reviewing a challenge to a criminal conviction based on the sufficiency of the evidence, the relevant question is whether, after viewing the facts in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). We will not disturb a conviction on review unless it is plainly apparent that such a degree of proof is lacking. *People v. Todaro*, 14 Ill. 2d 594, 602-03 (1958). Generally, a conviction cannot be reversed simply because the defendant argues that a witness was not credible. *People v. Brown*, 185 Ill. 2d 229, 250 (1998). Importantly, the trier of fact bears the responsibility to determine the credibility of witnesses, resolve conflicts or inconsistencies in their testimony, assess the weight to be given to their testimony, and draw reasonable inferences from all of the evidence. *People v. Cochran*, 323 Ill. App. 3d 669, 679 (2001); *People v. Woods*, 26 Ill. 2d 582, 585 (1963).

¶ 54 To prove defendant guilty, the State had to prove each element of the crimes charged beyond a reasonable doubt. IPI Criminal 3d No. 7.02A. In order to prove defendant guilty of first degree murder, the State needed to prove that defendant either (1) intended to kill or do great bodily harm to Darling or another, or knew that, in performing the acts which caused Darling's death, such acts would cause death to Darling or another, or (2) knew that such acts created a strong probability of death or great bodily harm to Darling or another. 720 ILCS 5/9-1(a)(1), 9-1(a)(2) (West 2008). To prove defendant guilty of aggravated battery with a firearm,

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the State needed to prove that defendant, "in committing a battery, knowingly or intentionally by means of the discharging of a machine gun or a firearm *** cause[d] any injury to another person." 720 ILCS 5/12-4.2 (West 2008).

¶ 55 In this case, defendant is correct to assert that the testimony of an accomplice should be cautiously scrutinized on appeal. *People v. Rouse*, 2014 IL App (1st) 121462, ¶ 43 (citing *People v. Holmes*, 141 Ill. 2d 204, 242 (1990)). Similarly, we acknowledge that rival gang members have a "clear motive to lie." *People v. Johnson*, 208 Ill. 2d 53, 103 (2003) (citing *People v. Blue*, 205 Ill. 2d 1, 15 (2001)). However, the inherent weaknesses of the testimony affect "questions of the weight of the evidence and the credibility of the witness, matters peculiarly within the province of the trier of fact." *Holmes*, 141 Ill. 2d at 242. Finally, an accomplice's testimony will be sufficient to sustain a conviction "if it convinces the jury of the defendant's guilt beyond a reasonable doubt." *People v. Smith*, 177 Ill. 2d 53, 74 (1997).

¶ 56 First, the instant case is distinguishable from cases in which a jury verdict has been reversed on appeal. In *Smith*, 185 Ill. 2d at 542-45, the prosecution's entire case identifying defendant as the perpetrator rested on one witness whose testimony about basic facts of the incident—including the number of people with the defendant when he was shot outside a bar—differed from other witnesses who testified that they were near the defendant when he was shot. *Id.* See also *People v. Davis*, 278 Ill. App. 3d 532, 541-43 (1996) (reversing a jury's guilty verdict when the State failed to supply facts to support the postulations about the homicide in that case). Here, the record shows that Mims and Straight testified consistently with each other:

both Straight and Mims unequivocally identified defendant as the rear passenger of a blue Dodge Charger, and both testified there were three people in the car during the shooting, that guns with lasers were employed in the shooting, and that someone yelled "stop" during the shooting before the vehicle pulled away. Moreover, Straight provided a detailed account of the events leading up to the offense and even recounted the exact route he drove on the night of the shooting. In short, Mims's and Straight's testimonies were consistent in all major respects and the jury did not need to resolve inconsistencies but rather assess each witness's credibility.

¶ 57 Straight's infirmities were properly before the jury for assessment of his credibility. Both parties recognize that Straight denied being involved in the shooting and told officers that the gunshot residue on his hands was from a gun he had touched before the shooting occurred. Yet, even when a former accomplice testifies for the State after having initially denied involvement in the offenses at issue, a court may find the testimony sufficient to sustain the convictions on appeal because any infirmities in the witness's testimony went to his credibility and it was the function of the jury to assess that credibility. *People v. Brown*, 185 Ill. 2d at 238, 250-51 (accomplice's detailed account of the offenses at issue and the partial corroboration of his testimony was sufficient to withstand defendant's attacks that the accomplice's testimony was not believable even though the accomplice initially denied any involvement in the offense).

¶ 58 When Straight was confronted with the fact that a .40-caliber Glock with a laser had been recovered and that the gun had been purchased by Straight's mother, he explained that he had lied because he was trying to protect his mother who had purchased the guns at Straight's

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request. With or without such an explanation, "it remains for the trier of fact to decide when, if at all, [a witness] testified truthfully." *People v. Cunningham*, 212 Ill. 2d 274, 282-83 (2004); see *People v. Young*, 263 Ill. App. 3d 627, 634-35 (1994) (finding no reason to question a witness's trial testimony where she initially provided a written statement and grand jury testimony claiming that she had no knowledge of the shooting at issue and denying she had seen the defendant, but later explained her untruthfulness by saying that she did so out of fear of the defendant and members of his gang). It is worth noting, without excusing them, that the lies Straight told after his agreement with the State did not pertain to defendant's role in the shooting but the narrower issue of the origin of the guns. Additionally, Straight confessed that he had lied to officer after he denied involvement in the shooting.

¶ 59 We do not accept defendant's argument that Mims' failure to identify him at the hospital jeopardized the credibility of his testimony when the jury also heard that Mims simply "wanted to go home," "did not want to get involved," was preoccupied because of allegedly poor treatment he received at the hospital and was not asked for further descriptions of the shooters by police. Moreover, the fact that Mims withheld the names of any guilty parties while he was receiving treatment at the hospital, calls into question defendant's claim that Mims was eager to implicate members of a rival gang.

¶ 60 In sum, when a jury has been given instructions on the possible motives of testifying witnesses and their prior convictions, and the jury is also fully aware of their drug use at the time in question, an appellate court should not substitute its judgment for the jury's on questions of

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witness credibility. Here the two witnesses' testimonies were consistent, as both identified defendant as a shooter and included a detailed description of the incident at issue. Finally, the State presented other evidence. Defendant was found in a blue Dodge Charger with occupants who either self-admitted or were identified by a witness as having been involved in the shooting shortly after it occurred. Moreover, defendant had gunshot residue on his hands. From this evidence, a rational trier of fact could have found defendant guilty of first degree murder and aggravated battery with a firearm.

¶ 61 For the foregoing reasons, we affirm the decision of the trial court.

¶ 62 Affirmed.