2011 IL App (2d) 091061-U
No. 2-09-1061
Order filed November 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-1702
MARQUIS D. THOMAS,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

Held: Defendant's first-degree murder conviction is affirmed because (1) defendant was proved guilty beyond a reasonable doubt; (2) the trial court did not abuse its discretion in declining to send to the jury a security videotape showing defendant at a hospital around the time of the offense; (3) the court did not err in admitting the testimony of three eyewitnesses who identified defendant as the offender; (4) the court did not err in excluding an alleged confession by a juvenile who later recanted the statement; and (5) the court did not err in refusing to instruct the jury regarding the bias of a witness who also had been arrested and charged with an unrelated offense.

¶ 1 A jury found defendant, Marquis D. Thomas, guilty of the first-degree murder of Lavontaye Nunn (see 720 ILCS 5/9-1(a)(1) (West 2010)), and the trial court imposed a 55-year prison term.

On appeal, defendant argues that (1) he was not proved guilty beyond a reasonable doubt because

he did not match the description of the offender; (2) the trial court abused its discretion in declining to give the jury a security videotape that purportedly showed defendant at a hospital around the time of the offense; (3) the court erred in refusing to suppress the testimony of three eyewitnesses who identified defendant as the offender; (4) the court erred by excluding the statement "I did it" made by N.H., a juvenile who recanted the statement; and (5) the court erred by refusing to instruct the jury regarding the bias of a witness who had been arrested and charged with an unrelated offense. We affirm.

¶ 2 FACTS

¶ 3 The shooting occurred on the central walkway of a courtyard on the 1500 block of Birch Court in Rockford. The block has two long rectangular apartment buildings that run north and south and are separated by a grassy central courtyard. The cental walkway runs north and south through the middle of the courtyard. To the west of the west building is Garden Court Street and to the east of the east building is Birch Court Street. The area is bordered on the north by Buckbee Street and on the south by 15th Avenue.

¶ 4 On the evening of April 3, 2007, Lavontaye and Eva Pennie were talking on the central walkway near 1504 Birch Court when a man walked up to them and began shooting. A bullet grazed Eva's face, and Lavontaye was hit several times. Lavontaye crawled south a short distance to where his body was found on the sidewalk between 1511 Birch Court, which is in the west building, and 1510 Birch Court, which is in the east building. The pathologist testified that the cause of death was brain trauma caused by gunshot wound. Lavontaye was shot twice each in the head and torso and once in the right arm. Shell casings found at the scene matched those removed from Lavontaye's body.

¶ 5 Ms. Minishia Harris lived at 1510 Birch Court on April 3, 2007. She moved out of the housing project by the end of May 2007 because she was scared of the people around the Blackhawk Projects, specifically because she had witnessed the murder in this case. Minishia testified that, at 9:15 p.m., she heard shooting and looked out her front window. Minishia was 10 to 15 feet from the scene and saw "a boy crawling, and I seen [*sic*] someone standing over him shooting." The shooter was wearing a black hoodie sweatshirt, and the hood fell down so Minishia could see his face. Minishia identified defendant in court as the offender. Minishia saw defendant run and heard the noise from a car that she identified as belonging to "Fo' Pumpkin." Minishia called 911. Minishia previously had seen defendant hanging around with Fo Pumpkin.

¶ 6 Minishia admitted that, when she was interviewed on the night of the shooting, she did not tell Detective Eric Harris what she had seen. Minishia testified that she was terrified about what happened and was scared of Fo' Pumpkin and the people he hung around. Minishia testified that she was very concerned because she saw defendant observing her apartment a couple weeks after the murder.

¶ 7 On cross-examination, Minishia testified that she was not paying attention to whether the shooter wore long or short pants or what kind of shoes he wore because she was not looking down or concentrating on what the person was wearing. Minishia testified that the shooter wore his hair in braids with a "do-rag" on the night of the shooting. Minishia saw the shooter run west toward Garden Court and enter a car that drove north on Garden Street toward Buckbee Street.

¶ 8 Minishia testified that she saw the police chasing defendant and Tommie Moore through the projects on April 29, 2007, and that she saw the police arrest them. Later that day, Minishia called the police and told them that they had arrested the person who had shot Lavontaye. Minishia acknowledged that, from 1999 to 2004, she had a criminal history including two retail thefts, an

aggravated battery, a bad check, State benefits fraud, forgery, and financial identity theft. Minishia had no convictions since that time.

¶ 9 Rockford Police Officer Michelle Bootz testified that she was on patrol at the Blackhawk Projects on the evening of April 29, 2007, when she arrested N.H. and Tommie Moore. Officer Bootz testified that another officer arrested defendant brought him to where N.H. and Moore were in custody and awaiting transport to the police station.

¶ 10 Ms. Nikita Bernel-Hill testified that she lived at 1407 Birch Court, which was north of the crime scene. Nikita heard gunshots, went to her children's room, looked out the window, and saw defendant run past. Defendant was about 10-15 feet away when Nikita saw him. Defendant was wearing a black hoodie and had a gun in his waistband. Defendant bent down to pick a telephone off the ground. Nikita saw defendant run east toward Birch Court and get into Fo' Pumpkin's car, which drove south on Birch Street toward 15th Avenue. Nikita testified that, while she was not sure, it looked like Tommie Moore, who was also known as "Trapper," was driving the car. Nikita called the police and told them that she heard shots but told them not to come to her house because she feared the people in the Blackhawk Projects.

¶ 11 Nikita further testified that, some time after the shooting, she encountered defendant when they both were being held in jail. Defendant threatened Nikita by telling her that he knew where her grandparents lived, and he mentioned the address. Nikita testified that defendant's mother offered her $5,000 to not testify at defendant's trial. On cross-examination, Nikita admitted that, on May 14, 2007, she told the police that the shooter was wearing a black hoodie, black jeans, and a baseball cap with the letter "B" on it.

¶ 12 Eva testified that she also lived at the Blackhawk Projects on the date of the shooting. Eva was standing on the sidewalk with Lavontaye, who she knew as "Face." Someone ran up and shot

Lavontaye repeatedly, and Eva ran west toward Sun Court Street and looked back. Eva did not identify defendant in court as the shooter. Eva did not speak with the police on the night of the shooting because she was scared, but she spoke with them the next day. Eva admitted that she had omitted certain information from her statement that day because she was scared.

¶ 13 Detective Eric Harris testified that he spoke with Eva on May 16, 2007, regarding the shooting. Detective Harris created a photographic lineup and showed it to Eva, who identified defendant as the person who shot and killed Lavontaye. Eva also gave Detective Harris a written statement in which she identified defendant as the person who she saw shoot the victim and who was the same person whom she identified in the photographic lineup. Eva signed and dated photographs used in the lineup. Eva's identification of defendant as the shooter was admitted as substantive evidence. The photograph of defendant used in the lineup was taken on April 29, 2007, which was about three weeks after the offense.

¶ 14 Eva testified that she remembered giving the police another statement on May 16, 2007, and she said that statement was truthful. Eva admitted that she told the police that she saw who shot Lavontaye, but she testified at trial that she was not sure who shot Lavontaye and that she could not remember who she said had shot him. Eva also testified that she remembered being shown photographs and identifying someone, but she did not remember that the person she identified was defendant. Eva testified that defendant wore his hair in braids.

¶ 15 Eva acknowledged that, in August 2008, she had talked with an Assistant State's Attorney and a detective, telling them that she was afraid for her life and she had been beaten and told to keep her mouth shut about the murder. Eva identified the written statement that she had given the police and testified that the statement was truthful. Despite that, she again testified that she did not see the person who shot Lavontaye in court.

¶ 16 Defendant presented an alibi defense through the testimony of Ms. Kimberly Keys as well as the security videotape from the Emergency Room of Swedish-American Hospital. Defendant's theory is that he could not have committed the murder because he was at Swedish-American Hospital attempting to visit a friend around the time of the shooting. He also argues that the videotape shows that he was wearing different clothing than the offender.

¶ 17 Kimberly testified that she "vaguely" remembered some of the events of April 3, 2007. Kimberly recalled that she was in her home on Seminary Street in the Blackhawk Projects on the night of the shooting. Defendant had spent the day going back and forth between homes of Kimberly and her next door neighbor, who was Pumpkin's sister. Kimberly, defendant, Ms. Demari Ingram, and Mr. Tavares Daniels left Kimberly's home and drove to Swedish-American Hospital about 9:39 p.m. Kimberly did not identify the friend. Tavares drove the car with defendant as a front seat passenger and the two women as rear seat passengers. Kimberly described Tavares' car as a navy blue "bubble" car with exhaust pipes that caused the car to be loud but not out of the ordinary. Kimberly admitted that the exhaust system gave the car a distinctive sound.

¶ 18 Kimberly testified that, when the foursome arrived at Swedish-American Hospital, they went to the front door but could not to open it. They walked around the building to the Emergency Room in the rear, where they were told they could not visit their friend. The foursome waited five minutes and left in Tavares' car.

¶ 19 The trial court admitted a copy of the security videotape from the Emergency Room of Swedish-American Hospital. The videotape was played in open court for the jury. The parties stipulated that the videotape and the time shown on it were accurate and that the videotape was recorded 12 minutes after Officer Aaron Lesmeister said he was dispatched to the scene. Kimberly

testified that the videotape showed her, Demari, Tavares, and defendant in the Emergency Room lobby.

¶ 20 On cross-examination, Kimberly admitted that initially she told the police that she never left her home on April 3, 2007, and that she changed her story when she was told about the surveillance videotape. Kimberly also acknowledged that, in April 2007, she and defendant had begun a sexual relationship and that she and Demari had smoked marijuana on the night of the shooting.

¶ 21 ANALYSIS

¶ 22 A. Sufficiency of the Evidence

¶ 23 Initially, defendant argues that he was not proved guilty beyond a reasonable doubt because the evidence established that the offender was wearing long pants and defendant was wearing knee-length short pants on the night of the shooting. When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, a reviewing court does not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "When reviewing the sufficiency of the evidence, 'the relevant question is whether, after viewing 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.' " (Emphasis in original.) *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). This standard applies in all criminal cases, regardless of the nature of the evidence. *Cunningham*, 212 Ill. 2d at 279. "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280.

¶ 24 Our duty is to carefully examine the evidence while giving due consideration to the fact that the court and jury saw and heard the witnesses. The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541. It is the province of the fact finder to assess the credibility of witnesses, weigh the evidence, decide what inferences it supports, and settle any conflicts in it. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). While the credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive. We will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. *Smith*, 185 Ill. 2d at 542.

¶ 25 The evidence presented at trial proved defendant guilty beyond a reasonable doubt of first-degree murder. Three eyewitnesses identified defendant as the person who shot the victim. Minishia testified that she had seen defendant around the Blackhawk Projects both before and after the murder. Minishia testified that, from a distance of 10 to 15 feet, she observed defendant running from the crime scene with a handgun in his waistband shortly after she heard shots. Nikita also identified defendant in court as the offender and testified that she was threatened by defendant after the murder and that defendant's mother offered her $5,000 to not testify against defendant. While Eva failed to make an in-court identification of defendant, she also testified that she was scared, had been beaten, and was threatened not to testify in this case. Also, Eva verified the truthfulness of a statement to Detective Harris in which she identified defendant as the offender and picked him from a photographic lineup. Detective Harris offered testimony that corroborated Eva's pretrial identification of defendant.

¶ 26 Defendant emphasizes a discrepancy in the testimony about the offender's appearance. Defendant points out that the jury heard conflicting evidence about whether the offender wore a "do-

rag" or a baseball cap and whether he wore short or long pants. Defendant argues that he could not be the offender because no one testified that the shooter wore short pants that night, and the security videotape taken about 12 minutes after the police were dispatched to the crime scene showed that defendant was wearing short pants at the hospital.

¶ 27 Even though two of the three eyewitnesses did not specify the length of pants the offender wore, the absence of this detail does not render the verdict so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. Moreover, there existed the possibility that defendant changed from long pants into short pants after the shooting. Officer Lesmeister testified that he was dispatched to the scene at 9:26 p.m., and he arrived three to five minutes later. Officer Lesmeister followed the ambulance carrying Lavontaye and arrived at the Swedish-American Hospital at 9:42 p.m. The jury heard evidence that Detective Schroder, driving 30 miles-per-hour and stopping as required by all traffic signals, timed the route from the Blackhawk Projects to Swedish American Hospital to be only six to eight minutes.

¶ 28 Even if Nikita was accurate in telling the police that the offender wore long pants and defendant was videotaped while wearing short pants at the hospital, there is nothing that prevented defendant from changing clothes and being driven from the murder scene between 9:26 p.m., when the police were dispatched, and 9:38 p.m., when the videotape at the hospital was recorded. Furthermore, despite the inconsistencies between the testimony of defendant's witness, Kimberly, and the State's witnesses, Eva, Nikita, and Minishia, the relative credibility of the witnesses was presented and argued to the jury. The guilty verdict illustrates that the jury chose to believe the testimony of the three eyewitnesses who independently testified that defendant was the person who shot and killed Lavontaye.

¶ 29 Defendant argues that the evidence is insufficient to convict because the State did not establish that defendant did not change from long pants to short pants after the murder. However, the State is not required to exclude every reasonable hypothesis of innocence. See *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). "Examining the trial evidence in the light most favorable to the State, we believe a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See *People v. Jordan*, 218 Ill. 2d 255, 270 (2006).

B. Hospital Security Tape

¶ 30 Defendant alternatively argues that, even if the evidence supports the conviction, several trial errors entitle him to a new trial. Defendant argues that the trial court committed reversible error in refusing to give the jury the security videotape that showed him at the hospital around the time of the shooting. Defendant contends that this error was compounded when the trial court denied the jury's request during deliberations to view the videotape. Defendant claims that the videotape supports his alibi defense that his presence at the hospital proves he could not have committed the murder.

¶ 31 "The decision of whether to allow jurors to take exhibits into the jury room is left to the discretion of the circuit court, whose decision will not be overturned absent an abuse of that discretion to the prejudice of defendant." *People v. Rogers*, 123 Ill. 2d 487, 516 (1988); *People v. Gomez*, 236 Ill. App. 3d 283, 293 (1992).

¶ 32 Defendant cites cases in which reviewing courts determined that the trial courts did not abuse their discretion in giving the jury an exhibit during deliberations. However, defendant fails to identify a case in which the decision to *not* allow an exhibit to be given to the jury was found to be an abuse of discretion. The relevant issue is not whether sending an exhibit to a jury is an abuse of discretion but whether *not* sending the videotape to the jury in this case warrants a new trial.

¶ 33 Similar to defendant in this case, the defendant in *Gomez* argued that the trial court erred in refusing to send photographic exhibits to the jury room during deliberations. The record showed that the trial judge did not send the photographs back to the jury room because during trial, 18 photographs taken by the landlord illustrating the damage to the building were admitted into evidence and published to the jury. Each individual juror was allowed to examine each photograph as long as they desired. The judge admonished the jury to view the photographs carefully since that might be the last time they had the opportunity to observe them. The judge was concerned with sending two of the photographs back to the jury room, and not the remaining 16. Gomez argued that he was prejudiced because the photographs that depicted the damage to his front and rear apartment doors demonstrated that the police version of events was a fabrication. *Gomez*, 236 Ill. App. 3d at 293. The appellate court disagreed, holding that, because the photographs at issue were admitted into evidence, published to the jury, and Gomez argued his theory of the case during closing argument, the trial judge did not abuse his discretion and Gomez was not prejudiced by the decision to not send the photographs back to the jury. *Gomez*, 236 Ill. App. 3d at 293.

¶ 34 The rationale of *Gomez* applies equally to this case. Here, both the prosecutor and defense counsel told the jurors during opening statements that they would see defendant on the hospital security videotape. Thus, the jury was alerted to look for defendant on the tape. Later, the videotape was admitted into evidence and played for the jury. The parties stipulated to the accuracy of the time shown on the videotape, and defendant's alibi witness was allowed to identify defendant's image on the tape. Defense counsel argued the alibi theory to the jury and mentioned the videotape extensively. Specifically, defense counsel mentioned that the tape showed defendant wearing short pants and looking "energetic and happy" rather than nervous. Counsel also argued that defendant did not have time to change his pants, dispose of the evidence, and pick up Kimberly and Demari

on the way to the hospital. In denying defendant's request to send the videotape to the jury room, the trial court commented that the jury already had seen it, defense counsel had mentioned it extensively during closing argument, and the parties had stipulated to its authenticity. We conclude that the trial court did not abuse its discretion in declining defendant's request to send the videotape to the jury room and that defendant was not prejudiced by the decision.

¶ 35 Defendant argues that the trial court's error in failing to send the videotape to the jury room at the start of deliberations was compounded by the court's denial of the jury's request to see it after deliberations had begun. The State argues that defendant has procedurally defaulted any claim of error on this point because he invited the alleged error or at least acquiesced in the court's decision to deny the jury's request. It is well established that, to preserve an issue for review, a defendant must make a contemporaneous objection at trial and raise the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see also *People v. Carter*, 208 Ill. 2d 309, 319 (2003) (Under the doctrine of invited error, a defendant may not request to proceed in one manner and then later contend on appeal that the course of action was in error).

¶ 36 Here, both defense counsel and the prosecutors were present when the trial court read the jury's note into the record. The court asked the attorneys to recommend a response to the request, and defense counsel stated, "the normal, you may rely on — " and after a pause a prosecutor finished defense counsel's sentence with "your own recollection of the presentation of the evidence and the facts presented." The trial court asked whether either side objected to "a response that simply reads 'you are to rely upon your own recollection of the evidence?' " Defense counsel replied "the response is fine. Obviously we still stand by our former request to send it back. But in the alternative, I guess that's next best."

¶ 37 We reject the State's assertion that defense counsel invited or acquiesced in the alleged error of denying the jury's request during deliberations to view the videotape. By clarifying that he was reaffirming his request to send the videotape to the jury and then alleging the error in the posttrial motion, defense counsel preserved the issue for appellate review.

¶ 38 Nevertheless, we conclude that the trial court did not abuse its discretion in denying the jury's request during deliberations to view the videotape again. A trial court's decision on the jury's request to take certain evidence to the jury room during deliberations will not be reversed absent an abuse of discretion. *People v. Olinger*, 112 Ill. 2d 324, 349 (1986). Such decisions must be based on objective factors such as whether the testimony is still fresh in the jurors' minds. For instance, this court has held that a court does not abuse its discretion in denying a jury's request for evidence where "there was no appreciable delay in the proceedings nor did the jury deliberate for a great length of time such that the testimony may have grown stale." *People v. Fisher*, 281 Ill. App. 3d 395, 406 (1996). In this case, the trial was only three days long and the jury's request for the videotape came shortly after closing arguments concluded. The trial was short, the evidence was straightforward, and defense counsel discussed the contents of the videotape at length during closing argument, all of which would have mitigated the risk of the videotape growing stale in the minds of the jurors. Moreover, the State did not seriously contest defendant's assertion that he was videotaped wearing short pants at the hospital at 9:38 p.m. on the night of the shooting. While we might have elected to send the videotape to the jury to remove the issue from the case, we conclude that the trial court did not abuse its discretion under these circumstances.

¶ 39 C. Admission of Eyewitness Identifications

¶ 40 Defendant argues that the trial court erroneously allowed the jury to hear the identification testimony of Eva, Minishia, and Nikita. Defendant argues that (1) because defendant already was

in custody when Eva, Minishia, and Nikita were interviewed, the police should have used a live lineup rather than a photographic lineup and (2) the photographic lineup that was used to identify defendant as the offender was unreliable and suggestive. We reject both propositions.

¶ 41 At the suppression hearing, Detective Harris testified that he used a photograph taken of defendant on April 29, 2007, to prepare a six-man photographic lineup comprising two rows of three men each. Defendant's photograph was placed in the middle of the top row. Detective Harris made two black-and-white photocopies of the lineup and used them throughout the investigation. The copies were admitted into evidence and made part of the appellate record.

¶ 42 On April 30, 2007, Minishia viewed one copy of the lineup and initialed the back of defendant's photograph to identify him as the person who shot Lavontaye. On May 14, 2007, Nikita viewed the other copy, and she also initialed the back of defendant's photograph. On May 16, 2007, Eva viewed the copy of the lineup that Nikita had viewed. Eva initialed the back of defendant's photograph, which already had been initialed by Nikita.

¶ 43 The trial court found that the circumstances of the identifications were not suggestive because (1) defendant's photograph was the same size as the other five photographs; (2) each photograph showed a different man from his shoulders up; (3) although the backgrounds of the photographs were slightly different, defendant's background was "remarkably similar" to the others and did not distinguish defendant; (4) all six men wore their hair in some form of braids; (5) all the men shared similar facial structures; (6) defendant's complexion was similar to four of the men and "almost identical" to that of the men in the number three and four spots in the lineup; and (7) the court could not see through the page to see which photographs had been initialed, and therefore, there was little chance that Eva's identification resulted from her seeing Nikita's initials through the page.

¶ 44 Defendant argues that the trial court erred in admitting the identifications made by the three eyewitnesses because defendant already was in custody and conducting a live lineup "was not shown to have been impossible." In a motion to suppress identification testimony, the defendant bears the burden of proving a pretrial identification was impermissibly suggestive. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). Only where a pretrial encounter resulting in an identification is "unnecessarily suggestive" or "impermissibly suggestive" so as to produce "a very substantial likelihood of irreparable misidentification" is evidence of that and any subsequent identification excluded by law under the due process clause of the fourteenth amendment. *Gabriel*, 398 Ill. App. 3d at 348.

¶ 45 Our supreme court has held that, where the defendant is in custody and a corporeal lineup is feasible, a photographic show-up is not favored and should not be employed. *People v. Holiday*, 47 Ill. 2d 300, 307 (1970). However, there is no *per se* right to a corporeal lineup when a defendant is in custody, and each case depends on its unique circumstances. *People v. Brown*, 52 Ill. 2d 94, 99 (1972) ("While we acknowledge that each instance of pretrial photographic identification should be examined to determine whether unreasonably suggestive procedures were used, we are not ready to hold that such identification procedure can never be used when the defendant is in custody.") A trial court's ruling on a motion to suppress identification will not be set aside unless manifestly erroneous. *People v. Allen*, 376 Ill. App. 3d 511, 520 (2007).

¶ 46 Detective Harris testified to the reasons the police used a photographic lineup rather than a live lineup in this case. Detective Harris stated that the Rockford police department does not conduct "individual live lineups" because prisoners do not volunteer and the police have few inducements to encourage their participation. Moreover, he testified that there was no one in the jail that resembled defendant's appearance and hair style. Detective Harris' testimony created the

reasonable inference that a live lineup likely would have been even more suggestive than the photographic lineup that ultimately was used because the individuals in the live lineup would have appeared less like defendant than those in the photographic lineup.

¶ 47 Defendant also argues that the composition of the photographic lineup was suggestive, both in the particular photograph of defendant that was used and the way it was placed among the other photographs on the page. Specifically, defendant argues that, rather than using a photograph taken at the time of his arrest on April 29, 2007, the police should have used a photograph taken at the time of a previous arrest on March 27, 2007, or somehow obtained a still frame from the hospital security videotape recorded on April 3, 2007, the night of the shooting. The clear implication of defendant's argument is that his appearance changed sometime after the offense, but he does not explain how or why a post-offense photograph would increase the risk of misidentification. In his appellate brief, defendant acknowledged that the March 27, 2007, photograph was not part of the record. We granted him leave to supplement the record, but it is unclear from the exhibit labels whether that photograph is among those he added to the record.

¶ 48 All matters to be considered on appeal must be made part of the court record. *People v. Steward*, 406 Ill. App. 3d 82, 87 (2010). An appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts that may arise from the incompleteness of the record will be resolved against the appellant. *Steward*, 406 Ill. App. 3d at 87; *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). To the extent that defendant argues that the police lineup should have included a photograph that either is absent from the record or is not identified on appeal, we resolve

the incompleteness against defendant and presume that the trial court's denial of the suppression motion conforms with the law and has a sufficient factual basis.

¶ 49 Furthermore, we reject defendant's argument that the composition of the lineup was suggestive. The law does not require that lineups and photographic arrays shown to a witness include near identical or look-a-likes of the witness's descriptions. The court must look to the totality of the circumstances surrounding the identification to determine whether due process is violated. *People v. Johnson*, 149 Ill. 2d 118, 147 (1992). The black-and-white photographs in the police lineup show that it included five other men of the same approximate age, skin tone, facial features, and hairstyle. The men all were shown from their shoulders up, and each wore a nondescript, solid colored shirt. While it appears than the men had varying lengths of braids and facial hair, these factors are relevant only within the context of the totality of circumstances. The participants in the photographic lineup shared many similar features, but participants in a lineup are not required to be physically identical. *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). Moreover, placing defendant's photograph in the middle of the top row did not draw unnecessary attention to it. We conclude that the defendant has not met his burden of proving that the pretrial identifications were impermissibly suggestive. See *Gabriel*, 398 Ill. App. 3d at 348 (2010). Because defendant has failed to establish that the identifications were improper, we need not consider whether the State can overcome such a showing by clear and convincing evidence that the witnesses were identifying defendant based on their independent recollections of the incident. See *People v. Brooks*, 187 Ill. 2d 91, 126-27 (1999).

¶ 50 D. Exclusion of Alleged Confession of N.H.

¶ 51 Before trial, defendant moved to admit the statement of N.H., a juvenile male, who blurted "I did it" while talking with Detective Harris at the police station about one month after the shooting.

The trial court excluded the statement, and defendant argues on appeal that the exclusion was an abuse of discretion entitling him to a new trial.

¶ 52 On April 29, 2007, defendant, Tommie Moore, and N.H. were arrested at the Blackhawk Projects. N.H. was arrested for criminal trespass and resisting arrest. On May 7, 2007, Detectives Harris and Posley transported N.H. from the juvenile detention center to an interview room at the Rockford police station. Detective Harris informed N.H. of his *Miranda* rights, and N.H. said he understood his rights. Detective Harris told N.H. that the police "had some information about a murder that [N.H.] was possibly involved in and they wanted to ask him about it." N.H. said "I did it." N.H. did not explain what he meant or provide any other information at that time. Because the police questioning of a murder suspect is recorded, Detectives Harris and Posley stopped the interview and stepped out of the interview room and left N.H. inside.

¶ 53 When the interview resumed, Detective Simon Solis monitored and videotaped it. N.H. recanted and tried to explain why he falsely said that he "did it." Six times N.H. said he did not know why he said he "did it." N.H. also explained that defendant had a motive to kill Lavontaye: as retaliation for the shooting of Marcellus Motton a few weeks before Lavontaye's murder.

¶ 54 The trial court excluded the videotape, N.H.'s statement, and the detectives' testimony about the interview, and defendant argues that the jury should have heard evidence of N.H.'s alleged admission. Testimony as to an out-of-court statement that is offered to establish the truth of the matter asserted is hearsay and is generally not admissible in evidence. *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). However, evidence of an out-of-court statement made against the declarant's penal interest is admissible where justice requires and where sufficient indicia of the trustworthiness of the statement are present. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997).

¶ 55 Four factors to consider in determining whether there are sufficient indicia of trustworthiness to render evidence of an out-of-court statement against penal interest admissible are: (1) whether the statement was made spontaneously to a close acquaintance shortly after the crime had occurred; (2) whether the statement is corroborated by other evidence; (3) whether the statement was self-incriminating and against the declarant's penal interest; and (4) whether there was an adequate opportunity to cross-examine the declarant. *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973). The factors identified by the United States Supreme Court in *Chambers* are merely guidelines, and the presence of all four factors is not a condition of admissibility. *People v. Tenney*, 205 Ill. 2d 411, 435 (2002). The primary consideration is whether the extrajudicial statement was made under circumstances which provide considerable assurance of its reliability by objective indicia of trustworthiness. *Tenney*, 205 Ill. 2d at 435. The decision of whether to admit evidence under the hearsay exception for a statement made against penal interest is within the sound discretion of the trial court, and its ruling will not be reversed absent a showing of the abuse of that discretion. *People v. Bowel*, 111 Ill. 2d 58, 68 (1986).

¶ 56 In excluding the statement, the trial court emphasized that, "what we have is simply a statement by [N.H.] 'I did it.' Nothing more." The court found that, while the statement was spontaneous, it was not made shortly after the crime, which had occurred one month earlier, and it was made to the detectives rather than to a close acquaintance. The court found that, even though there was some evidence that N.H. was aware of information that could be known only by someone around the crime scene, N.H.'s statement was not corroborated by other evidence. The court commented that, it appeared from the videotape that N.H. admitted that his role was to "give an all clear signal" to defendant, take the gun from defendant after the shooting and hand it off to Trapper

as defendant ran to the getaway car. The videotaped portion of N.H.'s interview is not part of the appellate record, which limits our review.

¶ 57 The trial court weighed the factors of admissibility outlined in *Chambers*, and we conclude that the trial court did not abuse its discretion in excluding N.H.'s statement. The court's ruling is not "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 58 E. Jury Instruction

¶ 59 Finally, defendant argues that the trial court erred in refusing to use his proposed instruction regarding the alleged bias of Nikita, who testified against defendant at a time when she was facing a controlled substance charge unrelated to this case. Defendant argues that the instruction was necessary because, in April 2009, Nikita sent the prosecutor a letter volunteering information and asking for special consideration in light of her cooperation in testifying against defendant.

¶ 60 The State correctly responds that defendant has procedurally defaulted the issue by failing to raise it in his posttrial motion. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Defendant argues that we should review the issue as plain error, which our supreme court has explained as follows:

> " '[T]he plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove "prejudicial error." That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely

> balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, "*regardless* of the strength of the evidence." (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant.' " *People v. Nicholas*, 218 Ill. 2d 104, 120-21 (2005) (quoting *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)).

¶ 61 A defendant does not procedurally default substantial defects in criminal jury instructions by failing to timely object to them where the interests of justice require. *Piatkowski*, 225 Ill. 2d at 564 (citing Ill. S. Ct. R. 451(c) (eff. July 1, 2006)). Supreme Court Rule 451(c) is coextensive with the plain error clause of Supreme Court Rule 615(a) (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967), and the two rules are construed identically. *Piatkowski*, 225 Ill.2d at 564. For the following reasons, we conclude that, because there was no error in rejecting defendant's proposed instruction, there can be no plain error. See *People v. Johnson*, 218 Ill. 2d 125, 139 (2005) ("there can be no plain error if there is no error").

¶ 62 At the jury instruction conference, defendant proposed the following instruction:

> "You may consider as bearing upon the credibility of a witness for the State that [s]he has been arrested for, and charged with, a crime, and that therefore may have an interest or motive in testifying in support of the State's position. You may consider such evidence even if it has not been shown that any promises of leniency have been made or that any expectation of special favor exists in the mind of the witness."

¶ 63 The trial court rejected the proposed instruction on the grounds that (1) there was no evidence that the State's Attorney's Office replied to the letter or indicated that it would show Nikita leniency and (2) the proposed instruction was a non-Illinois Pattern Jury Instruction (IPI). The court noted that it had allowed defense counsel to cross-examine Nikita on the issue of bias, and the court specifically told counsel that he could argue to the jury that Nikita was not credible when she testified that she was not expecting leniency.

¶ 64 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence. *People v. Parker*, 223 Ill. 2d 494, 501 (2006); *People v. Ramey*, 151 Ill. 2d 498, 535 (1992). Jury instructions should not be misleading or confusing. Their correctness depends not on whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them. *Herron*, 215 Ill. 2d at 187-88. Rule 451(a) provides that, whenever the IPI contain an applicable jury instruction and the court determines that the jury should be instructed on the subject after giving due consideration to the facts and law, "the [IPI instruction] shall be used [ ] unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. July 1, 2006). Where there is no IPI jury instruction on a subject on which the court determines the jury should be instructed, the court has the discretion to give a nonpattern instruction. Ill. S. Ct. R. 451(a) (eff. July 1, 2006); *Ramey*, 151 Ill. 2d at 536.

¶ 65 A trial court's decision on whether to use a non-IPI instruction should not be disturbed absent an abuse of that discretion. *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). Whether the court has abused its discretion in giving a particular instruction will depend on whether it was an accurate, simple, brief, impartial, and nonargumentative statement of the applicable law. Ill. S. Ct. R. 451(a) (eff. July 1, 2006); *Pollock*, 202 Ill. 2d at 211.

¶ 66 Defendant does not argue that the IPI instructions given to the jury stated the law inaccurately; instead he argues that his non-IPI instruction would have been useful because it went further than the IPI instructions. We conclude that the trial court did not abuse its discretion in rejecting defendant's non-IPI instruction, and instead using Illinois Pattern Jury Instruction, Criminal, No. 1.02 (4th ed. 2000) (IPI Criminal 4th), which provides as follows:

> "Only you are the judges of the believability of the witnesses and the weight to be given to the testimony of each of them. In considering the testimony of any witness, you make take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." IPI Criminal 4th No. 1.02.

¶ 67 First, non-IPI instructions, such as defendant's proposed instruction, are not to be used when the IPI instructions accurately state the law, as IPI Criminal 4th No. 1.02 does. Second, Nikita testified that she did not expect prosecutorial leniency in exchange for her testimony, and there was no evidence that such leniency was forthcoming. Third, the trial court allowed the defense to emphasize Nikita's alleged bias through cross-examination and closing argument. Under these circumstances, we conclude that the trial court did not abuse its discretion in determining that IPI Criminal 4th No. 1.02 was sufficient to instruct the jury on issues of credibility and bias.

¶ 68 CONCLUSION

¶ 69 For the reasons stated, defendant's first-degree murder conviction entered by the circuit court of Winnebago County is affirmed.

¶ 70 Affirmed.