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¶ 3 For the reasons that follow, we reverse and remand for a new trial.

¶ 4 BACKGROUND

¶ 5 Defendant's conviction arose from the events of August 12, 2009. That day, defendant shot and killed his brother, Reginald Jiggetts, at their grandmother's house in Markham, Illinois. The victim's girlfriend, Timberlyn Jones, was the only eyewitness to the shooting. Two of defendant's cousins, Ashley Bibbs (Bibbs) and Princess Jiggetts (Jiggetts), were in the house and heard the shooting, but did not observe the incident.

¶ 6 At trial, Timberlyn Jones (Jones) testified that on the night before the shooting, she, Ashley Bibbs, and the victim drove to the "projects" in Robbins, Illinois, where they met defendant. After the victim gave defendant some counterfeit money, the victim and the two women drove off. As the victim was driving, he received a phone call from defendant, who was yelling about money. The victim hung up and then ignored his phone when it rang several more times. The group made a stop in order for Jones to obtain some money, which she gave to the victim so he could pay the defendant. They then proceeded to the victim's grandmother's house, where he was residing.

¶ 7 Jones testified that the next afternoon, she and the victim were sleeping on a couch in the living room. Ashley Bibbs and Princess Jiggetts were also sleeping on couches in that room. About 5 p.m., Jones and the victim were awoken by defendant, who was standing over them and seemed mad. Defendant told the victim to get up and said something to the effect of, "You know

what I do when you do me wrong." The victim got up, handed defendant \$70, said "Come on, Bro," and walked into the kitchen. Defendant followed the victim into the kitchen, where the two men started arguing. Initially, Jones testified that she saw the victim reach out toward defendant with an open hand in a slapping motion, but that defendant leaned back and was not hit.

However, after reviewing her grand jury testimony, Jones testified that defendant swung at the victim before the victim made the slapping motion. Jones stated that after the victim made the slapping motion, defendant pulled a little silver handgun from his side and, with his hand outstretched, fired it. The victim fell to the floor and defendant walked out the kitchen door.

¶ 8 Princess Jiggetts testified that on the evening before the shooting, she was at her grandmother's house with several other relatives, including defendant. Jiggetts' aunt was talking about "fake money," and Jiggetts saw a counterfeit \$50 bill and a counterfeit \$20 bill. Defendant, who seemed "kind of calm but a little upset," made a phone call. Jiggetts stated that it sounded like defendant was talking to the victim. Defendant did not stay at the house overnight.

¶ 9 The next afternoon, Jiggetts took a nap on a couch in the living room. The victim and Timberlyn Jones were sleeping on an adjacent couch. Around 5 p.m., Jiggetts got up and prepared to bathe her daughter in the bathtub. She testified that while she was in the bathroom, she heard a loud noise, a bang "like somebody fell," and a scream. Jiggetts ran into the kitchen, where she saw the victim lying on the floor with blood on his chest. The victim said, "My chest, my chest." Jiggetts called 911, got a towel, and used it to apply pressure to the victim's chest. Eventually the paramedics arrived and took the victim away.

¶ 10 Ashley Bibbs testified that the night before the shooting, the victim drove her and Timberlyn Jones to the "projects" in Robbins. They met up with defendant, who gave the victim

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some money. The victim and the women then drove away. Bibbs testified that as they were driving, the victim's phone rang multiple times, but the victim did not pick up. The victim dropped Bibbs off at her grandmother's house. Bibbs testified that at some point that evening, she saw defendant in their grandmother's kitchen. Defendant was angry and said that "he couldn't believe that his brother \*\*\* gave him this bogus money." Bibbs recalled that defendant made a phone call and sometime later left the house.

¶ 11 Bibbs testified that the next afternoon, she, Princess Jiggetts, the victim, and his girlfriend Timberlyn Jones took naps on three couches in the living room. Around 5 p.m., Bibbs got up and took her daughter to the back of the house to change her diaper. While she was in the back, she heard some commotion and a "pow." Bibbs went to the kitchen, where she saw the victim lying on the floor.

¶ 12 Markham police detective Dashun Walker testified that he responded to a call reporting a gunshot victim. When he arrived at the given address, he found the victim on the kitchen floor, dazed and incoherent. The victim was barely responsive and was having trouble breathing. Detective Walker talked to the victim's aunt, Dolores Anderson, who told him the altercation had involved the victim and defendant, and that defendant was on his way to Robbins. Timberlyn Jones told Detective Walker that prior to being shot, the victim had been involved in an argument with defendant, and Ashley Bibbs told him that the incident "was over money." Detective Walker notified the special operations unit, which handles gang and narcotics investigations, that defendant was possibly en route to Robbins. He stated, "A couple of the members on that team were familiar with [defendant] and kind of were familiar with the areas in which he associated himself with in Robbins, and they went to Robbins, Illinois."

¶ 13 The forensic pathologist who performed the autopsy on the victim testified that the cause of death was a gunshot wound to the chest and the manner of death was homicide.

¶ 14 Markham police deputy chief James Walker testified that four days after the shooting, he received a phone call from Stanley Grice, an officer employed by the University of Illinois at Chicago police department who was a friend of defendant's family. During the call, the officers made arrangements for Officer Grice to bring defendant to the Markham police department. When defendant arrived at the station later that day, Deputy Chief Walker did not observe any injuries on him.

¶ 15 Defendant testified that in 1999, he was shot in a random shooting at a nightclub. He suffered a sciatic nerve injury as a result. He explained that due to the nerve injury, he could not control his leg below the knee. Since the injury, he has worn a plastic prosthetic brace on his leg. Defendant displayed the brace to the jury, which the trial court described as a slip-on shoe attached to a 12-inch piece of plastic with a Velcro strap.

¶ 16 Defendant testified that on the day of the shooting, he went to his grandmother's house to visit his extended family. When he arrived, the victim and his girlfriend were sleeping on a couch. Defendant woke the victim, who said, "Bro, I got that for you." Defendant understood this to mean that the victim had the \$70 he owed defendant. Defendant testified that he was upset with the victim about the money, but not angry. The victim got up, pulled money out of his pocket, and gave it to defendant. Both men walked into the kitchen. Defendant stated, "He was kind of upset that I had been -- I guess he felt like I was nagging him for the money." The men exchanged words, and then the victim turned, "got aggressive," and punched defendant. Defendant punched him back, and the men exchanged more blows. Defendant testified that the

victim was "getting the best of me" in the fight, and that he could not "keep up" because of his disability.

¶ 17 Defendant testified, "I wanted to try to stop the confrontation, so I had a gun in my pocket." He explained that he carried a loaded .25 caliber handgun every day "because of what happened to me, and in the area that I live in." When asked what must be done in order for the gun to fire, defendant answered, "Well, you must -- it takes a clip. You must put the clip in and then cock the gun for it to shoot." With regard to what happened next, defendant testified as follows:

"As I'm reaching for it, I just want to pull it out, hoping that he see it, and it stop the confrontation. But as I'm pulling it out, he landed another blow like to my face and my eye, and it blurring me and I'm falling off balance and I'm trying to catch myself. As I'm trying to catch myself, it goes off."

Defendant testified that less than two seconds elapsed from the time he was hit in the face to the time he pulled the weapon from his pocket. He did not see the firearm go off, since his vision was blurred. After defendant caught himself and his vision came back, he could see that the victim was hit. He panicked and ran from the house. When he got to his own home, he called his grandmother's house to see if anyone had called an ambulance. At some point, he called his lawyer, who arranged to have defendant meet up with a family friend who was a police officer and turn himself in at the Markham police station.

¶ 18 At a side bar prior to cross-examination, the prosecutor argued to the trial court that by testifying his reason for carrying a handgun was that he had been shot in 1999, defendant had "opened the door for questioning in cross-examination with respect to his drug dealing activities

that happened certainly the night before, on August 11, when the transaction occurred with the money between the victim and the defendant in this case." The prosecutor argued that evidence showing defendant carried a handgun because he was actively dealing drugs would speak to defendant's credibility. When asked by the trial court how the State would prove the drug dealing, the prosecutor indicated that if defendant denied it occurred, she could call Timberlyn Jones or Ashley Bibbs. The prosecutor stated that she had earlier directed those witnesses not to bring it up, but that if called in rebuttal, they would both testify that when they went to Robbins with the victim the night before the shooting, he purchased marijuana from defendant using \$70 in counterfeit money.

¶ 19 Defense counsel objected, stating that the defense had elicited nothing to lay a foundation for the admission of evidence of drug dealing. The court responded that the issue was not drug dealing, but rather, the reason defendant was carrying a handgun. The court also stated its belief that a corollary exists between people who are selling drugs and people possessing weapons.

When defense counsel continued to object, the court made the following statement:

"If you would have said he had the gun with him[,] it ends right there, but the problem is that once he says that he had the gun and the reason he had the gun is not for anything else other than to protect himself because he was shot years ago, I certainly think that you opened the door for what happened the night before."

¶ 20 During the cross-examination that ensued, defendant testified that he purchased his handgun from a random individual on the street a few years before the shooting at issue. He explained that there was a clip that was loaded and inserted into the weapon, and that in order to

fire the handgun, one would have to cock it, that is, "take that slide that's on the top of the gun and pull it back to push the bullet in the chamber," and then pull the trigger. The prosecutor confirmed defendant's testimony that he carried the weapon for protection due to his disability, and then asked defendant whether he carried it for another reason. When defendant stated that he did not, the prosecutor asked, "Well, isn't it true that you carried it the night before, on August 12, the night before you shot your brother, because you were out in the projects selling drugs?"<sup>1</sup> The trial court overruled defense counsel's objection, and defendant answered, "Yes, ma'am." Defendant thereafter acknowledged that he was selling drugs that night, that the victim gave him \$70 in exchange for marijuana, that he was upset when he realized the money was counterfeit, and that he tried to call the victim multiple times. However, defendant insisted that he did not go to his grandmother's house that night looking for the victim. Rather, he stated that he went there to visit family, as he did every day. Defendant also denied that when he woke the victim, he said something to the effect of, "You know what I do to people who wrong me." Finally, defendant testified that the day after the shooting, he disposed of the handgun by throwing it in the river near the casino in Joliet.

¶ 21 At the jury instructions conference, defendant requested that the trial court give instructions on both involuntary manslaughter and second degree murder. The court refused to instruct the jury on second degree murder, stating, "[T]he fact that the defendant's testimony regarding this is that the gun came out and the gun went off and it is more of an accident, not any type of self-defense issue." However, the trial court stated it would instruct the jury on

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<sup>1</sup> Although the record on appeal indicates that defendant was questioned about August 12 during cross-examination, we note that the "night before [defendant] shot [his] brother" was actually August 11.

involuntary manslaughter because defendant's testimony had described the reckless act of grabbing a handgun from his pocket during a fight with the victim.

¶ 22 The jury found defendant guilty of first degree murder and also found that he had personally discharged a weapon during the offense. In a posttrial motion, defense counsel argued, among other things, that the trial court erred in allowing the State to question defendant regarding having sold drugs to the victim the night before the shooting and in refusing defendant's request for a jury instruction on second degree murder. The trial court denied the motion, entered judgment on the verdict, and subsequently sentenced defendant to 20 years in prison for first degree murder and an additional 25 years for the personal discharge of a firearm.

¶ 23 ANALYSIS

¶ 24 Second-Degree Murder Jury Instruction

¶ 25 Defendant contends that the trial court erred in refusing to give a jury instruction on second-degree murder where there was some evidence that he believed, albeit unreasonably, that he was defending himself from the victim. Defendant argues that he was entitled to have the jury instructed as to any theory of defense supported by the evidence, even if that theory was inconsistent with his own testimony. The evidence he suggests would have supported a theory of self-defense was (1) his testimony that the victim was upset because he felt defendant was nagging him for money, that the victim initiated the confrontation by taking the first swing at defendant, and that defendant took out his handgun because he could not "keep up" with the victim, who punched defendant repeatedly; and (2) Timberlyn Jones' testimony that the victim and defendant were yelling and fighting in the kitchen. Defendant asserts that if the jurors believed Jones' testimony that he appeared to aim the firearm at the victim, they could have

found that he did so because he was losing ground to the victim and unreasonably believed that he needed to use force to defend himself.

¶ 26 Second degree murder occurs when a defendant commits first degree murder and one of two mitigating factors is present: sudden and intense passion resulting from serious provocation, or an unreasonable belief in the need to use force in self-defense. 720 ILCS 5/9-2 (West 2008); *People v. McDonald*, 329 Ill. App. 3d 938, 950 (2002). It is the defendant who bears the burden to prove, by a preponderance of the evidence, these mitigating factors. *McDonald*, 329 Ill. App. 3d at 950. If evidence exists in a murder prosecution which, if believed by a jury, would mitigate the crime to second degree murder, an instruction defining that offense should be given. *Id.* Whether sufficient evidence exists to justify a second-degree murder instruction is a determination that lies within the province of the trial court and that will not be disturbed on appeal absent an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008).

¶ 27 Here, evidence was provided at trial to demonstrate that defendant subjectively believed, reasonably or unreasonably, that his use of force was justified. Defendant testified that the victim initiated the confrontation by getting aggressive and throwing the first punch, that the victim was "getting the best of [him]" in the fight, and that he could not "keep up" because of his disability. From this evidence, the jury could have concluded that defendant believed he was acting in self-defense when he pulled his weapon. Defendant's testimony that the handgun discharged accidentally does not preclude a finding by the jury that he was acting in self-defense. A homicide defendant is entitled to an instruction on self-defense where there is some evidence in the record which would support the defense, even where the defendant has testified that he accidentally killed the victim. *People v. Everette*, 141 Ill. 2d 147, 156-57 (1990); see also *People*

*v. Robinson*, 163 Ill. App. 3d 754, 770-71 (1987) (the failure to give a self-defense instruction where there is some evidence of self-defense immediately preceding an accidental killing is reversible error). In this case, the trial court erred in refusing to give a jury instruction on second-degree murder. Accordingly, we reverse defendant's conviction and remand for a new trial.

¶ 28

#### Other Crimes Evidence

¶ 29 On appeal, defendant further contends that he was denied a fair trial where the court allowed the State, under the guise of impeachment evidence, to elicit testimony that he sold marijuana to the victim in the "projects" the night before the shooting. Defendant asserts that the State did not prove up its insinuation that he carried a handgun because he was a drug dealer. He also argues that testimony that he sold drugs to the victim the night before the shooting did not contradict his stated purpose for keeping a weapon on him, *i.e.*, for protection because he had a disability and lived in an unsafe area, and therefore, did not open the door to questions about a prior drug transaction. Defendant maintains that the cross-examination encouraged the jury to perceive him as a criminal and drug dealer who was prone to violence and likely to shoot his weapon intentionally. He asserts that evidence of the transaction with the victim was unfairly prejudicial, wholly irrelevant, and constituted improper impeachment on a collateral matter. He further argues that the prejudice was exacerbated where Detective Walker testified that he gave defendant's name to a unit that handles gang and narcotics investigations, and that members of that team were familiar with defendant and the areas "in which he associated himself with in Robbins."

¶ 30 Evidence of crimes for which the defendant is not on trial is admissible if relevant for any purpose other than to show the defendant's propensity to commit crimes. *People v. Chapman*,

2012 IL 111896, ¶ 19. Such purposes include, but are not limited to, motive, intent, identity, lack of mistake, and *modus operandi*. *Id.* Evidence of other crimes is also admissible where the evidence is procured, invited, or acquiesced to by the defendant. *People v. McGee*, 268 Ill. App. 3d 582, 586 (1994). However, even when other crimes evidence is offered for a permissible purpose, it should not be admitted if its prejudicial effect substantially outweighs its probative value. *Chapman*, 2012 IL 111896, ¶ 19. It is within the trial court's discretion to determine the admissibility of evidence of other crimes, and its decision will not be disturbed absent a clear abuse of that discretion. *Id.* An abuse of discretion occurs when a court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the court's view. *People v. Ward*, 2011 IL 108690, ¶ 21.

¶ 31 The State urges us to find that the trial court properly admitted the other crimes evidence because it showed defendant's motive and because defendant opened the door to his reasons for carrying a loaded weapon by testifying that he carried a handgun every day "because of what happened to me, and in the area that I live in." We disagree with the State. First, with regard to motive, the State's theory of the case at trial was that defendant shot the victim due to a dispute over a debt paid in counterfeit money. The State presented this theory in opening statements when the prosecutor specifically stated, "What could possibly drive a man to gun down his own brother? Money. Money. They say it is the root of all evil. And on that day, it was enough to cause this man to shoot and kill his own brother for \$70." In keeping with this theory, the State did not elicit any evidence of a drug transaction between defendant and the victim during its case in chief, and according to the prosecutor's own statements at side bar, affirmatively directed its occurrence witnesses not to mention the topic. When the prosecution eventually approached the

court about allowing the evidence to come in on cross-examination of defendant, the reason it gave had nothing to do with motive. In these circumstances, we find the State's current argument that the evidence was relevant to show motive to be disingenuous.

¶ 32 We also reject the State's argument that evidence of a drug transaction between the brothers was invited by defendant's testimony. Defendant testified on direct examination that he had a handgun with him at the time of the shooting because he carried a weapon every day for protection, as he had been injured in a shooting and lived in a dangerous neighborhood. The State asserts that contrary to defendant's testimony, "[t]he truth was that defendant carried a loaded gun, in part, because he was selling drugs on the night before the offense." The State's assertion is completely speculative. Nothing in the record supports the State's allegation that defendant was lying as to his reason for carrying a firearm. Just because the State did not accept defendant's stated reason does not mean that defendant was lying. Defendant's possession of a handgun on the day in question was consistent with his testimony that he always had a weapon with him for protection due to his disability. Therefore, the testimony elicited on cross-examination was not impeaching.

¶ 33 In this case, where evidence of a drug transaction between the brothers did not establish the actual motive for the shooting and was not invited by defendant's own testimony, we find that the prejudicial effect of the evidence of drug dealing substantially outweighed its probative value. See *Chapman*, 2012 IL 111896, ¶ 19. Moreover, we cannot find that the admission of other crimes evidence was harmless, as there is a reasonable possibility that the improper evidence damaged defendant's credibility and contributed to his conviction. See *People v. Agee*, 307 Ill. App. 3d 902, 906 (1999). The effect of the irrelevant evidence of other crimes deprived

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defendant of the right to a fair trial. Accordingly, we reverse defendant's conviction and remand for a new trial based upon the court's failure to give a second-degree murder jury instruction (*Supra* ¶ 27) and based upon the other crimes error.

¶ 34

#### CONCLUSION

¶ 35 For the reasons explained above, we reverse the judgment of the circuit court and remand for a new trial consistent with this order.

¶ 36 Reversed and remanded.