2016 IL App (3d) 140137-U

Order filed May 16, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0137
v.	)	Circuit No. 12-CF-593
	)	
ROBERT C. NUNN,	)	The Honorable
	)	Stephen Kouri,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: In a felony murder case in which defendant claimed that the trial court erred in refusing to admit certain documentary evidence at trial, the appellate court agreed and found that the error was not harmless. The appellate court, therefore, reversed defendant's conviction, vacated defendant's sentence, and remanded the case for a new trial.

¶ 2 After a jury trial, defendant, Robert C. Nunn, was convicted of first degree murder (felony murder) (720 ILCS 5/9-1(a)(3) (West 2012)) and was sentenced to life in prison.

Defendant appeals, arguing that the trial court erred in: (1) refusing to admit certain documentary

evidence at trial; and (2) sentencing defendant to life in prison. We agree with defendant's first argument and do not directly reach the second. We, therefore, reverse defendant's conviction, vacate defendant's sentence, and remand the case for a new trial.

¶ 3 FACTS

¶ 4 On May 31, 2012, during the early afternoon, Brandon Mitchell and Kelin Drummond drove to the 2700 block of Latrobe Street in Peoria, Illinois. Mitchell was driving and Drummond was in the front passenger's seat. When Mitchell and Drummond reached that location, they met with defendant and Sergio Herron, both of whom got into the back seat of Mitchell's vehicle. Shortly thereafter, a gunfight broke out in the vehicle between Drummond and defendant, with Drummond firing a .38 revolver and defendant firing a .45 pistol. They both fired their weapons several times. Defendant was shot in the stomach. Drummond was shot several times in the back and in the back of the head. He died from multiple gunshot wounds, including one to the back of the head where the bullet had lodged in his brain.

¶ 5 Police were dispatched to the area within moments of the shooting. They found Drummond dead in the vehicle on Latrobe Street. He was slumped over in the front passenger seat with the revolver in his hand and his seat belt still on. The vehicle was still running, and the front and rear driver's side doors were open. An investigation of the scene revealed that there were bullet holes through the front and rear seats of the vehicle, and that at least one of the bullets had traveled from front to back. A bullet fired from the .38 was found in the trunk of the vehicle. Bullets fired from the .45 were found in a front airbag, a front vent, and on the front passenger's side floorboard of the vehicle. Five spent shell casings from the .45 were found in the rear of the vehicle. Bullets fired from the .45 were also recovered later from Drummond's head and shoulder as the result of an autopsy.

¶ 6 About the same time as the vehicle with Drummond's body was discovered, police responded to a call from a residence on Humboldt Street about another shooting victim. The residence was located around the corner from where the vehicle with Drummond's body was found. The shooting victim at that residence was defendant. Defendant was transported to the hospital by ambulance and was treated for gunshot wounds to his stomach. At the hospital, defendant told police that two "shorties" (younger persons) had pulled up to buy some weed; that he and Sergio Herron had gotten into the car with them; and that the next thing he knew, there were gunshots, and he took off running. A search warrant was later executed at the Humboldt Street residence. The .45 pistol was found inside of a cooler in a garbage can in the back yard, $150 (one $100 bill, two $20 bills, and two $5 bills) was found in a bedroom dresser, and a bag containing 17 smaller individual baggies of cannabis was found on a closet shelf in that same bedroom.

¶ 7 Upon his release from the hospital, defendant was arrested and charged with the murder of Drummond. The charging instrument as to defendant contained two counts of first degree murder (felony murder and strong probability murder), two counts of armed robbery, and one count of aggravated unlawful use of a weapon. As to the felony murder charge, the charging instrument alleged that defendant and Herron had shot and killed Drummond while they were committing the forcible felony of armed robbery. Defendant claimed that the shooting was done in self-defense.

¶ 8 The case proceeded to a jury trial in December 2012. Just prior to the start of jury selection, defendant moved *in limine* to admit a printout of a series of Facebook messages into evidence at trial. The messages had allegedly been sent between Mitchell (the driver of the vehicle) and defendant in the hours leading up to the shooting. The State initially objected on the

basis of foundation. The trial court did not rule upon the admissibility of the messages at the time and left the matter open for further discussion.

¶ 9 At trial, the State's theory of the case was that defendant had killed Drummond during the course of a preplanned robbery. According to the State, defendant and Herron had lured Mitchell and Drummond to the Latrobe Street location under the pretense that they were going to sell marijuana to Mitchell and Drummond. After defendant and Herron got into the rear seat of Mitchell's vehicle, Mitchell saw Herron hand defendant a gun. Mitchell thought that he was about to be robbed, so he threw his $150 toward the back seat, jumped out of the vehicle, and ran away. Defendant then shot at Drummond with his .45 pistol, and Drummond returned fire with his .38 revolver.

¶ 10 In support its theory of the case, the State presented, among other things, the testimony of Mitchell. Mitchell testified that he had known defendant since they were little. Mitchell had seen defendant and Herron the weekend prior to the shooting, and they had told him that they had some marijuana to sell. Mitchell took defendant’s number. On the following Thursday, May 31, 2012, the day of the shooting, Mitchell picked up Drummond at about 11 a.m. The two of them wanted to get an ounce of marijuana from defendant. Mitchell texted defendant or Herron but received no response.

¶ 11 Mitchell did not know where defendant or Herron lived but thought that it was possible that they lived in the south end of town, so he and Drummond went to that area. Mitchell was driving at the time, and Drummond was seated in the front passenger's seat. Upon arrival into the area, Mitchell turned onto the first street, which was Latrobe, because there was a police car behind him and he wanted to let it pass. As Mitchell and Drummond were traveling on Latrobe, they happened to see defendant, Herron, and a third subject, who Mitchell did not know.

Mitchell stopped the car, and defendant and Herron got into the back seat through the rear passenger's side door. Herron was seated behind Mitchell, and defendant was seated behind Drummond. Out of the corner of his eye, Mitchell saw Herron hand defendant a black gun with some attachments on it. Mitchell thought that he and Drummond were about to be robbed. Defendant slid the top of the gun back and pointed it at Mitchell's head. Mitchell threw his money, $150 (one $100 bill, two $20 bills, and two $5 bills), into the back seat. As the first shot rang out and went past Mitchell, he jumped out of the vehicle and ran away. While he was running away, Mitchell heard additional shots being fired. Mitchell ran to a nearby school, and the police were called. Mitchell did not see Drummond with a gun that day and did not know that Drummond had a gun with him.

¶ 12 On cross-examination, defense counsel asked Mitchell if he had a Facebook account in 2011 and 2012. The State objected. The trial court excused the jury, heard argument on the issue, and ruled that the defense could ask Mitchell if he communicated with defendant by Facebook on the day of the shooting. The trial court ruled further that if Mitchell responded that he did not do so, the questioning of Mitchell on that topic could go no further.

¶ 13 When the jury returned and the question was asked again, Mitchell responded that he had two Facebook accounts during that time, one of which he was not using because it had been hacked. Mitchell stated that the name associated with the account that he was not using was "Brandon IsdatoyMz Mitchell." Mitchell confirmed that Facebook could be used for sending private email messages but denied having a Facebook message conversation with defendant on May 31, 2012. Mitchell also denied that he had made arrangements with defendant on May 31 to buy a .357 or .38 handgun for $150, that he had planned to meet with defendant on Latrobe

Street, that he had called defendant as he approached Latrobe, that defendant had handed him a .38 handgun for his inspection, and that he had handed defendant $150 in return.

¶ 14 Defendant's theory of the case at trial was that there was no robbery and that he had shot Drummond in self-defense. According to defendant, Mitchell and Drummond had come to the location to buy a gun, a .357 police special, from defendant, not drugs. They had agreed on a price of $150 through a series of communications (the Facebook messages) and had agreed to meet on Latrobe. Upon entering the vehicle, defendant handed the fully-loaded .38 revolver to Drummond, and Drummond or Mitchell handed over the $150. When Drummond saw that the gun was only a .38, and not a .357 as promised, however, he turned the gun on defendant and demanded that the money be returned. Defendant thought that his life was in danger and reached for his own gun. Drummond started firing and shot defendant in the stomach. Defendant returned fire until Drummond stopped shooting.

¶ 15 In support of his theory of the case, defendant presented, among other things, the testimony of Tahir Goodman. Goodman testified for the defense that he knew defendant and Herron. On the date in question, Goodman saw defendant and Herron walking on Latrobe Street and talked to them about smoking some marijuana. A car pulled up, and Goodman went between two houses to urinate. When Goodman came out from between the houses, he saw the front-seat passenger in the car point a gun backwards and shoot defendant. Defendant returned fire. Although Goodman could see both guns, he could not see them well enough to identify them. That night, Goodman gave a videotaped statement to investigators but left out the part about the marijuana and the shooting because he did not want to cooperate with the police. The marijuana that was found in the bedroom of the Humboldt Street residence was Goodman's. He had given it to Herron to hide when the ambulance was coming for defendant.

¶ 16 The defendant also presented his own testimony in support of his theory of the case. Prior to defendant's testimony, however, the attorneys again presented arguments on the admissibility of the Facebook messages. In response to a prior question by the trial court regarding why it made any difference whether the shooting arose out of a drug deal or a gun deal, defense counsel explained that it made a difference because the State's theory was that the case was a robbery and that it made no sense for defendant, one of the alleged robbers, to bring two guns with him to the scene of the robbery and to give one of the guns, which was loaded, to an intended victim of the robbery. Defendant asserted that the Facebook messages were relevant to show defendant's state of mind and to impeach the testimony of Mitchell as related to the charges in question and to defendant's claim of self defense. The trial court ruled that based upon the evidence that had been or would be presented, the Facebook messages could be authenticated. The trial court went on to conclude, however, that although defendant could testify about the Facebook message conversation, he could not admit a printout of the actual messages. In reaching that conclusion, the trial court cited and referred to the supreme court's decision in *People v. Harris*, 182 Ill. 2d 114 (1998). The defense was later allowed to make an offer of proof outside the presence of the jury as to the full text of the Facebook conversation.

¶ 17 Taking the witness stand, the 19-year-old defendant testified that on the day before the shooting, he spent the night at Herron's house on Humboldt Street. Defendant had an active Facebook account on May 31, 2012. His screen name was "Rob Geekteamceo Nunn." On Facebook, there was an area or wall where postings were public and an inbox area where Facebook users could exchange private messages, similar to email. Defendant had known Mitchell as an acquaintance for a couple of years, and Mitchell had a Facebook account with the

screen name “Brandon Isdatyomz Mitchell.”[1] Prior to the date of the shooting, the last time that defendant had seen Mitchell was a few months earlier at a party. Defendant had not seen Mitchell on the previous weekend, contrary to what Mitchell had stated in his testimony, and had not had a discussion with Mitchell on that weekend about selling marijuana to Mitchell.

¶ 18 While defendant was at Herron’s house on May 31, he received a Facebook message from Mitchell at about noon or 1 p.m. Defendant described his Facebook message conversation with Mitchell for the jury. According to defendant, Mitchell asked him if he knew anyone who was selling a "tool." The term "tool" meant a gun. Defendant told Mitchell that he had a "7" that he was willing to sell because he already had another gun, a .45. The term "7" meant a .357 handgun. Although the gun that defendant was selling was actually a .38, he told Mitchell that it was a .357 because he hoped to get more money from Mitchell for the gun. Mitchell responded that he wanted to buy the gun. Mitchell asked defendant if the gun was a long nose or a snug nose, and defendant stated that it was a snug nose. Mitchell and defendant agreed on a price of $150 for the gun and made arrangements to meet later on Latrobe. Defendant gave Mitchell Herron's phone number because defendant's phone service had been suspended. Defendant could still, however, use the internet browser on his phone for Facebook messaging.

¶ 19 During his testimony, defendant identified the .38 revolver and the .45 pistol as guns he owned on May 31, 2012. He stated that he bought them on the street because he was afraid for his life. Defendant took both the .38 and the .45 to his meeting with Mitchell. At some point, Mitchell called Herron’s number and said they were on the way. Mitchell called again a short

[1] In the record, the screen name of Mitchell's Facebook account was spelled slightly different during Mitchell's testimony than it was during defendant's testimony.

time later, saying that they were close and were turning the corner. Defendant and Herron went out to the street to look for Mitchell.

¶ 20 As Mitchell's car pulled up, defendant saw that Mitchell was driving and that Drummond was seated in the front passenger's seat. Defendant did not know Drummond personally but knew of him. Defendant got into the vehicle through the rear passenger's side door and sat behind Drummond. Herron got in through the rear driver's side door and sat behind Mitchell. Mitchell handed defendant the $150. Defendant put the money away, took out the loaded .38, which was in the pocket of his "hoody," and handed it to Mitchell. Mitchell handed the gun to Drummond, who said that the gun was not a "7." Defendant replied that the gun was a .38. Drummond appeared to be getting angry. Defendant asked Mitchell if he wanted the gun anyway, and Mitchell stated that he did. Defendant tried to get out of the car, but the rear passenger's side door was locked. Drummond pointed the .38 at defendant and told him to give the money back and to get out of the car. Defendant believed that he was in danger and reached for the .45 that was in the left cargo pocket of his shorts. Drummond fired through the seat, hitting defendant twice in the stomach. Mitchell and Herron jumped out of the car. Defendant felt that Drummond was going to kill him, so he fired the .45 over the seat at Drummond. Defendant kept firing until he felt safe—when Drummond was not firing anymore. Defendant scooted to the left, got out of the rear driver's side of the vehicle, and ran away.

¶ 21 Defendant ran back to Herron's house on Humboldt Street and told Herron's uncle that someone had tried to rob him and that he had been shot. He threw the money on the table, and Herron's uncle took the .45 pistol from him. An ambulance came and took defendant to the hospital.

¶ 22 When defendant was later released from the hospital, he was interviewed by the police. A videotaped copy of that interview had been played previously for the jury. Defendant told police that while they were in the car, some person in black walked up outside, opened Drummond's door, and started shooting at Drummond. Drummond returned fire and hit defendant. Defendant stated at trial that he did not tell the police the truth during that interview because he was doped up from having just gotten out of the hospital, was scared, and was reluctant to admit he had been involved in a gun transaction.

¶ 23 After all of the evidence had been presented and the attorneys had given their closing arguments, the trial court instructed the jury on the law. Among other things, the trial court told the jury that a person was not justified in the use of force if that person was committing an armed robbery. The jury later found defendant guilty of both counts of first degree murder and of armed robbery.[2] The jury also made a separate finding that during the commission of the first degree murder or armed robbery, defendant had personally discharged a firearm that proximately caused great bodily harm or death to another person. Defendant filed a motion for new trial, alleging, among other things, that the trial court erred in refusing to admit as evidence at trial the actual Facebook message conversation between Mitchell and defendant.[3] That motion was subsequently denied.

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[2] Just prior to trial, defendant had pled guilty to the single count of aggravated unlawful use of a weapon.

[3] Defendant had also sent letters to the court in which he made a *pro se* claim of ineffective assistance of trial counsel. After a *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)), the trial court appointed defendant a new attorney for further proceedings. Defendant's new attorney filed supplemental motions for new trial and represented defendant for

¶ 24 A presentence investigation report (PSI) was ordered and the case proceeded to sentencing. At the conclusion of the sentencing hearing, the trial court sentenced defendant to life in prison on the felony-murder charge. No sentences were entered on the other charges. Defendant filed a motion to reconsider the sentence, which the trial court subsequently denied. This appeal followed.

¶ 25 ANALYSIS

¶ 26 I. Alleged Error in the Admission of Evidence: the Trial Court's Refusal to Admit the Printout of the Actual Facebook Message Conversation into Evidence at Trial

¶ 27 As his first point of contention on appeal, defendant argues that the trial court erred in refusing to allow him to admit a printout of the actual Facebook message conversation into evidence at trial. Defendant asserts that the messages should have been admitted because they could have been properly authenticated and were relevant and material to the felony-murder charge and defendant's claim of self-defense. Defendant asserts further that that the messages were relevant to: (1) show his intent or state of mind because he would not have given Mitchell and Drummond a loaded gun if he was planning to rob them; and (2) impeach Mitchell and to challenge Mitchell's credibility since Mitchell had testified to a version of events at trial that was completely different from what Mitchell had stated in the Facebook message conversation. Defendant claims further that the alleged error in the admission of evidence was not harmless because the evidence went to the heart of the felony-murder charge and defendant's claim of self-defense and because the printout of the actual Facebook messages would have been more convincing to the jury than defendant's testimony alone about the Facebook conversation. In making that argument, defendant points out that in a separate unpublished appeal, we reversed

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the remaining proceedings in this case.

co-defendant Sergio Herron's conviction for armed robbery by accountability and remanded the case for a new trial, finding that the trial court had improperly denied Herron's request for a continuance so that he could gather more evidence about the Facebook messages. See *People v. Herron*, 2015 IL App (3d) 130502-U, ¶ 28.[4] In so doing, we stated that the Facebook messages went to the heart of the charges in that case. See *id*. For all of the reasons set forth, defendant asks that we reverse his felony-murder conviction and that we remand this case for a new trial.

¶ 28 The State argues that the trial court's evidentiary ruling was proper and should be upheld. In making that argument, the State does not dispute that the messages in this case could have been properly authenticated and notes that the trial court made that specific finding at trial. Rather than a lack of authentication, the State posits that the trial court excluded the printout of the Facebook message conversation because it pertained to a collateral matter—whether the two groups met for a gun transaction or a drug transaction—that was not relevant or material to the case. The State asserts that the trial court's ruling was made in reliance upon the supreme court's decision in *Harris* and was correct in that whether the initial transaction was a gun deal or a drug deal was not material to whether defendant was attempting to rob Mitchell and Drummond. Regarding defendant's claim that the messages were relevant to show his intent or state of mind and his corresponding assertion that robbers do not give loaded guns to their intended victims, the State responds that criminal activity often involves a lack of intelligent decision making and that handing a loaded gun to any person would seem to be unwise, even if one were selling a gun to that person. As for defendant's claim that the messages were relevant for the impeachment of

[4] We merely state defendant's argument here. As an order, rather than an opinion, the decision in the *Herron* case has no precedential value. See Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011).

Mitchell or to attack Mitchell's credibility, the State disagrees and asserts that at most, the messages would have shown that someone who had access to Mitchell's hacked Facebook account was able to send messages to defendant. According to the State, the messages did not establish what actually occurred in the vehicle, such as whether defendant or Drummond shot first or whether Drummond demanded that the money be returned. Rather, the messages could only establish the reason why defendant met with Mitchell and Drummond in the first place.

¶ 29 In the alternative, the State argues that even if the trial court erred in denying defendant's request to admit the printout of the actual Facebook messages, any error that occurred was harmless and would not have changed the result of the trial because the evidence of defendant's guilt was overwhelming. In making that argument, the State asserts that the evidence in this case did not support defendant's version of events and points out that defendant had lied to the police about what had occurred. For that reason and for all of the other reasons set forth, the State asks that we reject defendant's argument on this issue and that we affirm defendant's conviction of felony murder.

¶ 30 A determination of the admissibility of evidence is in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12; *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Under the abuse of discretion standard, "[t]he reviewing court owes some deference to the trial court's ability to evaluate the impact of the evidence on the jury." *People v. Donoho*, 204 Ill. 2d 159, 186 (2003). The threshold for finding an abuse of discretion, therefore, is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. See *In re Leona W.*, 228 Ill. 2d 439, 460 (2008); *Donoho*, 204 Ill. 2d at 182. Reasonable minds can disagree about

whether certain evidence is admissible without requiring a reversal of a trial court's evidentiary ruling under the abuse of discretion standard. See *Donoho*, 204 Ill. 2d at 186. Even if the trial court has committed an abuse of discretion in the admission of evidence, however, a new trial will not be ordered unless trial court's ruling appears to have affected the outcome of the trial. See *Leona W.*, 228 Ill. 2d at 460; *Troyan v. Reyes*, 367 Ill. App. 3d 729, 732-33 (2006).

¶ 31 One of the basic principles in the law of evidence is that what is relevant is generally admissible. See Ill. R. Evid. 402 (eff. Jan. 1, 2011); *Pikes*, 2013 IL 115171, ¶ 21. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence, or, in the context of a criminal case, if it tends to make the question of guilt more or less probable. Ill. R. Evid. 401 (eff. Jan. 1, 2011); *Pikes*, 2013 IL 115171, ¶ 21; *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). The assessment in that regard must be made in the light of logic, experience, and accepted assumptions as to human behavior. *People v. Patterson*, 192 Ill. 2d 93, 115 (2000). Simply put, if there is a sufficient connection between the evidence, the defendant, and the crime, the evidence should be deemed relevant. See *People v. Jones*, 22 Ill. 2d 592, 599 (1961). Evidence may be deemed irrelevant, however, if it has little probative value, such as if it is too remote or uncertain, is cumulative in nature, or is collateral to the real issues in the case. See Ill. R. Evid. 403 (eff. Jan. 1, 2011); *Wheeler*, 226 Ill. 2d at 132; *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 242 (1988). The proponent of the evidence has the burden to establish that the evidence is relevant. *Smith v. Silver Cross Hospital*, 339 Ill. App. 3d 67, 77 (2003).

¶ 32 Having reviewed the record in the present case, we conclude that defendant satisfied that burden. Defendant established that the Facebook message conversation was relevant for two purposes. The first purpose was to show his state of mind or intent in relation to the offenses

charged and his claim of self-defense. See *People v. Biella*, 374 Ill. 87, 89 (1940) (in a criminal case where the intent, motive, or belief of the defendant is material to the issue, the defendant should be allowed to testify directly to that fact); *People v. Parker*, 194 Ill. App. 3d 1048, 1058 (1990) (defendant's state of mind is a material issue for his affirmative defense of self-defense). The second purpose was to impeach Mitchell's testimony and to attack Mitchell's credibility. See *People v. Gacho*, 122 Ill. 2d 221, 252 (1988) (the introduction of prior inconsistent statements with the proper foundation laid is proper cross-examination when the prior inconsistent statements are offered for impeachment purposes and not as substantive evidence). Indeed, the trial court implicitly found as much when it allowed defendant to testify as to the contents and nature of the Facebook message conversation.

¶ 33 With the trial court's finding of relevance in place and with its prior finding that the Facebook message conversation could be authenticated, it was an abuse of discretion for the trial court to refuse to allow defendant to admit a printout of the actual conversation into evidence at trial. See *Leona W.*, 228 Ill. 2d at 460; *Donoho*, 204 Ill. 2d at 182. The Facebook message conversation went directly to an element of the charges in this case and defendant's claim of self-defense and tended to support defendant's theory—that defendant had not intended to rob Mitchell and Drummond and that no robbery had occurred. The printout was arguably the most probative evidence available on that issue—even more probative that defendant's own testimony. See *Biella*, 374 Ill. at 89 (the circumstances under which an act in question is done usually serves to manifest to a great degree the intent of the actor and may overcome the actor's own statement as to his intent; the actor has a right, however, to testify to his intent and to have the circumstances surrounding the act in question considered in connection with his testimony). The same can be said regarding the probative value of the evidence in relation to defendant's ability

to impeach Mitchell, the State's key witness, and the defendant's ability to attack Mitchell's credibility. Any concern that the trial court may have had that the printout was cumulative to, or duplicative of, defendant's own testimony, was minor in comparison to the strong probative value of the evidence and would not serve as a bar to admissibility. See *People v. Williams*, 181 Ill. 2d 297, 315 (1998) (evidence may properly be admitted even if it is cumulative to oral testimony that has been presented that covers the same issue). In addition, any concern of the cumulative nature of the evidence would also be undercut by the fact that, absent a stipulation or the lack of an objection by the State, having defendant testify was the only way for the defense to establish the required foundation for the admission of the printout and to provide the jury with the facts necessary to weigh the question of the authorship of the messages. See *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 36 (after the trial court has served its screening function, the authorship of the document is ultimately up to the jury to determine). We find, therefore, that under the circumstances of the present case, the trial court erred in refusing to allow defendant to admit the printout of the actual Facebook message conversation into evidence at trial.

¶ 34 In reaching that conclusion, we must take a moment to comment upon the trial court's reliance on the supreme court's decision in *Harris*. It is well established that both this court and the trial court are bound by supreme court precedent to the extent that it is applicable in any particular case. See *Angelini v. Snow*, 58 Ill. App. 3d 116, 119 (1978). In this instance, however, the *Harris* decision was not applicable because the facts of the *Harris* case were not comparable to the facts of the present case. *Harris* involved a defendant's attempt to impeach the State's key witness with a collateral and immaterial matter—why the witness was initially present at the location where he was picked up by the defendant. *Harris*, 182 Ill. 2d at 137-38. Whereas, in this particular case, in addition to impeachment, defendant sought to use the

evidence to show his intent or state of mind, a matter that was not collateral and was directly at issue at trial. Furthermore, unlike in *Harris*, the evidence that defendant sought to admit in this case was highly probative on the issues for which defendant sought to admit it. See *id*. Because of the lack of factual similarity between the *Harris* case and this case, the decision in *Harris* was not controlling here. The trial court's reliance on *Harris*, therefore, was misplaced.

¶ 35 Having found that an error occurred in the admission of evidence at trial, we turn next to the State's contention that the error was harmless. With that contention, we do not agree. To establish that an error in the exclusion of evidence is harmless, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. See *People v. McKown*, 236 Ill. 2d 278, 311 (2010); *People v. Thurow*, 203 Ill. 2d 352, 363 (2003); see also *Leona W.*, 228 Ill. 2d at 460; *Troyan*, 367 Ill. App. 3d at 732-33. In this particular case, however, the evidence that was excluded pertained to defendant's state of mind and intent, an essential element of the underlying charges and defendant's claim of self-defense, and also was used to impeach the credibility of the State's key witness. In addition, contrary to the State's assertion on appeal, the evidence of defendant's guilt in this case was not overwhelming, as it was clear that a gun battle had taken place in the vehicle between defendant and Drummond, that both subjects had fired their weapons numerous times, and that each subject was shot by the other. Under the circumstances of this case, we are not convinced that a retrial without the erroneous exclusion of the Facebook printout would produce the same result. See *id*. We, therefore, conclude that the error in this case was not harmless. See *id*.

¶ 36 II. Alleged Error in Sentencing: the Trial Court Sentencing the 19-Year Old Defendant to Life in Prison

¶ 37 As his second point of contention on appeal, defendant argues that the trial court erred in sentencing him to life in prison for felony murder. Since we have already determined that

defendant's conviction and sentence must be vacated and that defendant's case must be remanded for a new trial because of the error that occurred in the admission of evidence, we do not reach the sentencing issue directly. See *People v. Gamino*, 335 Ill. App. 3d 1020, 1022 (2002) (the appellate court does not give advisory opinions or answer moot questions).

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we reverse defendant's conviction of first degree murder (felony murder), we vacate defendant's sentence, and we remand this case for the defendant to be given a new trial. On remand, the new trial will apply to the felony murder charge, the other first degree murder charge, and the armed robbery charge, but not to the aggravated unlawful use of a weapon charge, to which defendant pled guilty prior to trial.

¶ 40 Reversed and remanded.