2017 IL App (1st) 160869-U

No. 1-16-0869

Fourth Division
September 29, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GARY SAMS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 12 CR 18726-04 The Honorable Matthew E. Coghlan, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: There was sufficient evidence at trial for a reasonable jury to determine that defendant shared a common design and participated and aided in the offense with members of a local street gang in the beating that resulted in the victim's death, and thus we affirm his first-degree murder conviction.

¶ 2 Following a jury trial, defendant Gary Sams was found guilty of first degree murder (720 ILCS 5/9-1 (West 2010)) and sentenced to 30 years with the Illinois Department of Corrections (IDOC). The conviction stemmed from an incident on May 30, 2010, in which

Alan Oliva (the decedent) was beaten to death by members of a local street gang. On appeal, defendant argues (1) that the State failed to prove him guilty beyond a reasonable doubt, (2) that the trial court erred by denying his motion *in limine* to bar gang evidence from being introduced, (3) that inflammatory remarks by the State during opening statements prejudiced defendant, and (4) the trial court erred by giving certain jury instructions and by denying others.

¶ 3 For the following reasons, we find (1) that there was sufficient evidence at trial for a reasonable jury to convict defendant of first degree murder, (2) that the trial court did not err by denying defendant's motion *in limine* to bar gang evidence at trial, (3) that the State's remarks during opening statements do not warrant a new trial, and (4) the trial court did not err in instructing the jury.

¶ 4 BACKGROUND

¶ 5 On the night of May 29, 2010, the decedent and his girlfriend, Paulina Ponce, were at a party on South Archer Avenue near Wood Street in Chicago. At the party, the decedent met Mario Gallegos. At midnight, the decedent, Ponce, Gallegos, and three other individuals left the party to purchase cigarettes. They first went to a liquor store that was closed. The decedent and Gallegos proceeded to a gas station a few blocks away while Ponce and the three other individuals returned to the party. After purchasing cigarettes, the decedent and Gallegos were on their way back to the party when they were attacked by a group of men. Gallegos escaped the attack without serious injury, but the decedent received serious injuries that led to his death later that morning.

¶ 6 I. Pretrial Proceedings

¶ 7 A grand jury charged defendant with five counts of first degree murder, two counts of armed robbery, two counts of aggravated battery, and three counts of mob action. The State proceeded on only the three counts of first degree murder, which included two counts of first degree murder for stabbing the decedent and one count of felony murder based on the commission of mob action.

¶ 8 Prior to trial, the State made a proffer concerning evidence showing that defendant was affiliated with the gang that was responsible for the beating. The evidence included pictures of two tattoos located on defendant's person, including an "SD" tattoo on his back, indicating an affiliation with the Satan Disciples gang that was responsible for the beating and death of decedent. The State also indicated that it intended to present expert testimony on gangs and gang affiliation. The defense objected. The trial court observed that it was within its discretion to allow such evidence and found that the probative value of the evidence outweighed its prejudicial effect.

¶ 9 Defendant filed a motion to reconsider the admission of defendant's tattoos, arguing that the State was unable to verify when the tattoos were placed on defendant. The trial court denied the motion, stating that there was a police report from 1998 which mentioned one of the tattoos. The trial court also observed that defendant's argument as to when the tattoos were placed on defendant would go to the weight of the evidence and not its admissibility.

¶ 10 Prior to jury selection, defendant objected to the State's proposed *voir dire* questions concerning the venire's feelings about gangs and about the law of accountability. The trial court overruled the objections.

¶ 11 Defendant also moved to preclude the State from eliciting evidence that the decedent lacked a criminal background and that the decedent was not in a gang. The trial court granted the motion in part, ruling that the State should not inquire into whether or not the decedent had arrests or a prior criminal history. However, the trial court denied the motion in part, ruling that the State could inquire about the decedent's gang affiliation, or lack thereof, because it was relevant to the circumstances of the offense.

¶ 12 Prior to opening statements, defendant moved to bar the State from discussing the decedent's background in detail during opening statement. The trial court denied the motion.

¶ 13 In its opening remarks, the State discussed details about the decedent's family, and mentioned that the decedent completed high school, attended college, and had a job.

¶ 14 II. Evidence at Trial

¶ 15 The State's evidence consisted of the testimony of police officers and other witnesses. The other witnesses included (1) Rhonda Oliva, the decedent's mother; (2) Paulina Ponce, the decedent's girlfriend; (3) Dawn Cupicciotti, the cashier at the White Castle restaurant where the decedent was found after the beating; (4) Mario Gallegos, the man that was attacked along with the decedent; (5) Wayne Kates, a former Satan Disciples gang member and a police informant; and (6) Dr. Steven Cina, who testified concerning the autopsy findings of the decedent.

¶ 16 The Chicago police officers who testified included (1) Officer Ricardo Sanchez, the beat officer who was first on the scene at the White Castle restaurant where the decedent collapsed; (2) Detective Robert Garza, who arrested the four suspects who were later charged, including defendant; (3) Officer Juan Perez, who worked in the gang investigations unit and assisted in the murder investigation; (4) Officer James Gallagher, who also assisted

in the investigation; (5) Detective James Halloran, who participated in the interview of defendant; and (6) Officer Chris Chmelar, who testified as an expert on gangs and gang affiliation.

¶ 17 A. Rhonda Oliva

¶ 18 Rhonda Oliva, the decedent's mother, testified that, on the night of May 29, 2010, the decedent informed her that he was going out for a little while with his girlfriend, Paulina Ponce. In the early morning hours of May 30, 2010, she received a phone call from Ponce informing her that the decedent had been "jumped" and was being taken to the hospital. When she arrived at the hospital, she was briefly able to observe the decedent alive, but shortly thereafter was informed that he died from his injuries.

¶ 19 B. Paulina Ponce

¶ 20 Paulina Ponce, the decedent's girlfriend, testified that she was with the decedent on May 29, 2010, and into the early morning hours of May 30, 2010. She and the decedent arrived at a party at about 11 or 11:30 p.m. They left the party at midnight to purchase cigarettes at a local liquor store. A total of six people went to the store, including the decedent, Ponce, and Mario Gallegos, whom they met at the party. The liquor store was closed, so the decedent and Gallegos went to a nearby gas station, but Ponce and the three others returned to the party instead.

¶ 21 When the decedent did not return to the party, Ponce texted him but received no response. Ponce tried calling him, and after a few attempts, the phone was answered but she did not recognize the voice. Gallegos returned to the party and informed Ponce that he and the decedent were attacked by a group of men, and he told her the location. A friend drove Ponce around the area where the attack occurred to look for the decedent. Ponce observed an

ambulance in front of a White Castle restaurant located on South Ashland Avenue. When Ponce approached the ambulance, she observed the decedent laying face up with an oxygen mask. Police officers asked Ponce some questions and requested that she take them back to the party. Ponce agreed, and they drove her back to the party. Ponce then left the party and went to the hospital. On the way to the hospital, Ponce called the decedent's mother and was in the hospital when she was told that he died.

¶ 22 C. Dawn Cupicciotti

¶ 23 Dawn Cupicciotti testified that she was a cashier at the White Castle located at South Ashland Avenue. At some point after midnight, she was mopping the floor of the dining area when the decedent, who was wearing a red shirt, entered the store. He sat down at a booth and put his head down. A short time later, she noticed that he vomited on the floor and she called her manager. When she returned, he was lying on the floor unresponsive. She noticed blood on his shirt and on the booth where he was sitting. She lifted his shirt and observed two puncture wounds. No more than 10 minutes had passed from the time the decedent walked in until the time Cupicciotti noticed the blood on his back. The manager called the paramedics, who arrived within five minutes to treat him.

¶ 24 D. Mario Gallegos

¶ 25 Mario Gallegos testified that, on May 29, 2010, he and his cousin went to a party near South Archer Avenue. At the party, he met the decedent. Gallegos, the decedent, and four other individuals walked to a nearby liquor store to purchase cigarettes, but the store was closed. Gallegos and the decedent decided to continue walking down Ashland Avenue while the rest of the group opted to return to the party.

¶ 26 Gallegos and the decedent walked to a gas station which was located further south on Ashland Avenue and purchased the cigarettes. On their way back to the party, a group of men came around a corner on South Ashland Avenue. One man was holding an aluminum baseball bat. Gallegos observed the man strike the decedent, who immediately collapsed. The decedent was covering his face while other men punched and kicked him.

¶ 27 The individual holding the bat then turned toward Gallegos and struck him in the abdomen. After being hit, Gallegos escaped and ran back to the gas station where he asked an employee for a telephone but was unable to call anyone because he was too scared to do so. Gallegos obtained a ride back to the party. On his way back, Gallegos passed the location of the incident but did not observe anyone there. When Gallegos arrived back at the party, he told the decedent's friends what happened. The police arrived at the party and spoke with Gallegos. The following morning, Gallegos learned that the decedent passed away.

¶ 28 On October 8, 2010, Gallegos met with police officers to view a photo array. Gallegos told the police officers that he recognized the person with the bat and signed his name on the photo of that individual. On October 17, 2010, Gallegos returned to the police station to view a lineup. During the lineup, he identified codefendant Daniel Guerrero as the man with the aluminum bat. On September 13, 2012, Gallegos again went to the police station to view other lineups. During those lineups, he was able to identify codefendants Pablo Colon and Marco Ramirez as two of the other attackers. On September 27, 2012, he was shown another lineup but was not able to identify anyone as being a part of the attack.

¶ 29 On cross-examination, Gallegos testified that the intersection where he was confronted by the group was illuminated by street lights. There were a total of four to five Latinos who confronted them. When the decedent was struck with the bat, Gallegos was right next to him.

Gallegos observed the other men physically beating the decedent, and they were in a horseshoe formation facing Gallegos. After striking the decedent, the man with the bat also struck Gallegos. Gallegos was never struck with fists or kicked. Before the man with the bat struck the decedent, absolutely no words were exchanged, and no gang slogans were mentioned. Gallegos did not observe anyone with a knife.

¶ 30 E. Officer Ricardo Sanchez

¶ 31 Officer Ricardo Sanchez testified that he was working the first watch as a beat officer on May 30, 2010. In the early morning hours, he responded to a call concerning a battery victim at a White Castle restaurant on South Ashland Avenue. When he arrived, he observed an ambulance in the parking lot and paramedics attending to a battery victim. When Sanchez approached, the paramedics informed him that the person had been stabbed.

¶ 32 Sanchez notified a supervisor via radio that the call had been upgraded to an aggravated battery. While at the White Castle, he spoke with restaurant employees and with the decedent's girlfriend. He traveled with his partner to the party and spoke with Mario Gallegos, who informed him what happened that evening. Gallegos gave a brief description of the offenders, who were three to four Latinos in their twenties. One was a short, heavyset male with a shag hairstyle. Gallegos informed him of the location where the incident occurred. Sanchez traveled with his partner to the location, but he did not find anything or anybody there. As he was searching, a supervising sergeant arrived, so he left the scene and went to Stroger Hospital to check on the victim. Sanchez spoke to the staff of the hospital and met the victim's family members. He met Chicago police detectives at the hospital and turned the investigation over to them.

¶ 33 On cross-examination, Sanchez testified that he responded to the call at approximately 1 a.m., and he and his partner were the first officers to arrive at the White Castle. He looked for eyewitnesses at the White Castle who might have observed what happened, but there were none.

¶ 34 Gallegos told Sanchez that the incident occurred in a lot across the street from the White Castle, which was visible from the restaurant.

¶ 35 F. Detective Robert Garza

¶ 36 Detective Robert Garza testified that, in September 2010, he was assigned to the murder investigation and he learned that officers were looking for codefendant Daniel Guerrero and other individuals who were regularly in the area where the attack occurred.

¶ 37 On October 8, 2010, Garza met with Mario Gallegos and showed him a photo array from which Gallegos identified Guerrero as the man who struck him and the decedent with a bat. On October 17, 2010, Garza conducted a physical lineup, and Gallegos again identified Guerrero as the man with the bat. Garza interviewed Guerrero and received names of other individuals that he was interested in interviewing. After the interview, Guerrero was released without being charged.

¶ 38 On July 27, 2011, Garza received information from Detective Brogan[1] about a possible witness, Wayne Kates, whom Garza interviewed. Kates subsequently gave a handwritten statement and appeared before the grand jury. After interviewing Kates, Garza considered Pablo Colon and Marco Ramirez as suspects.

¶ 39 On September 11, 2012, detectives arrested and interviewed Guerrero, Ramirez, Colon, and Jessie Talavera. On September 13, 2012, Bernard Monreal was also brought in and

[1]Detective Brogan's first name does not appear in the record on appeal.

interviewed. After the interviews, Guerrero, Colon, and Ramirez were charged with first degree murder. Garza continued with the investigation, which led to defendant, who was brought to the police station and interviewed on September 27, 2012. After being interviewed, defendant was also charged.

¶ 40 Garza testified that Gallegos made a positive identification of Ramirez and Colon from a lineup. However, in the only lineup that contained defendant, Gallegos was unable to make a positive identification and stated that he did not recognize anyone in the lineup.

¶ 41 On cross-examination, Garza testified that after interviewing and releasing Guerrero, he subpoenaed his phone records, which revealed three phone numbers that Guerrero contacted following his release from custody. Those three phone numbers belonged to (1) Pablo Colon, (2) Marco Ramirez, and (3) defendant. On cross-examination, Garza was asked whether he was sure that defendant's number was in Guerrero's phone records, and he replied affirmatively. Defense counsel pointed out that defendant's phone number was not contained on the general progress report that Garza authored showing a list of numbers that Guerrero called when he was released from custody. Garza responded that the list contained only those numbers that he was already somewhat familiar with and that he was not already familiar with defendant's phone number at the time he made the report.

¶ 42 Garza repeated that he spoke to Kates on July 27, 2011. The information that he obtained from Kates was based on conversations Kates overheard at a meeting attended by members of the gang. After talking to Kates, Garza had two additional suspects, namely, Ramirez and Colon, but Kates did not mention defendant. On September 25, 2012, defendant was brought to the police station and interviewed. Twenty-nine hours later, defendant was placed in a

lineup that Gallegos viewed but did not recognize defendant as being present during the incident.

¶ 43 G. Officer Juan Perez

¶ 44 Officer Juan Perez testified that he worked in the gang investigations unit and assisted in the murder investigation. After speaking with detectives, he began searching for defendant. On September 25, 2012, he went to a location on South Archer Avenue with between 8 to 10 officers to arrest defendant. While conducting surveillance, he observed defendant exiting the front door of his residence. He radioed enforcement officers that defendant was walking toward the rear of the residence, and they radioed back that they had apprehended him. Perez testified that he did not observe defendant's arrest but learned that defendant did not attempt to run.

¶ 45 H. Detective Robert Garza

¶ 46 Garza was recalled to testify and testified that he interviewed defendant in an electronic recorded interview room, where the recording device was on the entire time defendant was there and was recording constantly. Defendant was held in the interview room for 30 hours and was interviewed by multiple officers. Twenty-eight hours after he arrived, defendant admitted that he attempted to kick one of the victims.

¶ 47 During the interview, defendant told Garza what occurred the night of the murder. Defendant indicated that he was at a barbecue at Bernard Monreal's[2] apartment. Defendant first told Garza that he remained in the apartment and never left, then he indicated that he ran out and stopped in the alley, and then he indicated that he ran up to the crowd that was involved in the incident, but by that time, everybody was running from the scene. Eventually,

[2]Detective James Halloran testified that during his interview with defendant, defendant explained to him that on the night of the murder he was at a barbecue that was for Monreal. *Infra* ¶ 51.

defendant admitted that he did "kick one of the individuals involved that was walking down Ashland Avenue."

¶ 48 When Garza first spoke to defendant, defendant admitted that he kicked one of the men who was hunched over after he was hit with a bat. Garza summarized that defendant first told him that he was not at the scene, then said he was at Monreal's apartment and never came out, then stated he ran to the mouth of the alley and stopped, then indicated that he approached the melee and everybody was done and leaving, then he finally admitted that he was there to witness the victim being hit with the bat, and also kicked one of the victims one time, but that he was not sure where he kicked him.

¶ 49 On cross-examination, Garza testified that, during his interview with defendant, defendant said "I was an SD. I still associate with them," and explained that his association was through living in the neighborhood. Defendant described two groups of people, one hitting the man with the red shirt and another that went toward the man in the blue shirt. Defendant said that he kicked the man in the blue shirt. Defendant also said "I don't even think I kicked him. I tried to kick him," and Garza responded "that's bullshit" and "that's enough of that." At that point, defendant had already been in the room for 28 hours. An hour later, Garza placed defendant in a lineup, but Gallegos was unable to identify him as being at the scene of the attack.

¶ 50 At a sidebar, the State admitted that it had spoken to Garza in between the two parts of his testimony but only in relation to his then-upcoming testimony and not about his previous testimony. The defense objected to the State's conduct responding that, once a witness takes the stand and is sworn, he is not allowed to talk to either party. The trial court found that it

was not inappropriate for the State to speak to Detective Garza between his two times on the stand under the circumstances.

¶ 51 I. Detective James Halloran

¶ 52 Detective James Halloran testified that he became actively involved in the investigation once the arrests were made. He participated in defendant's interview and began his questioning after defendant was in custody for about 28 hours. During the interview, defendant explained to Halloran that they were having a barbecue for Monreal, who was moving. Defendant said that Colon let everybody know that there were "flakes" (members of a rival gang) nearby, and then everybody left to "jump those guys."

¶ 53 J. Dr. Steven Cina

¶ 54 Dr. Cina testified concerning the autopsy of the decedent. Cina opined that the cause of death was multiple stab wounds[3] and that the manner of death was a homicide.

¶ 55 K. Officer Chris Chmelar

¶ 56 Before Officer Chris Chmelar testified, the trial court instructed the jury:

> "Ladies and gentlemen, evidence is about to be received that the defendants have been involved in conduct other than that charged in the indictment. This evidence will be received on the issues of the defendant's [*sic*] identification and motive. And may be considered by you only for those limited purposes.
>
> It is for you to determine whether the defendants were involved in this conduct, and if so, what weight should be given to this evidence on the issue of the defendant's [*sic*] identification and motive."

[3]Wayne Kates later testified at trial that he was present at a gang meeting at which one of the participants told Kates that he had stabbed the decedent during the beating. *Infra* ¶ 64.

¶ 57 Officer Chmelar testified for the State as an expert witness on gangs and gang affiliation. He assisted in gang crime investigations throughout his career as a police officer. He is currently working for the federal Drug Enforcement Administration, where he received federal training on gang identification and different gang terminology. He is familiar specifically with the gangs operating in the Ninth District, including those in and around West 35th Street all the way to Archer and Ashland Avenues. He is familiar with how to identify members of those gangs by their tattoos, color of clothing, gang signs, and handshakes.

¶ 58 Chmelar testified that gangs in the Ninth District protect their territory through intimidation and violence. They usually have somebody posted or somebody out there and will not let opposing gang members travel through their area. Some of the new gang members would keep watch and call out to the other gang members for an "assist" in order to have the odds stacked in their favor. The Satan Disciples were part of the larger Folk nation. The area of the Satan Disciples gang is anywhere between Archer Avenue and 35th Street, and Ashland Avenue to Wolcott in the east. The Satan Disciples gang is known as Wildwood, due to it being in the area of 35th and Wood Streets.

¶ 59 Chmelar identified a photo depicting an "SD" tattoo on defendant's back and another depicting a tattoo on defendant's ankle. Chmelar testified that the "SD" tattoo on defendant's back stands for Satan Disciples. The tattoo was described as a little faded. Right above the S on defendant's back on the left there are two horns, and underneath the bottom part of the S, between the S and the D, a tail is located. The horns and the tail represent the devil, which is one of the signs used by the Satan Disciples street gang. There was also a pitchfork, which is consistent with what all the Disciple gangs within the Folk nation use.

¶ 60 The tattoo on defendant's ankle consisted of a pitchfork, which represents the devil; a six pointed star on the bottom right of the pitchfork, which represents the Folk nation; and a W to the left of the tattoo, which stands for Wood Street and Wildwood.

¶ 61 On cross-examination, Chmelar testified that he did not know defendant's age at the time that the SD tattoo was administered and was unsure if defendant was in the process of covering it up, which would be a severe violation if he was still in the gang. However, Chmelar testified that it was possible that the tattoo faded if defendant acquired it when he was 15 considering he is now 35. He also did not know how old defendant was when he acquired the ankle tattoo, but he agreed that it was also faded compared to recent non-gang tattoos on defendant's person.

¶ 62 Chmelar testified that the color red on one of codefendant Ramirez's tattoos is in reference to the Latin Counts gang, showing disrespect to that gang.[4]

¶ 63 L. Wayne Kates

¶ 64 Prior to the testimony of Wayne Kates, the trial court instructed the jury to consider his testimony about other wrongful conduct by defendant only for the limited purposes of identification and motive.

¶ 65 Kates testified that, on August 21, 2010, he went with his brother to Monreal's home for a gang meeting. Besides Monreal, Kates observed Ramirez, Colon, and Guerrero at the meeting. Ramirez told the group that, on May 29, 2010, Ramirez, Colon, Guerrero, and Talavera were driving around West 33rd Street near South Ashland Avenue when they observed a man who appeared to be a member of a rival gang. At the meeting, Ramirez

[4]This indicates that the color red is associated with a rival gang. This is relevant because the decedent was wearing a red shirt at the time of the attack, which can explain why the attackers called him a "flake." See *supra* ¶ 22.

further stated that they pulled into an alley behind the BBQ Patio restaurant, and Ramirez, Colon, and Guerrero exited the vehicle. Ramirez told Kates that they approached the man and wanted to check him for gang affiliation or gang tattoos. Ramirez said that, when they approached the man and asked him what he was, the man said he did not belong to a gang, turned around, and ran away. Also at the meeting, Guerrero stated that they caught up to the man, hit him with a baseball bat, and he fell down. Ramirez stated that he ran up to the man and started stabbing him. Ramirez said they just kept beating the man until he stopped moving and then they took off.

¶ 66 Kates testified that he initially did not inform the police of this information. Kates later gave Detective Brogan this information because Ramirez was accusing Kates of being involved in a situation that Kates had nothing to do with.

¶ 67 On cross-examination, Kates testified that defendant was not at the gang meeting. Ramirez told him that only four people were in the vehicle that night, and defendant was not one of them. Kates testified that Guerrero admitted that he hit somebody with a baseball bat, and that Ramirez admitted to stabbing the individual with the red shirt. At the meeting, Ramirez and Guerrero admitted that after the victim fell, he was beaten. Ramirez, Guerrero, and Colon were involved in the beating. Those were the only three people mentioned at the meeting as being involved. Kates testified that no one made any mention of defendant being present.

¶ 68 M. Jury Instructions

¶ 69 A jury instruction conference occurred on August 27, 2012. Defendant objected to the State's tendering of the Illinois Pattern Jury Instruction on circumstantial evidence. The court gave the following instruction over defendant's objection:

"Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict." See Illinois Pattern Jury Instructions, Criminal, No. 3.02 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.02).

¶ 70 Defendant requested an instruction on believability of a witness, arguing that Detective Garza was properly impeached when he provided an inconsistent statement concerning whether he had observed defendant's phone number in codefendant Guerrero's phone records.[5] Defendant requested the following jury instruction on prior inconsistent statements:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." See IPI Criminal 4th No. 3.11.

The court denied the request.

[5]Detective Garza testified that defendant's phone number was in codefendant Guerrero's phone records, indicating that Guerrero had contacted defendant after being released from custody. However, defendant's phone number was not recorded on the general progress report that Garza created with the data from the phone records.

¶ 71 Defendant objected to the State's tendering of the Illinois Pattern Jury Instruction on accountability for felony murder based on mob action, arguing that it was unclear. The court gave the following instruction over defendant's objection:

> "To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, Alan Oliva.
>
> It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit mob action, and that the deceased was killed by one of the parties committing that unlawful act." See IPI Criminal 4th No. 5.03A.

¶ 72 Defendant objected to the State's tendering of the Illinois Pattern Jury Instruction on the definition of first degree murder, arguing that there should be separate definitions for intentional murder and for felony murder based on mob action, in order for the jurors to distinguish between intentional murder and felony murder. During the conference, defendant discussed the topic of separate verdict forms. The trial court found that *People v. Smith,* 233 Ill. 2d 1 (2009), was instructive and stood for the proposition that a general verdict form is appropriate unless separate verdict forms are necessary to avoid an issue in sentencing. The trial court found that there was no issue in sentencing here because the underlying charge for mob action was nol-prossed and the only offense that remained was first degree murder. Since the jury would not be required to explain the basis of a conviction, there was no reason to give separate instructions for each theory. Therefore, the trial court gave the following instruction over defendant's objection:

"A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he intends to kill or do great bodily harm to the individual; or he knows that such acts will cause death to the individual; or he knows that such acts create a strong probability of death or great bodily harm to that individual; or he is committing the offense of mob action." See IPI Criminal 4th No. 7.01.

¶ 73 Defendant objected to the Illinois Pattern Jury issue Instruction for first degree murder, again arguing that there should be separate definitions for intentional murder and felony murder based on mob action. The court gave the following instruction over defendant's objection:

"To sustain the charge of first degree murder the State must prove the following propositions:

First: that the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of Alan Oliva; and

Second: That when defendant, or one for whose conduct he is legally responsible, did so, he intended to kill or do great bodily harm to Alan Oliva or another; or he knew that his acts would cause death to Alan Oliva or another; or he knew that his [acts] created a strong possibility of death or great bodily harm to Alan Oliva or another; or he was committing the offense of mob action.

If you find from your consideration that of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." See IPI Criminal 4th No. 7.02.

¶ 74 After the jury instructions were read to the jury, the jury went into deliberations and found defendant guilty of first degree murder. The jury signed a general verdict form, which did not require them to specify the basis of the verdict. On October 6, 2015, defendant filed a posttrial motion for a new trial, which was denied. On November 23, 2015, the court sentenced defendant to 30 years in the IDOC. Defendant was 34 years old at the time of the incident. On December 11, 2015, defendant filed a motion to reconsider sentence, which the court denied. On December 18, 2015, defendant filed a timely notice of appeal, and this appeal followed.

¶ 75 ANALYSIS

¶ 76 On appeal, defendant argues (1) that the State failed to prove him guilty of first degree murder beyond a reasonable doubt, (2) that the trial court erred by denying his motion *in limine* to bar gang evidence and thereby allowed prejudicial gang evidence to be introduced, (3) that inflammatory remarks by the State during opening statements prejudiced defendant, and (4) that the trial court erred by giving certain jury instructions and by denying defendant's request for other instructions. For the following reasons, we affirm.

¶ 77 I. Sufficiency of the Evidence

¶ 78 On appeal, defendant argues that the State failed to prove him guilty of first degree murder beyond a reasonable doubt because (1) there was insufficient evidence tying defendant to the murder, (2) there was insufficient evidence to find defendant guilty under a theory of accountability, and (3) the only evidence tying defendant to the crime was his

extrajudicial confession, and in Illinois, a conviction can only be sustained by an extrajudicial confession if it is accompanied by corroborating evidence. For the reasons stated below, we find that the evidence at trial was sufficient to support defendant's conviction.

¶ 79 The critical inquiry on review of a sufficiency of the evidence claim is whether, after reviewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). On review, all of the evidence is considered in the light most favorable to the prosecution. *People v. Furby*, 138 Ill. 2d 434, 455 (1990) (citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). It is the jury's responsibility to determine the witnesses' credibility and the weight to be given to their testimony, to resolve conflicts of evidence, and to draw reasonable inferences from the evidence; we will not substitute our judgment for that of jury on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). We will not set aside a conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶ 80 In the case at bar, the jury issued a general verdict, which did not explain its basis for the first degree murder conviction. Our supreme court has held that "[w]hen there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory." *Witherell v. Weimer*, 118 Ill. 2d 321, 329 (1987). Since we find that there was sufficient evidence for a reasonable jury to enter a conviction based on a theory of accountability, we find it unnecessary to discuss other theories.

¶ 81 In Illinois, a person "is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both." 720 ILCS 5/5-1 (West 2010). Generally, to convict a defendant under the theory of accountability, the State must prove beyond a reasonable doubt that the defendant (1) solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of the offense; (2) participated as such before or during the commission of the offense; and (3) had the concurrent, specific intent to promote or facilitate the commission of the offense. 720 ILCS 5/5-2(c) (West 2010). Our supreme court has recognized that the underlying intent of section 5-2(c) is to incorporate the principle of the common design rule. *People v. Nelson*, 2017 IL 120198, ¶ 39. Thus, to prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence either (1) that the defendant shared the criminal intent of the principal, or (2) that there was a common criminal design. *People v. Fernandez*, 2014 IL 115527, ¶ 13.

¶ 82 Defendant first argues that, at best, the State showed that defendant may have intended to intimidate the victims and did not show that he shared a common design to injure them. We are not persuaded by this argument for the following reasons.

¶ 83 Words in an agreement are not necessarily required to prove a common design or purpose, and a common design may be inferred from the circumstances surrounding the crime. *People v. Taylor*, 164 Ill. 2d 131, 141 (1995). Evidence that the defendant voluntarily attached himself to a group bent on illegal acts, with knowledge of its design, supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another. *Taylor*, 164 Ill. 2d at 141.

¶ 84 As part of the evidence at trial, a police officer testified to defendant's confession, in which he admitted (1) that he was at a party with Satan Disciple gang members when someone informed him that there was a "flake outside," (2) that he then ran outside and witnessed someone being hit with a baseball bat, and (3) that, after witnessing this, he attempted to kick one of the victims. Accordingly, there was enough evidence at trial for a reasonable trier of fact to determine that "defendant voluntarily attached himself to a group bent on illegal acts" (*Taylor*, 164 Ill. 2d at 141) and that there existed a common design between defendant and the other participants to injure the victims (see *Taylor*, 164 Ill. 2d at 141).

¶ 85 Defendant next contends that he cannot be held accountable for first degree murder because he did not know that one of the individuals in the group was going to stab the victim and because the evidence at trial suggested that the stabbing was random and spontaneous. We are not persuaded by defendant's argument for the following reasons.

¶ 86 Our supreme court has recognized that "[w]here there is a common design to do an unlawful act, then 'whatever act any one of them [does] in furtherance of the common design is the act of all, and all are equally guilty of whatever crime was committed.' " *Nelson*, 2017 IL 120198, ¶ 40 (quoting *People v. Tarver*, 381 Ill. 411, 416 (1942)). Thus, a defendant may be found guilty of first degree murder based on a theory of accountability where the defendant enters a common design to commit only a battery and a murder is committed during the course of the battery. *Nelson*, 2017 IL 120198, ¶ 40.

¶ 87 Accordingly, in the case at bar, the State was required to present evidence that a common design of only battery existed between defendant and the other participants to sustain defendant's conviction for first degree murder. As noted, the State provided sufficient

evidence that a common design of battery existed between defendant and the other participants. *Supra* ¶ 83.

¶ 88 Defendant next argues that his conviction for first degree murder cannot be sustained since the only evidence connecting him to the crime was his own confession. The basis for defendant's argument is the *corpus delicti* rule that says "proof of the *corpus delicti* may not be established by means of a defendant's extrajudicial confessions alone, but must instead find corroboration in evidence independent of those statements." *People v. Strickland*, 154 Ill. 2d 489, 522 (1992). We are not persuaded by defendant's argument for the following reasons.

¶ 89 In order to prove a defendant guilty of a crime, the State must prove beyond a reasonable doubt that (1) a crime occurred, known as the *corpus delicti*, and (2) that the crime was committed by the defendant. *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). In Illinois, the *corpus delicti* rule requires only that evidence apart from the defendant's confession demonstrates that a crime was committed. *Furby*, 138 Ill. 2d at 450. The occurrence of the injury or loss, and its causation by criminal conduct are termed the *corpus delicti*; the identity of the accused as the offender, the ultimate issue, is not considered part of the *corpus delicti*. *Furby*, 138 Ill. 2d at 446. Accordingly, there is no requirement that the defendant's identity as the offender be corroborated by evidence apart from his own extrajudicial statements. *Strickland*, 154 Ill. 2d at 522-23. In the case at bar, there was ample evidence at trial to show (1) that a crime was committed and (2) that death resulted from the crime. Therefore, there was no violation of the *corpus delicti* rule in this case.

¶ 90 In the case at bar, there was enough evidence at trial for a reasonable jury to determine that defendant shared a common design with the other members who participated in the

beating, and there was sufficient evidence for a reasonable jury to determine that a crime occurred and caused an injury and death. As a result, we do not find persuasive defendant's arguments concerning the sufficiency of the evidence.

¶ 91 II. Prejudicial Evidence

¶ 92 Second, defendant argues that the trial court erred by denying his motion *in limine* to bar gang evidence and thereby allowed prejudicial gang evidence to be introduced. The State argues that the evidence was relevant to establish motive, identity, and common design.

¶ 93 Although there may be prejudice among jurors against street gangs (*People v. Smith*, 141 Ill. 2d 40, 58 (1990) (*Steven Smith*)), an accused may not insulate the trier of fact from his gang membership if it is relevant to establish motive, identity, or common design because prejudice attaches to that revelation (see *People v. Gonzalez*, 142 Ill. 2d 481, 489 (1991)). Evidence of gang affiliation is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). It is generally held that evidence indicating the defendant was a member of a gang or was involved in gang-related activity is admissible to show common purpose or design. *Steven Smith*, 141 Ill. 2d at 58.

¶ 94 Furthermore, evidence indicating a defendant was a member of a gang or was involved in gang-related activity is admissible to provide a motive for an otherwise inexplicable act. *Steven Smith*, 141 Ill. 2d at 58. Any evidence which tends to demonstrate that an accused had a motive for committing a crime is relevant because it renders more probable the fact that the accused did commit the crime. *Steven Smith*, 141 Ill. 2d at 56.

¶ 95 Once gang-related evidence is determined to be relevant to an issue in dispute, it may be admitted so long as its probative value is not substantially outweighed by its prejudicial effect. *Johnson*, 208 Ill. 2d at 102; Ill. R. Evid. 403 (eff. Jan. 1, 2011) ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ***."). It is the function of the trial court to weigh the probative value and prejudicial effect of evidence to determine whether it should be admitted. *Gonzalez*, 142 Ill. 2d at 489.

¶ 96 Evidentiary rulings regarding gang-related evidence are reviewed only for an abuse of discretion. *People v. Villarreal*, 198 Ill. 2d 209, 232 (2001). An abuse of discretion occurs when " 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 97 In the case at bar, the trial court found that gang-related evidence was relevant to the State's case and that the probative value of the evidence outweighed its prejudicial effect. We cannot find that the trial court abused its discretion by admitting this evidence.

¶ 98 There is no question that the general nature of the beating was gang-related. Mario Gallegos and Detective Robert Garza testified that Gallegos identified at least three attackers through photo arrays and police lineups. Officer Chris Chmelar testified that both of these attackers had tattoos indicating a strong association with the Satan Disciples gang and that at least two tattoos on defendant's person indicated that defendant was associated with the Satan Disciples gang for at least some period of time. Officer Chmelar also indicated that the color red, the color of the shirt the decedent was wearing at the time of the beating, was the color of the Latin Counts gang. Wayne Kates testified that he was at a gang-related meeting when he heard members of the Satan Disciples gang discuss the beating and murder.

According to Kates, a gang member told him that he and two other members approached the victims, asked them "who they were," apparently in reference to gang affiliation, and then beat them when they tried to run away.

¶ 99 Furthermore, defendant confessed orally to the police (1) that he "was an SD," and "still associate[d] with them," (2) that he was at a party when someone informed him that there was a "flake" outside, and (3) that he ran outside together with others and attempted to attack one of the victims by kicking him.

¶ 100 As we have previously noted, "[i]t is the trier of fact's responsibility to determine the witnesses' credibility and the weight given to their testimony." *Brooks*, 187 Ill. 2d at 132. "[U]pon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." (Emphasis and internal quotation marks omitted.) *Furby*, 138 Ill. 2d at 455 (quoting *Collins*, 106 Ill. 2d at 261, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Accordingly, there was evidence at trial from which a reasonable jury could have determined (1) that at least three persons who were involved in the beating were members of the Satan Disciples gang, (2) that defendant was a member of the Satan Disciples gang for at least some period of time and still associated with them, and (3) that the beating was the result of a gang-related misunderstanding, whereby the attackers believed that the decedent was a member of a rival gang because of the color of his shirt.

¶ 101 Defendant's association with the Satan Disciples gang provided "a motive for an otherwise inexplicable" crime (*Steven Smith*, 141 Ill. 2d at 58) and rendered it more probable that defendant committed the crime (see *Steven Smith*, 141 Ill. 2d at 56). It also rendered it more probable that defendant voluntarily joined the group of attackers who were already on the scene and was part of the design to brutally attack the two men. See *Taylor*, 164 Ill. 2d at

141 ("Evidence that defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design also supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another."); see also *Steven Smith*, 141 Ill. 2d at 58 (evidence of gang-related activity is admissible to show common design or purpose); *Johnson*, 208 Ill. 2d at 102 ("Evidence of gang affiliation is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

¶ 102 Although there may be prejudice against street gangs (*Steven Smith*, 141 Ill. 2d at 58), the probative value of gang evidence in this case was so crucial that we cannot say the trial court abused its discretion when it admitted the gang evidence after having found that its probative value was not substantially outweighed by its prejudicial effect.

¶ 103 III. Remarks Not Inflammatory

¶ 104 Defendant next argues that the trial court erred by denying his motion *in limine* to bar the State from going into detail about the decedent's background and that the State's opening statements unfairly prejudiced him and denied him a fair trial.

¶ 105 An opening statement may include a discussion of the evidence and matters which may reasonably be inferred from the evidence. *Steven Smith*, 141 Ill. 2d at 63. It is an opportunity for the parties to tell the jury what evidence will be presented. Reversible error occurs only when the remarks are attributable to deliberate misconduct by the prosecutor and result in substantial prejudice to the defendant. *Steven Smith*, 141 Ill. 2d at 64. Substantial prejudice means that the result may have been different absent the complained-of remark. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). The trial court has discretion to determine the proper

character and scope of arguments, and a reviewing court will indulge every reasonable presumption that the trial court properly exercised its discretion. *Cloutier*, 156 Ill. 2d at 507.

¶ 106 In its opening remarks, the State discussed details about the decedent's family, and mentioned that the decedent completed high school, attended college, and had a job. The decedent's mother later testified at trial regarding these same details.

¶ 107 Our supreme court has instructed that remarks regarding a victim and his family are permissible, since "[c]ommon sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members." *People v. Free*, 94 Ill. 2d 378, 415 (1983); see also *Cloutier*, 156 Ill. 2d at 508. In *Cloutier*, the State made comments in its opening statement that the murder victim was previously married, had a child, and was engaged to be married. The supreme court ruled that "the prosecutor's comments concerning the victim's family *** were merely incidental to the presentation of the State's case and were not deliberate misconduct to inject irrelevant and prejudicial matters into the trial." *Cloutier*, 156 Ill. 2d at 508.

¶ 108 Similarly, in the case at bar, the State's reference to the general facts about the victim's family were "merely incidental to the presentation of the State's case" (*Cloutier*, 156 Ill. 2d at 508) and were a general description of the "[c]ommon sense" notion that the murder victim did not "live in a vacuum" (*Cloutier*, 156 Ill. 2d at 508). Therefore, the comments about the decedent's family do not warrant reversal in this case. See *People v. Sims*, 285 Ill. App. 3d 598, 611-12 (1996) (the court found that the prosecutor's remarks during opening statement and closing that the decedent was a husband and a father and testimony from the decedent's mother and from the decedent's widow that he was married and had four children were incidental to the State's case and not prejudicial); *People v. Childress*, 158 Ill. 2d 275,

297-300 (1994) (rejecting a prosecutorial misconduct claim of error where the prosecutor commented that the victim was a young mother and wife, and, referring to the defendant, stated that " '[b]ecause of his acts, look at the wide expanse of suffering by other people,' " and where a photo was admitted that showed the victim attending a wedding with her sister and family).

¶ 109 The State's remarks concerning the decedent's education and occupation were also not improper. Gang membership was a central issue in this case and was important to "provide a motive for an otherwise inexplicable act." *Steven Smith*, 141 Ill. 2d at 58. The evidence at trial suggested that the decedent was attacked as a "flake" (member of a rival gang) and that he was wearing a shirt with a color associated with a rival gang. Our supreme court has recognized that "there may be strong prejudice against street gangs." *Steven Smith*, 141 Ill. 2d at 58. Thus, to diffuse any prejudice that may have otherwise occurred against the victim, the State's remarks concerning the decedent's education and occupation were reasonable by showing who he was and not "attributable to deliberate misconduct of the prosecutor." *Steven Smith*, 141 Ill. 2d at 64.

¶ 110 Furthermore, these remarks were brief and isolated in comparison to the length of the State's entire opening, a factor that our supreme court has found to be "significant in assessing the impact of such remarks on a jury verdict." *People v. Runge*, 234 Ill. 2d 68, 142 (2009); *People v. James*, 2017 IL App (1st) 143036, ¶ 54.

¶ 111 IV. Jury Instructions

¶ 112 On appeal, defendant claims that the trial court erred by giving certain jury instructions and by denying others. Defendant appeals the denial of two jury instructions that he requested and also argues that several other jury instructions were improperly given.

¶ 113 Specifically, defendant claims that the trial court erred when it instructed the jury as to (1) IPI Criminal 4th No. 3.02, circumstantial evidence, when there was allegedly no circumstantial evidence offered against him; (2) IPI Criminal 4th No. 5.03A, the accountability instruction for felony murder, which defendant argues was "unclear"; and (3) IPI Criminal 4th No. 7.01 and IPI Criminal 4th No. 7.02, the definition and issues instructions for first degree murder, which defendant argues allowed for the possibility of a less than unanimous verdict.

¶ 114 Defendant also argues that the court erred when it refused his request for (1) separate verdict forms for intentional murder and felony murder and (2) IPI Criminal 4th No. 3.11, the instruction regarding prior inconsistent statements.

¶ 115 Defendant claims that these errors, when considered as a whole, deprived him of a fair trial. For the following reasons, we do not find these claims persuasive.

¶ 116 A. Standard of Review

¶ 117 The trial court's decision to give, or not give, a particular instruction is within the sound discretion of the trial court. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 33. Generally, a reviewing court will review jury instructions only for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 66 (2008); *In re Dionte J.*, 2013 IL App (1st) 110700, ¶ 64. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *Blum*, 235 Ill. 2d at 36.

¶ 118 When a reviewing court considers a challenge to any one instruction, we do not examine the instruction in isolation but rather we examine the instructions "as a whole" in order to determine whether, in their entirety, they "fairly, fully and comprehensively apprised the jury of the relevant legal principles." *People v. Banks*, 237 Ill. 2d 154, 208 (2010); see also *People v.*

Tatum, 389 Ill. App. 3d 656, 673 (2009). Jury instructions should not be misleading or confusing. See *People v. Bush*, 157 Ill. 2d 248, 254 (1993). Their correctness depends upon not whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them. *People v. Herron*, 215 Ill. 2d 167, 188 (2005); see also *People v. Lozada*, 211 Ill. App. 3d 817, 822 (1991).

¶ 119 Although jury instructions are generally reviewed for an abuse of discretion, our standard of review is *de novo* when the question is whether the given instructions accurately explained the applicable law to the jury. *Anderson*, 2012 IL App (1st) 103288, ¶ 34; see also *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 170 (2008). In addition, the effect of a general verdict form is a purely legal question, which we review *de novo*. *Smith*, 233 Ill. 2d at 15-21 (our supreme court applied *de novo* review when determining the effect of a general verdict form). *De novo* consideration means that we perform the same analysis as a trial court would perform. *Condon & Cook, L.L.C. v. Mavarakis*, 2016 IL App (1st) 151923, ¶ 55.

¶ 120 Ordinarily, a reviewing court will not reverse a trial court, even if the trial court gave faulty instructions, unless the instructions clearly misled the jury and resulted in prejudice to the defendant. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

¶ 121 B. Claims Preserved

¶ 122 A defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). In the case at bar, defendant objected to all the instructions in question during the trial, as well as in a posttrial motion, thereby preserving them for our review. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 123 Where the defendant has made a timely objection, the reviewing court must decide whether an error occurred and then whether the preserved error was harmless, and the State "bears the burden of persuasion with respect to prejudice." (Internal quotation marks omitted.) *People v. Johnson*, 218 Ill. 2d 125, 141-42 (2005). "In other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow*, 203 Ill. 2d 352, 363 (2003).

¶ 124 C. Circumstantial Evidence

¶ 125 Defendant first argues that there was not any circumstantial evidence offered against him at trial and therefore the trial court erred when giving IPI Criminal 4th No. 3.02. Circumstantial evidence has been defined as "the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *Pace v. McClow*, 119 Ill. App. 3d 419, 423-24 (1983). Circumstantial evidence may be used to prove a fact only when a reasonable inference can be drawn from the circumstances. *Caruso v. M&O Insulation Co.*, 345 Ill. App. 3d 345, 348 (2003) (defining circumstantial evidence as proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved). Proof which relies upon mere conjecture or speculation, rather than reasonable inference, is insufficient. *Thacker v. U N R Industries, Inc.*, 151 Ill. 2d 343, 354 (1992).

¶ 126 In the case at bar, defendant argues that the trial court erred by giving the following circumstantial evidence instruction:

> "Circumstantial evidence is the proof of the facts and circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of

defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict." See IPI Criminal 4th No. 3.02.

¶ 127 Although defendant argues that there was no circumstantial evidence in his case, the facts of the case reveal substantial circumstantial evidence linking defendant and the crime to the Satan Disciples gang. The evidence included (1) defendant's admission that he was an "SD" and that he still associated with them, (2) defendant's tattoos that referenced the Satan Disciples gang, (3) defendant's attendance at Bernard Monreal's party, and (4) testimony that the decedent was attacked as a "flake" by members of the Satan Disciples gang. The supreme court has found that the circumstantial evidence jury instruction is appropriate when there is a single piece of circumstantial evidence. See *People v. Lewis*, 165 Ill. 2d 305, 349 (1995) (instruction was proper where statement regarding motive constituted circumstantial evidence). Thus, we cannot find that the trial court erred by giving this instruction.

¶ 128 D. Prior Inconsistent Statements

¶ 129 Defendant argues that the court erred in refusing his request for IPI Criminal 4th No. 3.11, regarding prior inconsistent statements because Detective Garza's general progress report (GPR) was inconsistent with his trial testimony. Detective Garza testified that he recognized defendant's phone number from Guerrero's records but his GPR did not include defendant's phone number.

¶ 130 Defendant's requested IPI Criminal 4th No. 3.11 would read in relevant part:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

It is for you to determine what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

¶ 131 A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence; if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997); see *People v. Crane*, 145 Ill. 2d 520, 526 (1991).

¶ 132 A determination of whether a witness's prior statement is inconsistent with his present testimony is left to the sound discretion of the trial court. *People v. Billups*, 318 Ill. App. 3d 948, 957 (2001) (citing *People v. Flores*, 128 Ill. 2d 66, 87-88 (1989)). " '[A] prior statement of a witness does not have to directly contradict the testimony given at trial to be considered "inconsistent" ***.' " *Billups*, 318 Ill. App. 3d at 957 (quoting *People v. Zurita*, 295 Ill. App. 3d 1072, 1076 (1998)).

¶ 133 The trial court did not abuse its discretion in refusing IPI Criminal 4th No. 3.11. On cross-examination, defense counsel asked Garza whether he was sure defendant's number was in Guerrero's phone records, and he replied affirmatively. Defense counsel pointed out that defendant's phone number was not contained on the GPR that Garza composed containing a list of numbers that Guerrero called when he was released from custody. Garza explained that the list only contained those numbers that Garza was already familiar with and that he was not familiar with defendant's phone number at the time he made the report. "Consistency is measured against a witness's trial testimony: inconsistent statements are inconsistent with trial testimony; consistent statements are consistent with it." *People v. Johnson*, 385 Ill. App. 3d 585, 608

(2008). After reading Garza's trial testimony, we cannot find that the trial court abused its discretion in finding no inconsistency.

¶ 134 E. Accountability

¶ 135 Defendant next argues that the trial court erred when it overruled his objection to IPI Criminal 4th No. 5.03A, which he claims was unclear in its definition of accountability. Defendant argues that the words "such as" created an ambiguity. The instruction, as given, stated:

> "To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one of whose conduct he is legally responsible to kill the deceased, Alan Oliva.
>
> It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, *such as* to commit mob action, and the deceased was killed by one of the parties committing that unlawful act." (Emphasis added.) See IPI Criminal 4th No. 5.03A.

¶ 136 Defendant argues that the instruction was unclear because the "unlawful act" of mob action was not exclusively stated. Since the instruction uses the words "such as," defendant argues that the "unlawful act" could refer to a number of acts, including but not limited to "mob action." However, felony murder cannot be based on any unlawful act but is limited to felonies alone. Defendant uses the Oxford Dictionary of English definition to argue that the term "such as" means "of a kind that" or "like" and therefore prevents instructional clarity. *Such as*, Oxford Dictionary of English (2d ed. 2005).

¶ 137 Applicable IPI instructions are preferred over non-IPI instructions, and they should be used unless they do not accurately state the law. *People v. Askew*, 273 Ill. App. 3d 798, 809 (1995). Supreme Court Rule 451(a) provides that: "Whenever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, *** and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction *shall* be used, unless the court determines that it does not accurately state the law." (Emphasis added.) Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013).

¶ 138 Illinois Supreme Court Rule 451's use of the word "shall" means that the wording of an instruction is not optional—unless it does not accurately state the law. See *People v. Dominguez*, 2012 IL 111336, ¶ 17 ("The use of the word 'shall' means that it is mandatory ***."); *People v. Robinson*, 217 Ill. 2d 43, 51 (2005) (" 'shall' means shall," and thus is obligatory); *People v. Lampitok*, 207 Ill. 2d 231, 261 (2003) ("[T]he primary definition of 'shall' is, '[h]as a duty to; more broadly, is required to.' Black's Law Dictionary 1379 (7th ed. 1999)."). See also *Berz v. City of Evanston*, 2013 IL App (1st) 123763, ¶ 36 (Gordon, P.J., concurring in part and dissenting in part) ("The use of the word 'shall' means that it is mandatory ***." (Internal quotation marks omitted.)).

¶ 139 The IPI Criminal 4th No. 5.03A, Committee Note instructions read in relevant part:

> "Insert in the blank in the second paragraph the felony offense(s) that the evidence shows the defendant or his accomplice may have committed in order to come within the forcible felony murder rule."

¶ 140 Our supreme court and this court have repeatedly affirmed the use and wording of this instruction. *People v. Nash*, 2012 IL App (1st) 093233; *People v. Brunner*, 2012 IL App (4th) 100708; *People v. Garrett*, 401 Ill. App. 3d 238 (2010); *People v. Hudson*, 354 Ill. App. 3d 648

(2004); *People v. Martinez*, 342 Ill. App. 3d 849 (2003); *People v. Causey*, 341 Ill. App. 3d 759 (2003); *People v. Saraceno*, 341 Ill. App. 3d 108 (2003); *People v. Jackson*, 333 Ill. App. 3d 962 (2002); see also *People v. Shaw*, 186 Ill. 2d 301 (1998); *People v. Ramey*, 151 Ill. 2d 498, 535 (1992). Thus, we cannot find its wording to be reversible error.

¶ 141 F. Separate Verdict Forms

¶ 142 Defendant finally argues that the trial court should not have denied his request for separate verdict forms for intentional murder and felony murder. Defendant argues that if separate forms had been given, the jurors' verdicts may have been split. Defendant also argues that the trial court erred in overruling his objection to IPI Criminal 4th No. 7.01 and IPI Criminal 4th No. 7.02 (Supp. 2009), the definition and issues instructions for first degree murder. In support, defendant advanced the same argument that felony murder based on mob action should be separated from intentional murder.

¶ 143 The supreme court has held that specific verdict forms must be provided upon request *only* if the different forms of first degree murder could have different sentencing consequences. See *Smith*, 233 Ill. 2d at 23. However, where there are no sentencing consequences, it remains true that first degree murder is a single offense and that a conviction of this offense need not rest on a unanimous finding of a particular theory of murder. *People v. Bailey*, 2013 IL 113690 ¶ 58. Conviction for felony murder may require a sentencing treatment not applicable to convictions based on intentional or knowing murder. *Smith*, 233 Ill. 2d at 17. For example, "[a]ccording to Illinois law, the predicate felony underlying a charge of felony murder is a lesser-included offense of felony murder." *Smith*, 233 Ill. 2d at 17. Thus, "a defendant convicted of felony murder may not be convicted on the underlying felony." *Smith*, 233 Ill. 2d at 17. By contrast,

"there are no such limitations if the defendant is found guilty of intentional or knowing murder." *Smith*, 233 Ill. 2d at 17-18.

¶ 144 In the case at bar, defendant was charged with mob action, but this charge was nol-prossed before the start of the trial. Since he was not charged with the predicate felony, separate verdict forms were not required under *Smith*. Further, defendant does not argue that there were different sentencing consequences between intentional first degree murder and felony murder in this case. Thus, we cannot find any error here.

¶ 145 CONCLUSION

¶ 146 Where the evidence at trial showed that defendant was a member of the Satan Disciples gang or previously associated with them, that he was at a party with other members of the gang on the night of the murder, that he left the party after hearing that there were "flakes" outside, that members of the gang attacked and beat the victims, and that defendant was present and involved by attempting to kick one of the victims, the trial court did not err by allowing gang-related evidence, and there was sufficient evidence at trial to warrant defendant's first degree murder conviction. In addition, the State's remarks during opening statements regarding the decedent's family, education, and occupation were proper where the remarks were brief when considered in the context of the entire opening statement and were reasonably calculated to further the State's case. Lastly, the trial court did not err in instructing the jury.

¶ 147 Affirmed.