2020 IL App (1st) 180203-U

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SECOND DIVISION
July 7, 2020

No. 1-18-0203

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 15-CR-10041
	)	
KIMMAN WAIKONG,	)	The Honorable
	)	Charles Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in (1) refusing to allow defendant to introduce all or part of his statement to police after the State introduced a portion of it; (2) refusing to allow defendant to use exculpatory other-crimes evidence to make an argument about victim's *modus operandi*; (3) allowing cross-examination of character witnesses concerning specific act of misconduct; or (4) giving unmodified pattern jury instruction on character evidence.

¶ 2 Defendant Kimman Waikong was convicted in a jury trial of second degree murder arising out of the shooting death of Eric Magana on May 21, 2015. He was also charged with the attempted murder of Alejandro Carrasco arising out of the same incident but found not guilty. He was sentenced to a term of twelve years in the Illinois Department of Corrections. On appeal, defendant

argues that that the trial court erred (1) by refusing to allow him to introduce the entirety of his recorded statement to the police after the State had introduced a portion of it; (2) by improperly limiting the evidence he was able to elicit concerning Carrasco's prior conviction for aggravated robbery and the purposes for which he was able to use this evidence; (3) by allowing his character witnesses to be cross-examined concerning the charged conduct; and (4) by giving the jury an improper instruction on character evidence. For the reasons that follow, we affirm defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 On May 21, 2015, at approximately 11:00 p.m., Eric Magana was shot and killed in his car in an alley near the 1300 block of West 31st Place in Chicago. His friend Alejandro Carrasco was also shot and injured. Magana had arranged to meet defendant in the alley, ostensibly for the purpose of buying marijuana from defendant. Defendant was arrested the next day and charged with the first degree murder of Magana and the attempted first degree murder of Carrasco.

¶ 5 Prior to trial, defendant filed a motion *in limine* based upon his raising of an affirmative defense of self-defense. Defendant contended that Magana and Carrasco had planned to rob him of the marijuana, and, while defendant was talking to Magana through his car window, Carrasco had come up behind defendant, put an object that felt like a gun into defendant's back, and attempted to rob him. Defendant had then fired his weapon only in self-defense and to prevent a forcible felony. In his motion *in limine*, defendant sought leave to introduce evidence that Carrasco had been previously convicted of aggravated robbery to raise the inference that Carrasco was the initial aggressor, pursuant to *People v. Lynch*, 104 Ill. 2d 194, 199-200 (1984). According to the motion, in the previous incident, Carrasco and another individual planned to rob a victim named Samuel DeArce after DeArce got into a vehicle with them. While DeArce was in the front seat of

the vehicle, Carrasco, who was in the back seat, held an object that felt like cold metal to the back of his head and said, "Empty out all of your pockets or I'm gonna blow your f***ing brains out." DeArce gave Carasco his cell phone and fled the vehicle. DeArce pled guilty to aggravated robbery. The trial court granted this motion *in limine* and allowed use of this evidence as *Lynch* material. However, the trial court later denied a separate motion *in limine* by defendant to use this same evidence to argue intent, motive, and *modus operandi*.

¶ 6 At trial, the State's case-in-chief began with the testimony of Sarina Rojas. She testified that she was Magana's mother. In the early morning hours of May 22, 2015, two of her son's friends came to her house and told her that her son had been in an accident. She later went to the Cook County Medical Examiner's office and identified her son's body. On cross-examination, she testified that she owned a red Volkswagen Jetta, which she allowed Magana to borrow on the night he was shot. She did not own a BB gun, and she had never carried a BB gun in her car.

¶ 7 Alejandro Carrasco testified that he and Magana were close friends. On May 21, 2015, he was a passenger in Magana's red Volkswagen Jetta as the two men drove to an alley in Chicago. Prior to arriving, Magana had shown Carrasco two bundles of cash, consisting of a stack of bills folded over and rubber-banded. Carrasco could see a $20 bill on the outside of each, but he did not know the denomination of the bills underneath. Magana parked in a space in a parking area off the alley. While Carrasco stayed in the car, Magana walked over to defendant and handed him the bundles of cash. Magana and defendant appeared to argue briefly. Magana then ran back to the car "kind of scared," started the engine, and attempted to reverse. He then put the car in drive, at which point defendant fired four or five gunshots at the men while standing close to the driver's side door of the car. One bullet hit Carrasco in his stomach and remains lodged in his right hip. Another bullet hit Magana in the head, and Magana crashed the car into the side of a garage. Defendant ran

into a gangway between the nearby buildings. Carrasco called 911. Paramedics arrived and helped Carrasco, who was unable to stand, into a wheelchair. They also removed Magana from the car. Magana was bleeding profusely.

¶ 8 Carrasco acknowledged that the crime-scene photographs of the car showed a BB gun on the passenger side floor. He testified that he never saw a BB gun that day and that neither he nor Magana had carried any weapons that day. Carrasco also acknowledged his previous conviction for aggravated robbery, as well as convictions for burglary and aggravated unlawful use of a weapon. These convictions had all occurred in 2013.

¶ 9 Carrasco identified the written statement he gave at the hospital. He agreed that in it, he never stated that Magana got out of the car, had a conversation with defendant, or was scared when he got back inside the car. He also acknowledged that his written statement stated that he knew that Magana's purpose in going to the alley was to buy "weed," and he knew Magana was planning to buy a substantial quantity of it based on the size of the rolls of money shown to him.

¶ 10 Stanton Yuen and Wilson Yuen were called as witnesses and gave similar testimony. They were cousins who lived on West 31st Place, and they were both friends with defendant. On the night at issue, at about 10:45 p.m., defendant came to their residence. He arrived in his car and parked in the alley behind their residence. Soon after arriving, he received a phone call and said that he had to leave. Within a short time, both men testified to hearing two loud bangs coming from the alley. Defendant then knocked on their front door. He handed Stanton a paper grocery bag containing two bags of marijuana and told him to hold it for him. Stanton took the bag and put it in a closet. Defendant also asked Wilson to drive him home, which Wilson did. During the drive, defendant used Wilson's phone to call Stanton. Defendant told Stanton that he had dropped his own phone outside, and he asked Stanton to retrieve it. Stanton responded he could not do so

because there were people outside. Wilson testified that on the drive, he had asked defendant what had happened, and defendant responded that he "shot him." When Wilson asked why, defendant said that "he tried to trick me." Wilson dropped defendant at his home, and by the time he returned, police cars were everywhere. Wilson and Stanton spoke to police, gave them permission to search their residence, and told them about the bag of marijuana.

¶ 11 Officer Michael Alariz of the Chicago Police Department responded to a shots-fired call at approximately 11:30 p.m. He discovered a vehicle that had crashed into a garage. He observed that the man in the driver's seat had a gunshot wound to the head and was not moving. The man in the passenger seat had a gunshot wound to the abdomen.

¶ 12 John Cole, a paramedic with the Chicago Fire Department who was on the ambulance team dispatched to the scene, testified that the individual in the driver's seat of the car had critical, catastrophic injuries and was "probably DOA." The individual in the passenger seat had an injury consisting of three holes in the left hip-groin area from an apparent gunshot wound, but he was alert and talking.

¶ 13 Officer Paul Presnell, a forensic investigator with the Chicago Police Department, processed and photographed the scene following the incident. He found a car crashed into a garage with its driver's side window 80% down, fired-bullet damage to the lower part of the windshield, and blood on the seat and door frame. Inside the car, he found a fired bullet, an unloaded BB gun, and a black jacket. In a parking spot behind the house, he found a white cell phone. In the alley, he found a black cell phone and two bundles of money. Each bundle consisted of a folded-over stack with a $20 bill on top, a $20 bill on the bottom, and 100 singles, for a total of $140. He also found two fired cartridge cases in the alley and three live cartridges. He also lifted fingerprints from the outside of the car. He found a paper bag containing two plastic bags of marijuana inside a closet

in the Yuens' residence.

¶ 14 Officer Elizabeth Vera of the Chicago Police Department testified that on the day following the incident, she assisted in the execution of a search warrant at the apartment where defendant resided. There she photographed a firearm in a waist holster. A stipulation was then presented that a Glock 42 firearm with a six-round magazine, one live .380 auto cartridge, and a black holster were recovered from the apartment.

¶ 15 Officer Thomas Ellerbeck of the Chicago Police Department testified that no fingerprint ridge impressions were found on the Glock 42 firearm, the magazine, or the holster recovered from defendant's apartment, or on the BB gun found in the car.

¶ 16 Dr. Jon Gates of the Cook County Medical Examiner's Office testified to an opinion within a reasonable degree of scientific certainty that Magana's cause of death was multiple gunshot wounds and that the manner of death was homicide. He testified that Magana suffered an entrance gunshot wound at the left scalp and an exit wound at the right forehead, which would have been a fatal wound. He suffered a second set of gunshot wounds to his right arm. Neither wound showed evidence of close-range firing.

¶ 17 Detective Antonio Corral of the Chicago Police Department swabbed defendant's hands for gunshot residue on the day following the incident. Mary Wong, a forensic scientist with the Illinois State Police with expertise in gunshot residue, testified that the results of that gunshot residue test indicated that defendant "either discharged a firearm, was in the vicinity of a discharged firearm, or came in contact with a primer gunshot residue related item."

¶ 18 Aimee Stevens, a forensic scientist with the Illinois State Police specializing in firearms identification and examinations, testified that the recovered cartridge cases and bullet were fired from the recovered Glock 42 firearm. She testified that the live rounds recovered were of an

appropriate caliber to be fired from that firearm.

¶ 19 John Gorski, a forensic scientist with the Illinois State Police, testified that three of the fingerprints lifted from the exterior of the car matched the fingerprints of Eric Magana. One print matched the fingerprint of a person named Zachary Davidson. None matched the fingerprints of defendant or Carrasco.

¶ 20 Bill Cheng, a forensic scientist with the Illinois State Police, testified that none of the DNA profiles obtained from swabs of the BB gun, the Glock firearm, or the holster were suitable for comparison.

¶ 21 Detective Robert Sandoval of the Chicago Police Department was assigned to investigate the incident. When he arrived on scene, he observed a car crashed into a garage. Both its windows were partially rolled down, and it had apparent gunfire damage to the windshield on the passenger side. There was blood on the passenger seat and passenger-side door frame. A pellet gun was on the passenger-side floorboard. About three feet behind the car, he found two expended shell casings on the pavement. A live round was a few inches from the shell casings. Two bundles of currency and a black cell phone were also found nearby. A second live round was found on the cement of the gangway near the house. A third live round and a white cell phone were found in a carport across the alleyway from the car. He spoke to Wilson and Stanton Yuen inside their residence, and he observed a paper grocery sack containing two one-pound packages of marijuana. Detective Sandoval testified that two days after the incident, he took Carrasco's written statement with Assistant State's Attorney Sheri Bennet. He testified that Carrasco told him in that statement that defendant had reached into the car and swung a punch at Magana as he was reversing out of the parking spot. On cross-examination, he testified that Carrasco never told him that Magana had gotten out of the car or that a drug transaction had taken place outside the car. Further, he stated

that he asked Carrasco about the BB gun found in the car and that Carrasco had denied any knowledge of it.

¶ 22 Officer Leo Augle of the Chicago Police Department testified that he arrested defendant in the early morning hours following the incident. After learning defendant's name and address, he observed defendant leave his residence and enter the passenger side of a car. He stopped that car and asked defendant if he knew why he was being pulled over. Defendant responded, "Yes, I shot somebody." After Officer Augle testified, the State rested.

¶ 23 In the defense case, defendant testified that as of May 2015, he was involved in dealing cannabis. He also at that time owned two firearms, one of which was a Glock 42, for which he had a firearm owners identification card and a concealed carry license. He explained that he knew Magana by the nickname "Spooky." Prior to day of the incident, Magana had purchased cannabis from him on several occasions. The prior sales took place in the alley behind the home of his friends Stanton and Wilson Yuen. At about 11:00 p.m. on May 21, 2015, defendant received a call from Magana, who wanted to buy some marijuana. Magana told him that in about 20 minutes, he would be in the alley where they had dealt on the prior occasions. Defendant drove his car to the alley and parked in the back parking lot. In the trunk of his car was a grocery bag containing two pounds of marijuana. Defendant testified that he would normally sell this quantity of marijuana for $6000 to $8000. He was armed with his Glock 42, which he carried in a "belly band." He also had two cell phones on him, one white and one black.

¶ 24 Defendant went inside the Yuens' residence until he received a second phone call from Magana, who said he was two minutes away. Defendant went outside to the alley. Magana arrived in a red car and parked in a spot next to defendant's car. Magana was alone in the car. Defendant retrieved the bag of marijuana from his trunk and walked toward Magana, who never got out of

the car. He asked Magana if he had the money, and Magana showed him two bundles of cash. Defendant asked Magana to open the bundles of cash, at which point defendant felt someone poke a hard cylinder object against his back that felt like a pole or the barrel of a gun. A person behind defendant then told him to "throw everything in the car or I'll put a hole in your back." Defendant believed he was being robbed and that Magana had set him up. He was also in fear he might be killed.

¶ 25 Defendant threw the bag of marijuana toward the car window. It was too large to fit through the window, and it fell to the ground. Defendant also took his two cell phones out of his pockets and threw them toward Magana. Defendant then reached into his vest, took out his gun, and fired a shot straight ahead into Magana's car. Defendant testified that he was not intending to kill anybody, but he hoped to make a loud disturbance so he could get out of the situation. He knew there was a fair chance that by firing into the car, he might hit Magana. After he fired the gunshot, Magana reversed the car quickly. Defendant testified he was not at this point hanging onto the car or putting his arm into it, and he never attempted to punch Magana at any time.

¶ 26 As he fired the shot, defendant moved to his left to get away from the person behind him. He then saw the person who had been behind him run toward the car as it was reversing. The car eventually started to drive forward. Defendant then fired two more shots from his hip toward the car's passenger window. He then saw the car crash into the garage. Defendant grabbed the brown bag and ran through the gangway toward the front door of the Yuens' residence. He knocked, and Wilson answered. Defendant threw the bag inside their residence and told Wilson to drive him home, which he did. As they were in the car, he told Wilson he had shot somebody. Wilson asked him why, and defendant said, "He tricked me." Wilson dropped defendant off at his house, and he then asked his girlfriend to drive him to a gas station so he could buy cigarettes. On the drive to

the gas station, he was arrested.

¶ 27 On cross-examination, defendant testified that Magana never handed him the bundles of money, and he did not know that the bundles consisted mostly of singles. He testified that he spoke to detectives from the Chicago Police Department twice on the day following the incident. He agreed that he was given Miranda warnings prior to speaking to them. Defendant then agreed that he had made multiple statements to the detectives that were lies. First, he agreed that he had told them five times that he was the one buying marijuana from Magana. He agreed that he told them that he had brought $360 in cash to purchase the marijuana, in one bundle of money consisting of singles and twenties. He told them his girlfriend had driven him to the Yuens' house and that the reason his car was in the back of their house was because Wilson had taken it that morning. He told them that he never went back to the Yuens' house after the shooting. He told them that he had the marijuana with him when his girlfriend dropped him off and had put it by the front door of the Yuens' house. He also told them that he had grabbed the bag of marijuana as he was walking out to meet Magana. He disagreed that he had not mentioned to detectives during the interview that the person behind him had said, "I'll put a hole in your back." He also disagreed that he had shot at the car while it was driving away.

¶ 28 Following cross-examination, the trial court denied defendant's attorney's request to question defendant on the exculpatory portions of the two police interviews, specifically about the fact that he had repeatedly mentioned in those interviews that somebody had stuck something in his back. On redirect examination, defendant explained that he lied to the detectives about being the seller of the marijuana because he did not know how much trouble he was in, and he believed he would be in less trouble as a buyer than as a seller. He also lied about how he arrived at and left the Yuens' residence because he did not want to get them involved or into trouble.

¶ 29 The defense called Samuel DeArce, who testified to the incident in which he was robbed by Carrasco on October 25, 2013. On that day, DeArce received a ride from a friend who was also friends with Carrasco. Carrasco was in the back seat of the car. DeArce testified that after he got in the front seat of the car, Carrasco put what he thought was the tip of a gun barrel to the back of his head and robbed him of his phone, a pack of Swishers, and some rolling papers. The trial court sustained the State's hearsay objection to a question of the exact words Carrasco had used when he held a gun to his head.

¶ 30 Defendant called five character witnesses. Lisa Van testified that defendant was her cousin's boyfriend, and she had known him for about six years. She saw him weekly or biweekly on a social basis. In her opinion, defendant was a very peaceful person. Hai Hoang testified that he had been friends with defendant for about seven years and would see him weekly on a social basis. His opinion was that defendant was a peaceful person. Thuy Nguyen testified she had known defendant for six years, and he would come by her house at least once a week. Her opinion was that defendant was very peaceful. Mario DeCarlo testified that he had known defendant for about five years and saw him socially every day or every other day. His opinion was that defendant was a peaceful person. On cross-examination, the State asked each of these witnesses if they considered "a drug dealer armed with a loaded semi-automatic Glock firearm, peaceful?" Each time, an objection to this question was overruled. Van and Decarlo then answered yes. Hoang and Nguyen answered no.

¶ 31 Diana Lin testified that she was defendant's ex-girlfriend. She is also an attorney licensed in Illinois. Lin testified that she had known defendant for nine years, and they had dated on and off for about four years, during which time she would see defendant at least four or five times a week. Her opinion was that he was a peaceful person. She was asked on cross-examination if she

considered a drug dealer armed with a fully-loaded semiautomatic Glock to be peaceful, and she answered, "I think it's possible, yes." She was then asked on redirect to explain the basis for this answer. She stated that it would depend on whether a person had a concealed carry license for their weapon. She further testified that it was her understanding that applying for such a license was an involved process, but an objection to this testimony was sustained. Asked for the further basis for her opinion, she testified that the law made a distinction between whether someone was carrying a gun and whether that person was violent. An objection to this testimony was also sustained.

¶ 32 Assistant State's Attorney Sheri Bennet testified that she took Carrasco's written statement two days after the incident. She confirmed that during Carrasco's statement to her, he never told her that Magana had gotten out of the car to speak to defendant or that Magana had returned to the car from that conversation looking scared. He did use the word "weed" when describing what Magana was intending to purchase. He told her that defendant had swung a punch at Magana while he was in the car, that defendant was holding onto the car through the driver's side window, and that defendant's whole right shoulder was inside the car.

¶ 33 After the defense rested, the State called in rebuttal Detective Carlos Cortez of the Chicago Police Department. He testified that he interviewed defendant twice on the day following the incident and that the interviews were electronically recorded. He testified that during the interviews, defendant never told him that someone behind him had said, "I'll put a hole in your back." Defendant did tell him that "Spook came up to stick him," that "he had to drop everything, and then he pulls the gun, and he knows he's coming there to stick him." The State then published to the jury the portion of the electronic recording of the interview containing those statements by defendant.

¶ 34 On cross-examination, Detective Cortez stated that during the interview defendant never

described the object that was stuck against his back as a gun, but rather he described it as a pole, stick, or some other hard object. Detective Cortez was asked whether, over the course of the interviews, defendant said that maybe 30 or 40 times. The trial court overruled the State's objection to that question, and Detective Cortez answered that he did not think it was asked that many times. A sidebar was then ordered, in which the trial court stated that it would not allow defendant to elicit 30 or 40 prior statements made by defendant in the interviews that were consistent with his trial testimony that someone had come up behind him and stuck a hard object into his back. The trial court admitted the electronic recording of the interviews of defendant into evidence, to which defendant had no objection. The State then rested its rebuttal case.

¶ 35 In closing arguments, the State argued that defendant intentionally shot at Magana out of anger that Magana had tried to shortchange him on the money he was paying to buy two pounds of marijuana. Defendant's attorney argued that defendant had acted in self-defense after Magana and Carrasco had conspired to rob him of the marijuana without paying for it by Carrasco sticking what defendant thought was a real gun (but was actually the BB gun found in the car) into his back. Among his arguments, he argued that Carrasco was not a credible witness, that the shooting could not have occurred in the way the State contended it did if Carrasco was already inside the car at the time he was shot, and that the jury should consider Carrasco's prior aggravated robbery of DeArce as supporting the contention that Carrasco was the aggressor.

¶ 36 After closing arguments, the trial court instructed the jury. One of the instructions given was an unmodified version of Illinois Pattern Jury Instruction, Criminal, No. 3.16 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.16), involving character evidence. It informed the jury in part that defendant had "introduced evidence of his reputation for being a peaceful and law abiding citizen." In giving this instruction, the trial court had rejected a modified version of IPI Criminal

No. 3.16 tendered by defendant that stated defendant had "introduced opinion evidence that he's a peaceful person."

¶ 37 The jury was then sent to deliberate. During the discussion about what exhibits would be sent to the jury room, the trial court ruled over defendant's objection that the electronic recording of defendant's statement, which was four hours in total, used by the State only as impeachment, and never viewed by the jury during the trial, would not be given to the jury during deliberations.

¶ 38 The jury found the defendant guilty of second degree murder of Magana. It found him not guilty of attempted first degree murder of Carrasco. Defendant filed a posttrial motion for a new trial or for judgment *n.o.v.*, which was denied. Defendant was sentenced to a term of 12 years in the Illinois Department of Corrections. This direct appeal then followed.

¶ 39 II. ANALYSIS

¶ 40 A. Defendant's Statement to Detectives

¶ 41 Defendant's first argument on appeal is that the trial court erred by refusing to allow him to introduce the entirety of his recorded statement to the police once the State had introduced a portion of that statement. He alternatively argues that the trial court erred in refusing to admit certain portions of the statement. He contends that the admission of this evidence was proper under Illinois Rule of Evidence 106 (eff. Jan. 1, 2011) and the common law completeness doctrine.

¶ 42 Initially, we reject the State's argument that defendant forfeited review of this issue by failing to invoke this specific legal basis of admissibility at trial or in his posttrial motion. See *People v. Naylor*, 229 Ill. 2d 584, 592 (2008). While we agree that defendant's attorney never made a direct request to the trial court to publish any portion of defendant's video statement to the jury, he did make several arguments to the trial court to make use of defendant's statement and has therefore adequately preserved the issue for review.

¶ 43 Illinois Rule of Evidence 106 (eff. Jan. 1, 2011) provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is a partial codification of the common law completeness doctrine, which provides that if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context, so that a correct and true meaning is conveyed to the jury. *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 42.

¶ 44 The remainder of a writing, recorded statement, or oral statement is admissible under either Rule 106 or the common law doctrine only if it is necessary to prevent the trier of fact from being misled, to place the admitted portion in proper context so that a correct and true meaning is conveyed to the jury, or to shed light on the meaning of the evidence already received. *Id.* at ¶ 45. " ' "[A] defendant has no right to introduce portions of a statement which are not necessary to enable the jury to properly evaluate the portions introduced by the State." ' " *Id.* (quoting *People v. Caffey*, 205 Ill. 2d 52, 91 (2001) (quoting *People v. Olinger*, 112 Ill. 2d 324, 338 (1986))).

¶ 45 Here, through cross-examination of defendant, the State introduced evidence that during defendant's two recorded statements to the detectives, he falsely told the detectives (1) that he was buying marijuana from Magana, not selling it; (2) that he brought $360 in cash with him to purchase the marijuana; (3) that his girlfriend had driven him to the Yuens' residence; (4) that the reason his car was in the back of the Yuens' residence was because Wilson had taken it that morning; (5) that when his girlfriend dropped him off, he had the weed with him and had put it by the front door of the Yuens' residence; and (6) that as he was walking out to meet Magana, he grabbed the paper bag with the two pounds of marijuana in it and walked out of the house. He

admitted that he made some of these false statements multiple times during the interviews. Defendant also stated on cross-examination that he had told the detectives during the interviews that he heard someone say, "I'll put a hole in your back."

¶ 46 During a sidebar conference following the cross-examination of defendant, defendant's attorney stated that it was his position that once the State introduced part of the statement, the defense could "introduce the rest to complete the record." This was an incorrect statement of the law, as the State's mere introduction of part of the statement did not entitle defendant to introduce the remainder of it absent a showing that the portion introduced by the State was misleading or otherwise required context to be properly evaluated by the jury. *People v. Ward*, 154 Ill. 2d 272, 310-12 (1992).

¶ 47 This issue next arose when the State called in rebuttal Detective Cortez to perfect the impeachment of the defendant. Detective Cortez testified that he interviewed defendant two times on the same day. On direct examination, he testified as follows:

> "Q. And did the defendant in either of those interviews that you had with him, ever tell you that someone behind him said, I'll put a hole in your back?
>
> A. No.
>
> Q. Did the defendant ever tell you during the interview—I believe it was in the first—in the first interview that you had with him—that Spook came up to stick him. That he had to drop everything, and then he pulls the gun, and he knows he's coming there to stick him.
>
> He says he knows he's going to stick him. So, he was scared, too; and that's why he actually carries it. Otherwise—otherwise, he wouldn't carry it?
>
> A. That's correct."

Following this testimony by Detective Cortez, the State published to the jury the portion of defendant's recorded statement where defendant said this.

¶ 48 The following colloquy then occurred during cross-examination of Detective Cortez by defendant's attorney:

> "Q. *** Now, you testified that during the interviews, Kimman Waikong never told you that the person behind him said, I'll put a hole in your back, right?
>
> A. Yes.
>
> Q. However, he did tell you, that the person behind him—the person behind him, did stick an object in his back, which he felt to be a pole, or a gun, or something of the sort, correct?
>
> A. He never said a gun. He always said he stuck something behind me, like a pole or a stick.
>
> Q. Pole, or stick, or some sort of hard object, correct?
>
> A. Correct.
>
> Q. Okay. And in fact, over the course of the interviews, he told you that maybe 30, 40 times, did he not?
>
> MS. GRGUROVIC [(ASSISTANT STATE'S ATTORNEY)]: Objection.
>
> THE COURT: I'll allow that question. Overruled.
>
> Q. Didn't he?
>
> A. No, I don't think that was asked that many questions—that many times."

¶ 49 The trial court then called another sidebar conference, in which the following colloquy occurred:

"THE COURT: Where are you going with this?

MR. S. RICHARDS [(DEFENDANT'S ATTORNEY)]: I just wanted to establish that, numerous times, he said that somebody came up behind him, stuck a hard object, pole in his back, and asked him to give everything up.

* * *

THE COURT: So, how are you going to do this, is my question?

You, pointing out in the transcript, going through every single time this was allegedly said?

Where are you going with this?

He said it happened several times, and you're saying it's 30 or 40 times.

Where are you going with this?

MR. S. RICHARDS: Well, I think his recollection would be refreshed—would either—he either—he would list—if I—if I asked him these specific questions and answers, I think he's going to remember them, No. 1.

THE COURT: You're going to go through 40 different times?

It's been asked. It's been mentioned.

How do you intend to do this?

I'm just trying to figure this out.

MR. S. RICHARDS: Yes.

THE COURT: And what's the State's response?

MS. GRGUROVIC [(ASSISTANT STATE'S ATTORNEY)]: This is eliciting a prior consistent statement. The defendant already—already testified that he felt a hard object in his back. This is not impeachment. This is improper, and I am objecting.

THE COURT: Okay. A prior consistent statement. I allowed it, because the State did put in the fact that supposedly, he never elicited some type of a statement that someone behind him said they were going to put a hole in his back.

But you're going to put in 30 or 40 prior consistent statements?

You're just not going to—it came out that he—he answered to that regard, that he did say that.

And we're going to move on."

Before resting on rebuttal, the trial court admitted the electronic recording of the interviews of defendant into evidence, to which defendant had no objection. However, the defendant's attorney made no specific request to the trial court to publish all or any portion of the defendant's video statement to the jury during the trial.

¶ 50 On appeal, defendant directs this court's attention to approximately 20 instances in his recorded statement where he told the police that, immediately before the shooting, someone behind him stuck something against his back that felt like a pole and demanded that he throw the items in his possession into the car, and he acted out of fear because of this. Defendant argues that, under Illinois Rule of Evidence 106 and the completeness doctrine, he should have been permitted to introduce evidence of the number of times he made such statements to the detectives. He argues that the portions of his statement that the State introduced were "profoundly misleading" because these other statements by him were not also included. He argues that the State was allowed to impeach defendant about the numerous times he lied to the detectives and about the fact that he

never told them that someone had threatened to "put a hole in [his] back." He contends that the omission of these statements gave the false impression that he never told the police that someone had robbed him by sticking a hard object to his back, and the statements introduced by the State should not have been considered without the context of the numerous times he told the detectives about the attempted robbery.

¶ 51 We find no error in the trial court's determination that the portions of his statement defendant sought to introduce were inadmissible. As shown above, the trial court found that the defendant was attempting to introduce 30 or 40 instances during his statement to police where the defendant had made statements that were consistent with his trial testimony. "The general rule is that prior consistent statements of a witness are inadmissible for the purpose of corroborating the trial testimony of the witness, because they serve to unfairly enhance the credibility of the witness." *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 60. " 'The danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve.' " *Id.* (quoting *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985)). The two exceptions to this rule are (1) where the prior consistent statement rebuts a charge that the witness is motivated to testify falsely and (2) where the prior consistent statement rebuts an allegation of recent fabrication. *People v. Davis*, 2018 IL App (1st) 152413, ¶ 59. This court will not reverse a trial court's evidentiary ruling concerning a prior consistent statement absent an abuse of discretion. *Id.*

¶ 52 Here, defendant testified on direct examination that as he was talking with Magana, he felt something poke in his back that felt like a hard cylinder object, such as a pole or a barrel of a gun, and someone told him to throw everything in the car. He testified that he believed he was being

robbed and was in fear for his safety about the fact that he might be killed. Defendant was not impeached on cross-examination regarding this aspect of his testimony. Thus, we find that defendant, by seeking also to establish that "numerous times" he told the detectives that someone had come up behind him, stuck an object such as a pole in his back, and told him to give everything up, was merely attempting to elicit evidence that defendant made prior statements consistent with his trial testimony. This evidence did not qualify for either of the exceptions in which evidence of prior consistent statements is admissible. The trial court's exclusion of the evidence on this basis was not an abuse of discretion.

¶ 53 As to the argument that the defendant's statements should have been admitted under Rule of Evidence 106 or the common law doctrine of completeness, we agree with the State that the portions of defendant's statement that it introduced into evidence were not misleading and that defendant's additional statements to police were not necessary to enable the jury to properly evaluate those potions introduced by the State. Defendant admitted to making many statements to the detectives in his interview that he later agreed had been false. However, the fact that they were false statements does not make the State's introduction of them misleading. We reject defendant's argument that the omission of the statements he sought to use gave the jury the false impression that he never told the police that someone had robbed him by sticking a hard object to his back. Rather, testimony that defendant had made a statement to this effect was elicited from Detective Cortez on both direct and cross-examination. As the statements introduced by the State were not misleading, and defendant's additional statements were not necessary to enable the jury to properly evaluate those portions introduced by the State, the admission of defendant's statements was not required under Rule 106 or the doctrine of completeness. *Craigen*, 2013 IL App (2d) 111300, ¶ 45.

¶ 54 Although defendant never attempted to publish any portion of his video statement to the jury

during the trial, he contends that he sought to have the entirety of his recorded statement go back to the jury room for its use during deliberations. The trial court ruled that the video could not go back to the jury room, and defendant contends that the trial court erred in doing so.

¶ 55 The decision whether to allow jurors to take exhibits into the jury room is within the sound discretion of the trial court. *People v. McDonald*, 329 Ill. App. 3d 938, 947 (2002). This court will not reverse that decision unless there is abuse of discretion to the prejudice of defendant. *Id.* at 948.

¶ 56 In the trial court, the discussion about whether defendant's recorded statement would be sent to the jury room occurred as follows:

> "THE COURT: *** I'm, also, going to deny—I assume neither side is asking for it; but the four-hour statement made by this defendant, that was used by the State, to impeach his testimony, is in fact *** not properly admissible, not properly viewed by the jury. So, I'm going to deny that *suis sponte* [*sic*].
>
> MR. S. RICHARDS [(DEFENDANT'S ATTORNEY)]: Okay. And that would be denied over our objection.
>
> THE COURT: You're talking Carrasco, not your client?
>
> MR. S. RICHARDS: I'm talking about my client's [electronically recorded interview]. I tried a number of times to get the remaining disks in, and I was denied.
>
> THE COURT: Okay. All right. I think I ruled properly; and if I haven't, the Appellate Court will tell me otherwise."

¶ 57 We find no abuse of discretion in the trial court's determination that the defendant's entire recorded statement would not be sent to the jury room for use during deliberations. As we interpret

the trial court's comments, its basis for declining to send defendant's entire video statement to the jury room was that (1) the video was four hours long, (2) only a very short portion of it was actually published to the jury during the trial, and (3) it was admitted only for impeachment and not as substantive evidence. Thus, even though the video was admitted into evidence, the trial court properly declined to send the entire video to the jury room, where the jury would have received it without guidance from the court or attorneys about how it could properly be used or interpreted as part of the jury's deliberations.

¶ 58 B. Evidence of Carrasco's Prior Conviction for Aggravated Robbery

¶ 59 Defendant next raises a series of arguments concerning the evidence pertaining to Carrasco's prior conviction for aggravated robbery. Prior to trial, the trial court granted defendant's initial motion *in limine* to admit certain evidence of this conviction as *Lynch* material to support the inference that Carrasco was the aggressor and that defendant had acted in self-defense. See *Lynch*, 104 Ill. 2d at 199-200. According to that motion, in October 2013, Carrasco and another individual planned to rob Samuel DeArce after he got into a vehicle with them. When DeArce got into the front seat, Carrasco, who was in the back seat, held what DeArce described as a cold metal object to the back of his head. Carrasco then said, "Empty out all of your pockets or I'm gonna blow your f***ing brains out." DeArce gave Carrasco his cell phone and fled the vehicle. For this, Carrasco pled guilty to aggravated robbery.

¶ 60 After the trial court granted this motion, defendant filed a second motion *in limine* seeking to use the same evidence for the additional purpose of showing Carrasco's intent, motive, and *modus operandi*. At the hearing on this motion, defendant's attorney stated that this motion was "really a question just for arguments," since the evidence of his conviction was being admitted for impeachment and as *Lynch* material. He argued that in addition to being admissible for these

purposes, it should also be admitted for the purpose of showing Carrasco's *modus operandi*, because of the striking factual similarities between the robbery of DeArce and the defendant's story of what occurred in the incident at issue. The trial court denied the motion, concluding that any argument about Carrasco's *modus operandi* was simply an argument that Carrasco had a propensity to commit robbery, and this was not proper argument. There was no discussion at the hearing of use of the evidence to argue intent, motive, or for any other purpose.

¶ 61 The State contends that defendant forfeited review of two of his arguments by failing to include them in his posttrial motion. First, the State contends defendant has forfeited his contention that the trial court erred by limiting his presentation of *Lynch* material to a single witness, DeArce, and barring him from putting on evidence of Carrasco's statement to police. Second, it argues that he has forfeited his contention that the trial court erred by sustaining a hearsay objection that prevented DeArce from testifying at trial to the exact words that Carrasco allegedly used when he put the object to his head.

¶ 62 It is well-established that both a timely objection and a written posttrial motion raising the issue are required to obtain appellate review of alleged errors that could have been raised during trial. *Naylor*, 229 Ill. 2d at 592. The failure to include an issue in a posttrial motion results in the issue being procedurally defaulted. *Id.* Defendant filed no reply brief in this court, and therefore he has not responded to the State's forfeiture argument. We have reviewed defendant's posttrial motion and agree that these issues were not included. As defendant has advanced no argument that these issues are reviewable despite this forfeiture, we will not further consider these forfeited claims. See *People v. Nelson*, 235 Ill. 2d 386, 437 (2009).

¶ 63 Defendant contends that the trial court erred by denying his second motion *in limine* to admit the underlying facts of Carrasco's conviction for the purposes of showing intent, motive, and

modus operandi. As stated above, this evidence was admitted for purposes of impeachment of Carrasco and as *Lynch* material to support defendant's theory that Carrasco was the aggressor and that defendant had acted in self-defense. Thus, defendant is essentially arguing that he should have been allowed to use this evidence as a basis for making these additional arguments to the jury. We first address its use for showing *modus operandi*, which was the purpose that defendant's attorney solely focused on at oral argument on the motion *in limine*.

¶ 64 Defendant points out that in this context, he is attempting to use the facts of Carrasco's prior conviction as "exculpatory other-crimes evidence." As such, the generally-applicable rationale for the exclusion of other-crimes evidence—that its admission prejudices the defendant—is not a concern. See *People v. Cruz*, 162 Ill. 2d 314, 350 (1994). The general rule is that evidence of crimes for which a defendant is not on trial is inadmissible if its relevance is merely to establish a defendant's propensity to commit crime. *People v. Manning*, 182 Ill. 2d 193, 213 (1998). Such evidence overpersuades a jury and presents the risk of conviction on the basis that the jury feels defendant is a bad person deserving punishment. *Id.* However, other-crimes evidence is admissible for the purpose of proving intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003); see also Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Even where other crimes-evidence is offered for a permissible purpose, such evidence will not be admitted if its prejudicial effect substantially outweighs its probative value. *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010).

¶ 65 By contrast, "in cases where a defendant seeks to introduce other-crimes evidence to exculpate himself, there is usually no need for the trial court to be concerned with balancing probative value against prejudicial effect." *Cruz*, 162 Ill. 2d at 350. Exculpatory other-crimes evidence is admissible "where the evidence contains 'significant probative value' to the defense

without any reference to the element of prejudice." *Id.* (quoting *People v. Tate*, 87 Ill. 2d 134, 143 (1981)). However, the fact that a defendant seeks to introduce other-crimes evidence as exculpatory evidence does not relax the degree of identity between the crimes being compared. *Id.* at 351. Instead, although the consideration of prejudice is dispensed with such a defendant offers such evidence, " 'for such evidence to have significant probative value' under *modus operandi*, there must be a substantial and meaningful link between the offenses being compared, regardless of which party offers the evidence." *Id.* (quoting *Tate*, 87 Ill. 2d at 143).

¶ 66 Where other-crimes evidence is offered to show *modus operandi*, "a 'high degree of identity' between the facts of the crime charged and the other offense has been required." *Id.* at 349 (quoting *People v. Illgen*, 145 Ill. 2d 353, 373 (1991)). While some degree of dissimilarity between the offenses is allowed, "*modus operandi* refers to a pattern of criminal behavior so distinctive that separate crimes are recognized as the handiwork of the same wrongdoer." *Id.*; see also *People v. Kimbrough*, 138 Ill. App. 3d 481, 486-87 (1985).

¶ 67 Here, we cannot say that the requisite high degree of identity existed between Carrasco's robbery of DeArce and defendant's testimony of what occurred in this case, or that the two incidents are so distinctive as to be recognized as the handiwork of the same wrongdoer. One involved the robbery of a cell phone from a teenage acquaintance by luring him into a car, while the other purportedly involved an attempted robbery of a substantial quantity of marijuana from an adult during a drug transaction in an alley by walking up behind him. Thus, we find no error by the trial court in refusing to allow defendant to use this evidence to argue Carrasco's *modus operandi*.

¶ 68 We reiterate again, though, that this evidence was fully admitted, despite the trial court's ruling that defendant could not use it for the purpose of arguing that Carrasco had acted consistent

with his "*modus operandi*." It was admitted as *Lynch* material, meaning defendant had the right to use this evidence to show that Carrasco had a violent character and to argue that this supported his theory that Carrasco was the initial aggressor. See *Lynch*, 104 Ill. 2d at 199-200. It appears to us that, despite being unable to argue "*modus operandi*," defendant did have a full opportunity to use this evidence to make an extremely similar argument under *Lynch*. Thus, we do not see how defendant suffered prejudice as a result of his inability to argue *modus operandi*.

¶ 69 Finally, although defendant's written motion *in limine* sought to use the same evidence to argue intent and motive, we agree with the State that he never requested a ruling from the trial court about whether the evidence could be used for those purposes. Also, his brief on appeal argues that this evidence could additionally be used to show identity, but it does not appear that this argument was raised in the trial court at all. The only purpose for which defendant requested a ruling from the trial court was its use to show *modus operandi*. Use of this evidence to show *modus operandi* is distinct from use of it to show intent, motive, or identity. See *People v. Davis*, 248 Ill. App. 3d 886, 896 (1993). Defendant's failure to obtain a ruling from the trial court on the use of this evidence for these other specific purposes results in forfeiture of his right to obtain appellate review of the issue. *People v. Neal*, 142 Ill. 2d 140, 151-52 (1990).

¶ 70 C. Cross-Examination of Character Witnesses

¶ 71 Defendant presented the testimony of five character witnesses, each of whom testified on direct examination to having an opinion that defendant was a peaceful person. Each witness was then asked on cross-examination whether he or she considered "a drug dealer armed with a loaded semi-automatic Glock firearm, peaceful?" The trial court overruled repeated objections when this question was asked. Defendant argues on appeal that the trial court erred in doing so. He contends that character witnesses may not be questioned on cross-examination about specific instances of

misconduct by a defendant.

¶ 72 Prior to the adoption of the Illinois Rules of Evidence, the general rule was that character could be proved only by evidence of a defendant's general reputation in the community for characteristics relevant to the crime for which the defendant was charged, and the personal opinion of an individual witness was not competent evidence of either character or reputation. *People v. Nyberg*, 275 Ill. App. 3d 570, 583 (1995). Because a person's reputation is determined largely by what the group as a whole thinks of him, courts consistently held it improper to permit a character witness to be cross-examined as to his or her own knowledge of the defendant's particular acts of misconduct. *Id.* Rather, cross-examination was confined to disparaging rumors and conversations that the witness had heard in the community and that negated the character sought to be established. *Id.*

¶ 73 Illinois Rule of Evidence 405(a) (eff. Jan. 1, 2011) abrogated the rule prohibiting defendants from introducing character evidence through opinion testimony and instead expressly permitted the practice. See *People v. Garner*, 2016 IL App (1st) 141583, ¶ 30. Rule 405(a) states, "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion." Ill. R. Evid. 405(a) (eff. Jan. 1, 2011).

¶ 74 Defendant argues that, despite the adoption of Rule 405(a), the rule barring the cross-examination of a character witness about specific acts of misconduct remains. He points out that the committee commentary to the Illinois Rules of Evidence demonstrates that the addition of opinion evidence as a method of proving character was a recommended change to Illinois law, which the Illinois Supreme Court approved. Indeed, the committee commentary makes clear that this was an area in which the Special Supreme Court Committee on Illinois Evidence

recommended and the Illinois Supreme Court approved a change in Illinois evidence law "(1) where the particularized evidentiary principle was neither addressed by statute or specifically addressed in a comprehensive manner within recent history by the Illinois Supreme Court, and (2) where prior Illinois law simply did not properly reflect evidentiary policy considerations or raised practical application problems when considered in light of modern developments and evidence rules adopted elsewhere with respect to the identical issue." Ill. R. Evid., Committee Commentary, § 4 (eff. Jan. 1, 2011).

¶ 75 One of the evidence rules adopted elsewhere with respect to this issue is Federal Rule of Evidence 405(a) (eff. Dec. 1, 2011), which similarly allows evidence of a person's character or a character trait to be proven by testimony about the person's reputation or by testimony in the form of an opinion. However, the federal rule contains a second sentence not found in the Illinois rule: "On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct." *Id.* Defendant argues that the fact that this second sentence exists in the federal rule but was not adopted as part of the Illinois rule is a strong indication that the Illinois Supreme Court intended that the traditional prohibition on cross-examination of character witnesses about specific instances of misconduct is unchanged.

¶ 76 We do not accept defendant's argument. We do not believe that the fact that Illinois Rule of Evidence 405(a) neither expressly allows nor prohibits the cross-examination of a character witness regarding specific instances of a defendant's conduct indicates that such questioning is flatly prohibited. When a character witness testifies to his or her opinion of the defendant's character, as opposed to testifying about the defendant's reputation in the community, the rationale for prohibiting cross-examination concerning the witness's knowledge of particular acts of misconduct is absent. That rationale is that a person's reputation is determined by what the relevant

group as a whole thinks of him, not by a specific witness's opinion. *Nyberg*, 275 Ill. App. 3d at 583. By contrast, where a witness expresses his or her opinion about a defendant's character, cross-examination of that witness about specific instances of misconduct may be appropriate to test the bases of that opinion or to undercut it. Rather than a flat prohibition, we believe that, as with most issues involving the extent of cross-examination, this is a matter vested in the sound discretion of the trial court. See *People v. Stevens*, 2014 IL 116300, ¶ 16. Here, we conclude that the trial court did not abuse its discretion in overruling the objection to the question posed to defendant's character witnesses on cross-examination.

¶ 77 On a related matter, defendant argues that the trial court erred by not allowing one of his character witnesses, Diana Lin, to fully explain the bases for her opinion that he was peaceful. However, this argument is forfeited for two reasons. First, defendant did not include this issue in his posttrial motion, and he makes no argument that it can be reviewed as plain error. See *Nelson*, 235 Ill. 2d at 436-37. Second, although defendant sets forth Lin's testimony, he fails to argue this issue. His entire argument consists of only one statement that the trial court erred without any legal analysis, and he fails to cite any legal authority in support of the claim. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Therefore, this issue will not be considered.

¶ 78 D. Jury Instruction on Character Evidence

¶ 79 Finally, defendant contends that the trial court erred by instructing the jury with an unmodified version of IPI Criminal No. 3.16 tendered by the State and by refusing the modified version of this instruction tendered by defendant. As discussed above, defendant presented evidence of his character through five witnesses who testified to their opinion, not to evidence of his reputation. Each of them testified on direct examination that they held the opinion that defendant was a peaceful person. None of them were asked or provided any opinion about whether

defendant was also "law-abiding."

¶ 80 IPI Criminal No. 3.16, titled "Evidence of Defendant's Reputation," states in full as follows:

> "The defendant has introduced evidence of his reputation for [(truth and veracity) (morality) (chastity) (honesty and integrity) (being a peaceful and law-abiding citizen) (____)]. This evidence may be sufficient when considered with the other evidence in the case to raise a reasonable doubt of the defendant's guilt. However, if from all the evidence in the case you are satisfied beyond a reasonable doubt of the defendant's guilt, then it is your duty to find him guilty, even though he may have a good reputation for [(truth and veracity) (morality) (chastity) (honesty and integrity) (being a peaceful and law-abiding citizen) (____)]." IPI Criminal No. 3.16 (approved Oct. 17, 2014).

In this case, the trial court gave a version of this instruction that included the phrase "being a peaceful and law-abiding citizen" in the first and last sentences. In doing so, the trial court rejected defendant's modified version of IPI Criminal No. 3.16, which substituted "opinion" for "reputation" and omitted the reference to his being a "law-abiding citizen." Defendant's tendered instruction stated as follows:

> "Defendant introduced *opinion* evidence *that he's a peaceful person*. This evidence may be sufficient when considered with the other evidence in this case [to] raise a reasonable doubt of defendant's guilt. However, if from all the evidence in this case you are not satisfied beyond a reasonable doubt of defendant's guilt, then it is your duty to find him [not] guilty. However, if from all the evidence in the case you are satisfied beyond a reasonable doubt of defendant's guilt, then it is your duty to find him guilty even if there is *opinion* evidence *that he is a peaceful person*." (Emphases added.)

¶ 81 In the trial court, defendant's attorney argued that it was appropriate to omit the phrase "law

abiding" from the pattern instruction, as defendant had not introduced any opinion evidence that he was a law-abiding person. He conceded the evidence was to the contrary, as defendant had admitted to selling marijuana at the time of the incident.

¶ 82 In rejecting defendant's tendered instruction and accepting the State's instruction, the trial court stated that it was unaware of any case law that the character trait contemplated by the instruction was merely one of being peaceful, as opposed to one for being peaceful and law-abiding. The trial court stated that it recognized why defendant had omitted the phrase "law abiding" in the proposed instruction, but it felt that without a case on point stating that it should not use the pattern instruction, its mandate was to give the unmodified version of that instruction. Defendant contends that this was error on the part of the trial court.

¶ 83 In a criminal case, a trial court is required to use the Illinois Pattern Jury Instructions, Criminal, if those instructions are applicable to the facts and law of the case and correct statements of law. *People v. Rodriguez*, 387 Ill. App. 3d 812, 822 (2008); Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013). Although the pattern instructions are not themselves law, and they are open to challenge if they are inaccurate statements of the law, the pattern instructions are mandatory if they are applicable and accurate. *Rodriguez*, 387 Ill. App. 3d at 822. The question of whether to give a particular jury instruction is within the province of the trial court, and a reviewing court will not reverse a trial court's refusal of a nonpattern jury instruction absent an abuse of discretion. *People v. Garcia*, 165 Ill. 2d 409, 432 (1995). Further, a reviewing court will not reverse a trial court even for giving a faulty instruction unless the instruction clearly misled the jury and resulted in prejudice to the defendant. *Rodriguez*, 387 Ill. App. 3d at 821 (citing *Shultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002)).

¶ 84 Defendant argues that the unmodified version of IPI Criminal No. 3.16 given by the trial

court did not accurately state the law because it informed the jury that he had introduced "evidence of his reputation" for being peaceful when he had actually submitted "opinion evidence" that he was peaceful. He argues that the unmodified jury instruction does not conform with Illinois Rule of Evidence 405(a) (eff. Jan. 1, 2011), which allows character to be proved either by testimony as to reputation or by testimony in the form of an opinion.

¶ 85 Defendant also argues that the requirement in IPI Criminal No. 3.16 that the jury be instructed that a person who asserts that he is "peaceful" must also assert that he is "law-abiding" does not conform to the law. He contends that the character trait pertinent to a charge of first-degree murder is that of being peaceful, but a person can be peaceful and still break the law in nonviolent ways, such as by selling marijuana. He further cites several cases in which the appellate court mentioned a defendant putting on evidence of a character trait of being peaceful without also mentioning the trait of being law-abiding, although none of the cases involved an issue similar to that presented here. See *e.g.*, *People v. Devine*, 199 Ill. App. 3d 1032, 1037 (1990) (mentioning defendant's testimony that he was a peaceful person).

¶ 86 While defendant's arguments are not wholly without merit, we do not fault the trial court for giving an instruction that conformed to the language of the pattern instruction. The instruction given was an accurate statement of the law, although its language may not have strictly recited the nature of the evidence defendant presented the case. However, even if we found some error in the use of the phrases "evidence of his reputation" or "law-abiding" in the instruction, we do not see how the instruction given misled the jury or resulted in prejudice to the defendant. Defendant argues that the trial was a credibility contest about whether he or Carrasco was the initial aggressor, and in doing so the jury had to weigh Carrasco's history involving aggravated robbery against the testimony of defendant's character witnesses that they knew him to be a peaceful person. He argues

that by "giving an instruction which referred to a form of character evidence not offered, omitting the form of character actually offered, and requiring [defendant] to offer a character trait which did not apply to him, the trial court eviscerated this testimony." Defendant does not explain this argument any further, and we fail to see how the instruction "eviscerated" the testimony of his character witnesses. All five of them testified to their opinion that he was a peaceful person, and there was no confusion in the evidence that defendant admitted to selling marijuana and was therefore not fully law-abiding. The instruction given did not undermine this testimony, and we do not believe there was any way this instruction could have affected the verdict in this case. Thus, if any error occurred in the giving of this instruction, it was harmless.

¶ 87 III. CONCLUSION

¶ 88 For the foregoing reasons, defendant's conviction is affirmed.

¶ 89 Affirmed.