2017 IL App (1st) 151963-U

No. 1-15-1963

Third Division
December 27, 2017



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ESAU ESCOBAR,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County.<br><br>No. 11 CR 17225<br><br>Honorable Michael B. McHale, Judge, presiding. |

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Conviction for first degree murder affirmed where defendant failed to prove he held an unreasonable belief in the need for self-defense. The trial court did not abuse its discretion in denying defendant's proposed serious provocation instruction, denying his request for mistrial, and barring an attempted impeachment.

¶ 2 Defendant Esau Escobar was convicted of the first degree murder of Jose Guevara and sentenced to 45 years' imprisonment. On appeal, he contends that his conviction should be reduced to second degree murder because he had an unreasonable belief that the use of

deadly force was required to defend himself. He also contends that the trial court erred in failing to instruct the jury regarding serious provocation, in not granting mistrial after a witness mentioned defendant's gang affiliation, and in barring impeachment of a witness. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, Jorge Guevara[1], the victim's cousin, testified that he and Guevara partied at home on July 29, 2011. On the following morning, Jorge learned that Guevara had left their house with defendant during the night. Detectives subsequently notified Jorge of Guevara's death, and he confronted defendant who "played it off" and feigned ignorance. When Jorge pressed the matter, defendant confessed that he had been drinking with Guevara, Juan Lozano, and a man named Osman.[2] Defendant was driving the men around in Osman's car. A gun went off in the backseat of the car where Lozano and Guevara sat, wounding Lozano. Osman panicked and kicked everyone out of the car. Defendant told Jorge that he ran away as additional gunshots went off but did not see anything. Jorge told defendant that the police had recovered a gun. At that point, defendant began to shake, tear up, and look down. He admitted that the gun would have his fingerprints and told Jorge, "I'm sorry, you know whatever is going to come out in that fingerprints."

¶ 5 Lozano's trial testimony was as follows. Around 4:30 a.m. on July 30, 2011, Lozano spotted defendant driving by in a car he did not recognize. He called defendant's cell phone and found out defendant "was still partying" so he asked to join him. Defendant picked up Lozano and they drove around while drinking. While driving, defendant received a call from someone looking to buy a gun. Lozano told defendant that he knew where they could get a

gun and directed him to a house where they obtained a .22 revolver with a long barrel. Next, defendant drove to Jorge's house. Guevara came out of the house and joined Lozano in the backseat of the car. Defendant resumed driving as the group waited for a liquor store to open. While driving to the store, Guevara examined the gun and complained that it was missing two bullets. After they had stopped at the liquor store, Guevara continued to complain.

¶ 6 As Lozano was looking out the window, Guevara shot him in the head. The bullet entered behind his left ear and became lodged under his right eye. Immediately after the gun was fired, Guevara said "ahh chingado," which Lozano explained meant "like holy cow." Guevara seemed surprised by the gunshot. Lozano, bleeding profusely, struggled with Guevara for the gun. Defendant stopped the car, turned around in the driver seat, and reached back towards the men. Defendant struggled with Guevara and eventually obtained the gun. Lozano testified that he did not remember anything else until defendant dropped him off at the hospital.

¶ 7 On August 8, 2011, two detectives interviewed Lozano in his home. At trial, Lozano admitted that he told the detectives that he saw defendant shoot Guevara after Guevara had jumped out of the car, but he further testified that they had “made” him tell them that and he just said what they wanted to hear. One of the detectives remained with Lozano until an assistant state’s attorney arrived at the home. Lozano told the female assistant state’s attorney that the detectives had treated him well and agreed to make a written statement that described defendant getting out of the car and shooting with his arm extended and pointing at Guevara who was running away.Lozano repeatedly testified that he was not in his right state of mind during these interviews. He had just been released from the hospital after a week-long recovery and was on medication which made him feel nauseated and tired. He denied being

[1] For clarity, all later uses of "Guevara" are in reference to the victim, Jose Guevara. From this point forward, we will refer to Jorge Guevara, the victim's cousin, solely as Jorge.

on drugs in his statement because he thought the question was in reference to street drugs not prescription medicine.

¶ 8 Lozano further testified that a month later, he met with a male assistant state's attorney prior to giving grand jury testimony. Lozano told him what happened and that, "[t]hey made me tell them that I'd seen [Guevara] jump out and then seen my friend jump out as seen upon the gun and shoot him, which I never seen none of that." Lozano admitted that he told the grand jury that he saw Guevara jump out of the car and start running and then defendant jumped out and shot him four times.

¶ 9 Officer Scott Ahern testified that he was the first to arrive at the crime scene. He approached Guevara who was lying in a grass parkway near the corner between the street and the sidewalk. Guevara's shirt was soaked in blood. The fire department arrived and attended to Guevara before transporting him to the hospital. Ahern stayed at the scene to look for evidence and noted blood spots in the area and a bullet hole in a car's windshield. Ahern then left for the hospital, but later returned to the scene after other officers had already cleared the area. A citizen approached Ahern and led him to the alley south of the crime scene where he found a gun inside a garbage can.

¶ 10 Officer David Ryan, a forensic investigator, testified that he and his partner collected the evidence at the scene. He noted there was no blood in the grassy area, but there was blood found on the curb next to where Guevara was found. There was also blood on the sidewalk next to the alley, on the sidewalk next to the street, and a "transfer of blood" across the hood of a parked van. Ryan's partner took sample swabs from these four locations. Ryan estimated the distance from the mouth of the alley, where blood was found, to the street to be

[2] Jorge was never told the identity of this other man but defendant's testimony identified him as Osman.

approximately 125 feet. Ryan further testified that the van where blood was found had an impact mark which could have been caused by a bullet or stone. No bullets were recovered at the scene. Ryan and his partner also processed the recovered gun, an H&R Arms .22 caliber, nine-shot capacity revolver. The gun, which was bloody, was found beneath some bags in a dumpster behind a large apartment building further down the alley. No bullets were in the gun, but seven spent cartridges remained in the gun's cylinders. It was swabbed for blood and other possible DNA evidence. Ryan and his partner also examined Guevara's body at the hospital. They took photographs, fingerprints, and collected samples for a gunshot residue test. Ryan testified that he did not know if anything was done to preserve evidence on Guevara's hands; he only knew that Guevara had been removed from the scene and pronounced dead at the hospital.

¶ 11 The parties stipulated that DNA tests run on the swabs of the four blood spots identified at the scene and from the recovered gun were compared to the standards provided by Lozano, Guevara, and defendant. Each test matched Lozano’s standard. Guevara's blood was not identified in the recovered evidence.

¶ 12 Robert Berk, a trace evidence analyst, testified that he examined the gunshot residue samples collected from Guevara's hands. He concluded that neither of Guevara's hands exhibited evidence of gunshot residue. Guevara's right hand had none of the markers screened for and Guevara's left hand only had two out of the three markers. On cross-examination Berk testified that the control sample taken also exhibited two out of the three markers which was unusual, but did not represent a contaminated sample. Further, Berk noted that some manufacturers of .22 caliber bullets do not use all three of the markers screened in this test, that smaller caliber bullets generally produce less particles than larger

bullets when fired, and that particles could be removed from the test subject over time or by something coming into contact with the subject's hand such as the fabric of a body bag.

¶ 13 Tonia Brubaker, a forensic scientist for the Illinois State Police, compared four fired bullets recovered from Guevara's body and the seven spent cartridge cases to the recovered gun. She concluded that three of the recovered bullets were a match, but the fourth bullet did not have enough individual characteristics for her to make a determination with scientific certainty. She also concluded that all seven of the cartridges were fired from the recovered gun.

¶ 14 Jennifer Barrett, a forensic scientist specializing in fingerprints, testified that she examined the gun and the discharged cartridge cases and concluded that defendant's prints matched the unknown latent print recovered from the gun. No other fingerprints were identified on the gun.

¶ 15 Dr. James Filkins conducted Guevara's autopsy and testified as an expert in forensic pathology. Dr. Filkins's external examination of Guevara revealed one abrasion to the left cheek and four gunshot wounds. He removed four small caliber bullets and tracked the trajectory of each, assuming that Guevara was standing upright when he was shot. Two bullets entered Guevara's back and had a straight back to front trajectory without angling up or down, or side to side. Two bullets entered from the front and had a downward trajectory. Of the two bullets that entered from the front, one entered his left cheek, travelling through his mouth and into his neck. The other entered his chest, travelling through his organs and into his lower back. The downward trajectory could have been a straight trajectory had Guevara been bent over rather than standing. The doctor could not determine the order in which the gunshot wounds had occurred. Guevara's t-shirt was soaked in blood, and his

boxers and pants were bloodied, but not saturated to the same extent. Dr. Filkins opined that the gunshots to Guevara's back would have bled substantially and he would have expected some spill onto the ground. As for the gunshots to the front, there would be less blood than from the other wounds, but since one penetrated the left cheek, Dr. Filkins would expect a good amount of blood to drip out. It was possible for someone suffering from all four wounds to keep moving for about 30 yards.

¶ 16 He also examined Guevara's body for evidence of "close-range firing," or firing from within three feet. Dr. Filkins explained this would be shown by stippling or "powder tattooing" on the body which consists of tiny cuts and abrasions on the surface of the skin left by unburned gunpowder residue. However, such effects depend on the characteristics of the weapon and the type of ammunition used. Dr. Filkins did not find stippling on Guevara's face or hands and noted that Guevara's shirt would have blocked any stippling effect on his torso.

¶ 17 Detective Ronnie Lewis testified that he and his partner spoke with Lozano after his discharge from the hospital. Lewis described Lozano as being happy to cooperate. After their initial interview, Lewis waited with Lozano for an assistant state's attorney to arrive. Lewis was present for the majority of the assistant state's attorney's conversation with Lozano and the preparation of Lozano's statement. Lozano's statement to the assistant state's attorney was "substantially the same information that he had told" Lewis.

¶ 18 Assistant State's Attorney Karin Sullivan testified that Detective Lewis and his partner contacted her on August 8, 2011. Sullivan went to Lozano's house and spoke with him about the day of the shooting. After this initial conversation, Sullivan asked the detectives to briefly step out and she asked Lozano about how the detectives treated him. After Lozano indicated that things had been fine, Sullivan asked him if he was willing to memorialize his statement

and gave him options for proceeding. After Lozano agreed to make a handwritten statement, Sullivan spent approximately 90 minutes asking Lozano questions and writing down his answers. She gave Lozano an opportunity to review and make corrections to each page before she, he and Lewis signed each of the ten pages. Throughout the two hours there, Sullivan thought Lozano gave coherent answers, appeared to understand everything and did not seem tired or under the influence of any alcohol or drugs. Lozano told her that he was only taking over-the-counter Tylenol. Sullivan testified that the detectives might have said something here and there, but largely did not participate in her interview with Lozano.

¶ 19 Defendant testified that in the early morning hours of July 30, 2011, he was drinking in front of his home with his girlfriend. Around 3:00 a.m. an acquaintance named Osman walked by and defendant invited him over. Between 4:30 and 5:00 a.m., Lozano called defendant and asked to be picked up. Osman offered to pick up Lozano in his car if defendant would drive. After they picked up Lozano, Guevara called defendant, asking about getting a gun. Defendant put Guevara on hold and conferred with Lozano before agreeing to supply one. On Lozano's direction, defendant drove to a house where Lozano obtained the gun. They then met with Guevara at Jorge's house where defendant gave him the gun for free. Guevara joined the men in the car and defendant continued driving with Osman in the front passenger seat and Lozano and Guevara in the backseat. Guevara argued with Lozano about bullets missing from the gun. He did not address defendant but sounded angry with Lozano. About half an hour later, they ran out of beer so defendant drove to a liquor store and Lozano went inside to buy more.

¶ 20 Defendant then drove from the store to an alley. He heard a gunshot and immediately stopped the car at the alley’s mouth. Guevara said a Spanish slang phrase which can indicate

anger or surprise. Defendant turned around and saw blood gushing from the back of Lozano's head. Lozano and Guevara were fighting for the gun. Lozano asked for help so defendant quickly jumped out of the car, opened the rear door, and reached in with both hands to grab the gun from Guevara. Lozano held on to the nose of the gun, but let go once defendant got a grip. Defendant then struggled one-on-one with Guevara. Guevara was roughly the same size as defendant and they struggled for approximately five seconds. Guevara used all of his force to fight, but defendant ultimately got full control of the gun. He took two to three steps back from the car when Guevara "was getting out of the vehicle like charging *** coming forward towards [defendant]." Guevara was "halfway" out the car. Defendant testified that he did not recall seeing whether Guevara's feet had reached the ground. He demonstrated to the jury that Guevara was "raising [*sic*] from a crouched position, hands outstretched in front of me [*sic*] and moving in a forward direction." Defendant fired two shots. He did not know at the time whether he hit Guevara, so when Guevara continued running and brushed past defendant on his left side, defendant turned and quickly fired two more shots. Defendant estimated that only two seconds passed between the two sets of shots. He fired at Guevara because he was "in fear of [his] life and the life of [his] friend."

¶ 21 Guevara continued running straight down the block. Defendant jumped in the car and drove down the alley, slowing down to throw the gun in a dumpster. Despite having his cell phone on him, he did not call for help. He drove Lozano to the hospital, where paramedics near the emergency area came over to help Lozano. After Lozano was put into the wheelchair and taken into the hospital, defendant went home because he was scared. He parked the car in a lot near his house and walked the remainder of the way. Once home, he told his girlfriend what had happened. He spent the rest of the day in his house. When Jorge came and asked

about Guevara, defendant lied because he was scared. Defendant subsequently went to his mother's house in Joliet where he stayed for a few weeks. He spoke daily with Lozano's family concerning Lozano's status in the hospital. He also spoke with his family about what to do before hiring defense counsel who arranged his surrender to the Chicago Police.

¶ 22 Following the close of evidence, defense counsel proposed a jury instruction on serious provocation under substantial physical injury or assault. The court denied the instruction determining that serious provocation was not applicable to the facts of this case. Over the State's objections, the court gave both self-defense and second-degree murder instructions. The jury found defendant guilty of first degree murder.

¶ 23 II. ANALYSIS

¶ 24 A. Appellate Briefs

¶ 25 Initially, the State argues that defendant's failure to include record citations in the argument section of his appellate brief should result in the waiver of these issues on appeal. We note that defendant's brief does contain appropriate citations in his statement of facts. Supreme Court Rule 341(h)(7) requires the appellant to support his or her argument with citation to the record. Although a failure to do so violates Illinois Supreme Court Rule 341 (eff. Jan. 1 2016) and may result in the waiver of that argument, (*People v. Johnson*, 192 Ill. 2d 202, 206 (2000)); the doctrine of waiver is a limitation on the parties, not the reviewing court (*People v. Donoho*, 204 Ill. 2d 159, 169 (2003)). As our review is not excessively hindered by defendant's lack of citations, we address the merits of his appeal. See *People v. Flanagan*, 201 Ill. App. 3d 1071, 1075 (4th Dist. 1990).

¶ 26 Defendant argues that the State's appellate brief contains several statements implying that he is a gang member without any support of that proposition in the record. Although the

State's brief makes reference to gang membership without support from the admitted trial evidence, the questionable reference does not does not affect our review of the arguments in this case. We confine our review to the facts reflected in the record.

¶ 27 B. Second Degree Murder

¶ 28 Defendant contends that we should reduce his conviction to second degree murder because he established that he unreasonably believed that deadly force was justified when he shot and killed Guevara. The State responds that defendant's subsequent actions demonstrate a subjective knowledge that his actions were not justified and defendant's evidence in support of his theory of self-defense was incredible.

¶ 29 Second degree murder requires proof of all the elements of first degree murder plus the presence of either imperfect self-defense or serious provocation. 720 ILCS 5/9-2(a) (West 2008); *People v. Jeffries*, 164 Ill. 2d 104, 113-14 (1995). If the State proves the elements of first degree murder beyond a reasonable doubt, the defendant bears the burden to establish, by a preponderance of the evidence, the existence of the mitigating factor. 720 ILCS 5/9-2(c) (West 2010). In order to prove the mitigating factor of imperfect self defense, a defendant must establish that he or she, at the time of the murder, held an unreasonable belief that deadly force was "necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a), 9-2(a)(2) (West 2010).

¶ 30 Defendant does not contest that the State presented sufficient evidence to prove the elements of first degree murder. Thus, the question presented is whether the jury came to the correct conclusion about defendant's mitigation based on the evidence presented. *Castellano*, 2015 IL App (1st) 133874, ¶ 144. In reviewing the jury's determination, we consider whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found that the mitigating factors were not present." *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996). It was the jury's responsibility to determine the credibility of the witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007). We will not retry a defendant. *Id.*

¶ 31 Lozano testified that Guevara seemed surprised after he shot Lozano, supporting an inference that the gunshot was accidental as Guevara examined the gun. Defendant then turned around and struggled with Guevara managing to disarm him. According to Lozano's grand jury testimony, Guevara then jumped out of the car and started running. Defendant then "jumped out and shot him four times." Although Lozano recanted that testimony at trial, his recantation was impeached by his former statements to the detectives and the assistant state's attorney. The gunshot to Guevara's face contained no evidence of close-range firing, which undercuts defendant's assertion that he shot Guevara from less than three feet away as he left the car. Thus, the jury could reasonably conclude that defendant shot the unarmed Guevara as he fled from the car and was no longer a threat to anyone. It could therefore infer that the shots fired at the fleeing victim were not fired because defendant was actually afraid for his life. This inference is further bolstered by defendant's actions following the incident. Defendant did not call for an ambulance, but disposed of the gun, dropped Lozano at the hospital without offering further help, lied to Jorge Guevara about what had occurred, and then hid from the police for more than a month. All these actions are circumstantial evidence of a guilty intent, rather than an actual intent to defend himself. See *People v. Williams*, 266 Ill. App. 3d 752, 760 (1994).

¶ 32 Defendant's argument largely relies on the assumption that his own testimony was true. He argues he was credible because the location of the blood spots corroborates where he stopped the car and because the trajectory of the bullets that struck Guevara's front could support his testimony that he shot Guevara as he was bent getting out of the car. This argument seeks to have this court reweigh the evidence considered by the jury, something we will not do. See *Saxon*, 374 Ill. App. 3d at 416. The jury heard all of the evidence, was instructed on second degree murder, and concluded that defendant was guilty of first degree murder, clearly finding his testimony to be incredible. Taking the evidence in the light most favorable to the State, the jury could have reasonably concluded that defendant did not act under an unreasonable belief in the need for self-defense.

¶ 33 C. Instruction Based on Provocation

¶ 34 Defendant contends that the trial court erred in refusing a jury instruction on serious provocation based on physical injury or assault. He argues that the court wrongly concluded that mitigation based upon provocation is only applicable where a defendant or his or her family are harmed and asks this court to extend the doctrine to close friends of a defendant.

¶ 35 A trial court's ruling on jury instructions will not be overturned unless it is an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42. "Serious provocation" involves "conduct sufficient to excite intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2010). One recognized category of serious provocation involves substantial physical injury or assault. *People v. Page*, 193 Ill. 2d 120, 133 (2000). Serious provocation can arise from substantial injury or assault to both the defendant and his or her family members. *People v. Calhoun*, 404 Ill. App. 3d 362, 387 (2010). A defendant must prove that they were acting under a sudden and intense passion, and also prove that a reasonable person would

have been incited to the same passion under the circumstances. See *People v. Chevalier*, 131 Ill. 2d 66, 73 (1989).

¶ 36 A defendant is entitled to a jury instruction on the provocation theory of second degree murder when the evidence supports it. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). The evidentiary threshold is low; as long as the evidence provides some foundation, even if tenuous, the instruction should be given. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 56. Defendant's own uncorroborated testimony may form the evidentiary basis for the proposed instruction. See *People v. Pietryzk*, 153 Ill. App. 3d 428, 436-38 (1987).

¶ 37 Defendant failed to provide any evidence that he was acting under a sudden and intense passion brought on by the injuries to Lozano. In his own testimony, defendant stated that he fired at Guevara not because he was angry or provoked to intense passion, but because he was afraid for his "life and the life of [his] friend." Self-defense or defense of others is not equivalent to acting under sudden and intense passion resulting from provocation. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 92. If the defendant's actions were merely defensive or motivated by fear and a desire to escape the victim, a finding of second degree murder based on provocation is not appropriate. *People v. Slaughter*, 84 Ill. App. 3d 1103, 1110 (1980). Accordingly, the trial court did not abuse its discretion in denying an instruction on provocation. As we find that defendant failed to present sufficient evidence to suggest that he acted under an intense passion, we need not determine whether to extend serious provocation to situations where friends of a defendant are injured.

¶ 38 D. Request for Mistrial

¶ 39 Defendant argues that the trial court abused its discretion when it denied his request for a mistrial after Detective Lewis mentioned defendant's gang affiliation. He contends that the

remark caused substantial prejudice because it led the jury to infer a motive for the murder. The State responds that the comment was harmless and that any prejudice was prevented by a curative instruction.

¶ 40 Prior to trial, defendant filed a motion *in limine* to bar any reference to gang affiliation during the trial. The trial court granted the motion. However, on cross-examination, Detective Lewis testified that he spoke "[t]o the gangs, the Saints that the defendant belongs to--," before being interrupted by defendant's objection. The trial court sustained the objection and in a sidebar outside of the presence of the jury, denied defendant's motion for a mistrial, but agreed to make a curative instruction. Prior to the jury's return, the court noted for the record that the witness was inarticulate and speaking very quickly, such that the court "doubt[ed] the jury picked up as much detail as the answer was actually expressed." Nevertheless, the court subsequently admonished the jury to disregard any mention of gangs.

¶ 41 Mistrials are granted at the discretion of the trial court and will be upheld unless the court abused its discretion. *People v. Phillips*, 383 Ill. App. 3d 521, 547 (2008). An abuse of discretion exists only when the trial court's ruling is "arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." *People v. Santos*, 211 Ill. 2d 395, 401 (2004). The violation of an order *in limine* will constitute grounds for mistrial only where the violation deprived the defendant of a fair trial. *People v. Hall*, 194 Ill. 2d 305, 342 (2000). Improper remarks are considered in context of the language used, their relationship to the evidence, and their effect on the defendant's rights to a fair and impartial trial; reversal is merited only if the remarks result in substantial prejudice to the defendant. *People v. Smith*, 141 Ill. 2d 40, 60 (1990). Generally, the trial court can cure any error by instructing the jury to disregard the question and answer. *Hall*, 194 Ill. 2d at 342. Yet in some

situations, an improper question or answer may be so damaging that a trial court cannot cure the prejudicial effect. See *People v. Carlson*, 79 Ill. 2d 564, 577 (1980).

¶ 42 Evidence of gang membership is only admissible where there is sufficient proof that gang activity is related to the crime charged. *People v. Smith*, 141 Ill. 2d 40, 58 (1990). The public holds a strong prejudice against gang members (*People v. Roman*, 2013 IL App. (1st) 110882, ¶ 24), and defendant has a right to not be assumed guilty based on membership in an undesirable group (*People v. Matthews*, 299 Ill. app. 3d 914, 923 (1989)).

¶ 43 Viewing the detective's remark in context of the whole trial, it did not create substantial prejudice to defendant. The singular and fleeting reference to gang membership was minor. The comment was objected to before the detective had even finished answering and the trial court sustained the objection. The jury was then instructed to disregard the comment. No further references to gangs or gang activity were made. Moreover, the reference was not detailed or couched in inflammatory language. We cannot say the trial court abused its discretion in denying defendant's motion for mistrial based upon this plain, isolated statement, particularly where the trial court immediately sustained defendant's objection and provided a curative instruction.

¶ 44 Defendant analogizes his case to *People v. Maldonado*, 398 Ill. App. 3d 401 (2010), and *People v. Joya*, 319 Ill. App. 3d 370 (2001). In both cases, the appellate court held that the trial court erred in admitting gang testimony that had no probative value. *Maldonado*, 398 Ill. App. 3d at 421; *Joya*, 319 Ill. App. 3d at 377. Here unlike in *Maldonado* and *Joya*, the trial court barred the admission of any gang-related evidence and promptly instructed the jury to disregard the gang-related testimony. Thus, *Maldonado* and *Joya* are inapposite.

¶ 45 E. Impeachment

¶ 46 Defendant contends that the trial court erroneously barred defense counsel from impeaching Detective Lewis with his general progress notes. He argues that the trial court incorrectly applied a standard of "glaringly inconsistent," rather than "materially inconsistent" when considering the detective's statements. The State responds that defense counsel was improperly trying to perfect impeachment of Lozano through the detective and that the record did not contain a prior inconsistent statement by the detective.

¶ 47 During the cross-examination of Lewis, defense counsel attempted to introduce the detective's general progress report from the investigation to impeach his statement that Lozano had told the assistant state's attorney "substantially the same information" that he had told Lewis before the assistant state's attorney arrived. The State objected to the report as hearsay. At a sidebar, defense counsel stated, as an offer of proof, that the detective's notes indicated that Lozano stated that defendant started shooting "while" Guevara jumped out of the vehicle. The trial court sustained the State's objection.

¶ 48 The trial court's evidentiary decisions are reviewed under the abuse of discretion standard. *People v. Cruz*, 162 Ill. 2d 314, 331 (1994). Although out-of-court statements are generally barred as hearsay, a witness's prior inconsistent statements are permissible to impeach the credibility of that witness. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 33. Prior inconsistent statements are those that either have a tendency to contradict or are directly contradictory with the witness's testimony. *People v. Modrowski*, 296 Ill. App. 3d 735 (1998).

¶ 49 Defendant argues that the detective's notes contradict his testimony that Lozano's statements to the detectives and the assistant state's attorney were "substantially the same." Based on the offer of proof, the notes indicated that Lozano told Detective Lewis that

defendant "started shooting while the guy jumped out of the vehicle." We find nothing contradictory about these two statements. Detective Lewis never testified to the substance of either of Lozano's statements, merely to the fact that both statements were substantially similar.

¶ 50 Defendant attempts to create an inconsistency by noting that Lozano testified that he told the assistant state's attorney that defendant shot Guevara as he was running away. He argues that therefore, because the notes are inconsistent with Lozano's testimony, Detective Lewis's testimony that the statements were substantially the same is rendered inconsistent. Yet even in this cobbled together attempt, we cannot find that the statements are contradictory. Lewis's testimony was that the two statements were "substantially" similar. The report indicates that defendant started shooting while Guevara jumped out of the vehicle, which presumably was the first step in the process of him running away. Lozano testified that he told the assistant state's attorney that defendant shot Guevara as he was running away. Both statements indicate that defendant fired at Guevara in his attempt to flee the vehicle. Although they are not exactly the same, they do appear to be substantially similar. Accordingly, the trial court did not abuse its discretion in barring the detective's notes.

¶ 51 III. CONCLUSION

¶ 52 Based upon our review, we find defendant failed to establish that he held an unreasonable belief that self-defense was necessary. He also failed to present any evidence to warrant a jury instruction on serious provocation. The trial court did not err in denying defendant's request for mistrial where the court sustained the objection to improper gang-related testimony and admonished the jury to disregard any reference to gangs. Lastly, the trial court

did not err in barring defendant's attempts to use Detective Lewis's notes for impeachment. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 53 Affirmed.