No. 128747

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-19-0283.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 16 CF 373.
-vs-	)	
MITCHELL DEANDRE BUSH,	)	Honorable John P. Vespa,
Defendant-Appellant.	)	Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

SANTIAGO A. DURANGO
Deputy Defender

MARK D. FISHER
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

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CYNTHIA A. GRANT
SUPREME COURT CLERK

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ARGUMENT

I. Mitchell Bush was not proved guilty of felony murder beyond a reasonable doubt where (A) he was not shown to have engaged in the underlying offense of mob action, and (B) no independent felonious purpose was shown in the commission of the mob action and murder.

A. Defendant was not shown to have committed mob action beyond a reasonable doubt.

The State repeatedly maintains that Mitchell Bush and Henry Mayfield had a "concerted plan," a "common purpose" and a "shared purpose," and that they acted on their plan and purpose by knowingly disturbing the peace and using violence outside the Roberson residence (State's brief, pp. 18-21). This argument mis-characterizes the record.

The evidence at trial was undisputed that, on the day of the shooting, Henry received kidney dialysis treatment, and Henry and Mitchell thereafter planned to spend time together watching television and playing video games as they often did following Henry's treatments. After Henry's treatment that day, Kim Williams, the mother of his children, picked up Henry and then Mitchell in her car, intending to drive them home. At that time, she had no intent to go to the Roberson residence (R1096-97, 1099, 1101). On her way home, however, she received a phone call from her niece, Laterra Price, saying that Kim and Henry's teenaged son, Jayurion Mayfield, had been attacked by some people outside the Roberson residence. She then picked up Jayurion and drove to the Roberson residence intending to find out what happened and hoping to prevent any further altercations. Kim did not drive there with the intent to fight anyone or cause a disturbance (R1101-04). She went there intending to be a "peacemaker" (R1130).

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Mitchell confirmed Kim's testimony that his intent that day was to spend time quietly socializing with Henry following Henry's dialysis treatment. In the past, they had gone to Henry's house, or Kim's house, or the house of a friend of Henry's, in order to relax and spend time together following Henry's treatments. That was his sole intention when Kim picked him up on the day of the shooting (R888-89, 914-15). Mitchell had a gun with him, but only because he hoped Henry would know someone he might be able to sell it to (R915-16). When Kim stopped the car outside the Roberson residence, Mitchell assumed that was the location where he and Henry were going to socialize. He had no indication of what was about to happen (R921).

The foregoing, undisputed, evidence showed that Mitchell was literally "along for the ride" when Kim drove to the scene of the incident. It was not his car, he did not drive the car, he had no idea they were going there, and Kim, the owner and driver of the car, herself had no intention of going there before hearing about what happened to her son, Jayurion. The evidence thus flatly contradicts the State's claim that Mitchell shared any plan or purpose with Henry to engage in violence or otherwise disturb the peace. The notion that Mitchell and Henry shared such a plan or purpose was also undermined by evidence concerning Henry's medical condition. As noted above, Henry had just received one of his periodic kidney dialysis treatments. Kim testified he had a catheter in his chest connected to his heart and arm (R1097). Mitchell knew Henry had a catheter and believed Henry was disabled and in poor medical condition (R891, 902-04, 906). Henry was obviously in poor health and "really can't do much of anything but go somewhere

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and sit" following his treatments, according to Kim, a licensed practical nurse (R1096, 1100). Hence, his intention to socialize quietly at home with Mitchell that afternoon. Note, too, Kim's testimony that Henry had peaceful intentions when she drove to the Roberson residence (R1113).

Finally, this Court must consider that, when they arrived outside the Roberson residence, Henry told Mitchell to "go up the street" (R924). Henry would not have told Mitchell to put distance between himself and the scene if the two shared a plan or purpose to engage in violence or otherwise disturb the peace. The State's characterization of the evidence is simply inaccurate. What the evidence shows is that Mitchell was driven to the scene and that he discharged his gun only after Henry became embroiled in an altercation and Mitchell feared for Henry's and his safety.

The State maintains that Mitchell "committed multiple acts constituting mob action" (State's brief, p. 15). The State is wrong. Apparently, the State is referring to Mitchell "brandishing his gun and making threats" in addition to firing the gun (State's brief, p. 17). The State's hyperbole should not persuade.

Mitchell testified that people congregated with Minnie Roberson inside the fence bordering her front yard were yelling and threatening the people outside the fence. Mitchell was one of the people standing outside the fence. He heard statements from Roberson's people like "we're going to f*** you up" and "[w]e fixing to beat they ass" (R926). He also heard them say, "all you got to do is run up," which he interpreted to mean a challenge to a fight (R927). Kim Williams and Sharonda Brown, whose son, Tresean, had also allegedly been attacked by people outside the Roberson residence earlier that day, described similar conduct. Kim

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said Roberson's people were hostile and yelling and that some of them were holding knives, sticks, and socks filled with heavy objects (R1110-11). Sharonda also heard screaming and threats like "we will beat your ass," and saw knives and canned goods shoved into socks (R1161-62). Jerrica Williams, Kim and Henry's daughter, likewise saw knives and heard screaming and yelling. She also saw a man inside the fence rip his shirt off, which to her meant that he was ready to fight (R62, 866). Jayurion also saw Roberson's people arguing and threatening, yelling "bring it on," and holding knives, bats and socks filled with cans (R1075-80). Although the entire encounter was not captured on videotape, the videotape nonetheless shows a very chaotic scene (Peo. Exs. 3, 6).

This was the scene confronting Mitchell shortly after arriving outside the Roberson residence. In response to threats uttered by Lathaniel ("Nate") Gulley and others inside the fence, Mitchell took out his gun and said, "you're not going to do anything to me" (R928). The State calls this "brandishing," implying sinister or at least aggressive conduct. And the State characterizes his statement as a threat. But a rational trier of fact would reasonably have interpreted his action and statement as an attempt to calm the harsh rhetoric and forestall the threatening conduct coming from Roberson's people. Intended intimidation perhaps, but not a threat. Unfortunately, it did not have the desired effect because Nate responded by saying, "f*** that, we got guns too" (R929). Jerrica also heard that statement followed by more yelling (R866). In Mitchell's mind, Nate's statement about guns was corroborated by the sight of men inside the fence clutching their waistbands (R932) and that statement added to his fear (R931).

Shortly after Nate made his statement about guns, Mitchell saw Henry

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embroiled in combat with Dwayne Jones. He saw the two of them fighting for possession of a broomstick or pole, and Mitchell knew that Henry had not taken such an object with him when he got out of the car, so he assumed that Dwayne had wielded it against Henry. Mitchell testified he feared for Henry's safety, especially considering Henry's medical condition, and feared for his own safety as well. That is when he fired his gun (R930-34, 943-45, 976). He believed that was his only alternative (R947, 950). Notably, the jury found much of Mitchell's testimony to be credible, as evidenced by its verdict of guilty of second degree (unreasonable belief in self-defense) murder (C973).

The foregoing evidence shows that Mitchell engaged in a single act– firing his gun – not multiple acts. And the evidence does not show that he acted in concert with Henry to commit violence or otherwise disturb the peace. He therefore could not have been guilty of mob action or of felony murder based on mob action.

The State distorts the record when it asserts that "defendant almost immediately began brandishing his gun and making threats" (State's brief, p. 17). While it is not clear from the record exactly how much time elapsed between Mitchell's arrival at the scene and the firing of his gun, he did not act immediately. When Henry told him to "go up the street," he did in fact go partway up the street (R924, 926). But he returned after hearing yelling and threats (R927). Photographs contained in the record show he did not immediately advance towards the Roberson house. People's Ex. 3A shows him standing next to a woman across the street from the house with his left arm hanging by his side. He appears to be merely observing, and is not holding a weapon (E3-4). People's Ex. 32 shows him standing at the edge of the driveway with his arms behind his back. He appears nonchalant and

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is not holding a weapon (E45-46). These photographs belie the idea that he acted immediately or that he went to the scene with the plan or purpose of engaging in violence or otherwise disturbing the peace. The evidence just does not support the State's theory of the case.

Finally, the State maintains that Mitchell fired his gun "to assist Henry" (State's brief, p. 22). Of course, the State here is using the word "assist" to mean Mitchell endeavored to help Henry in committing violence and disturbing the peace pursuant to their preconceived plan or purpose. But what the evidence actually showed was that they had no preconceived plan or purpose, and that Mitchell fired the gun to defend Henry – to help him avoid great bodily harm at the hands of Dwayne Jones and the other aggressors positioned in Roberson's front yard. Again, the jury's verdict of guilty of second degree murder indicates the jury found that Mitchell had an actual belief in the need for self-defense and/or defense of Henry although the jury concluded that deadly force was not necessary.

B. Mitchell's felony murder conviction must be reversed because the acts which formulated the basis for the predicate felony of mob action were inherent in Dwayne's murder and were not committed with an independent felonious purpose.

In Part 1B of its argument, the State declares that the trial evidence demonstrated Mitchell committed mob action when he joined Henry "and others" in confronting and attacking Roberson, Dwayne Jones and Nate Gulley (State's brief, p. 22). This theory diverges from its prior theory that Mitchell only acted in concert with Henry. In any event, it is not consistent with the trial evidence. As explained above, Kim and Henry went to the Roberson residence with peaceful intentions, hoping to reason with Roberson and to prevent a recurrence of the beating of their son, Jayurion. Mitchell, meanwhile, was just "along for the ride"

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– a bystander or observer who planned to spend the day peacefully with the still ailing Henry. Ultimately, he pulled his gun in an effort to ward off the hostile conduct and threats being exhibited by the Roberson group. It was only when his peacekeeping effort failed and he saw Henry fighting with Dwayne that he pulled the trigger, resulting in Dwayne's tragic death.

In part IB1 of its brief, the State argues Mitchell was properly convicted of felony murder because he committed mob action with a felonious purpose separate from the intent to kill Dwayne (State's brief, pp. 23-25). The State maintains his separate felonious purpose was to disturb the peace by using force or violence (State's brief, p. 25). But, in fact, the evidence showed his only purpose was to defend himself and Henry. The jury found that to be the case when it found him guilty of second degree murder based on the sincere yet unreasonable belief in the need to use deadly force in self-defense and defense of Henry (C973). Mitchell did not commit mob action and thus could not be convicted of felony murder predicated on mob action.

Citing *People v. Davis*, 213 Ill. 2d 459, 471 (2004), and *People v. Morgan*, 197 Ill. 2d 404, 447 (2001), the State correctly observes that "this Court has expressed concern that a felony murder charge may improperly allow the [State] to eliminate the offense of second degree murder and avoid the burden of proving an intentional or knowing first degree murder because many murders are accompanied by predicate felonies" (State's brief, p. 24). That is *exactly what happened here*. In this very case, the jury found Mitchell guilty of second degree murder as a lesser-included offense of knowledge murder (C973). But the conviction of felony murder predicated on mob action overrode the second degree murder

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conviction and resulted in a much higher sentence than Mitchell otherwise would have received. This Court should hearken to its words in *Davis* and *Morgan*, correct the anomaly and the injustice that happened in this case, reverse outright Mitchell's conviction of felony murder, and reinstate and order sentencing on the jury's verdict of second degree murder.

Finally, in its Issue IB1 argument, the State repeats its prior misstatement that Mitchell immediately brandished a gun and threatened Roberson's family after getting out of Kim Williams' car (State's brief, p. 24). As explained above, he did not threaten anyone, and he did not act as soon as he exited the car. He stood by as an observer, attempted to ward off the Roberson family's aggressive conduct and threats, and pulled the trigger only after seeing the still-ailing Henry fighting with Dwayne, and after fearing for Henry's and his own safety.

In Part IB2 of its brief, the State urges this Court to abandon the "same-act test" and to rule that felony murder does not require proof of felonious conduct separate from the act that killed the victim. The State argues it should only have to prove that the defendant acted with a felonious purpose independent of the murder (State's brief, pp. 25-33). This is not the first time the State has made this argument to this Court. Thirteen years ago, in *People v. Davison*, 236 Ill. 2d 232, 243 (2010), the State made the very same argument and asked this Court to overrule its well-established precedent, *People v. Morgan*, 197 Ill. 2d 404, *People v. Pelt*, 207 Ill. 2d 434 (2003), and *People v. Davis*, 213 Ill. 2d 459. This Court refused to do so. *Davison*, 236 Ill. 2d at 244. Your Honors explained in *Davison* that felony murder "must have an independent felonious purpose" and that reviewing courts must also consider "whether the State improperly used felony-murder charges to avoid the burden of proving an intentional or knowing murder." *Id.* That burden

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is avoided if the State is allowed to prove felony murder based on criminal acts inherent in the murder. *Id.* at 243-44. The *Davison* Court stated in no uncertain terms: "Despite the State's invitation to abandon the latter consideration, we continue to adhere to these principles." *Id.* at 244. The State has offered Your Honors no good reason to depart from this uniform precedent.

The State complains that the "same-act test" requires the defendant to commit "at least two separate felonious acts, only one of which kills the victim" (State's brief, p. 29). This is not true. In *Davis*, for example, where the victim was beaten to death by several individuals and it could not be determined which individual struck the fatal blow, this Court affirmed the defendant's felony murder conviction while stating that it was not necessary to prove that he struck the victim at all. 213 Ill. 2d at 474. The "same-act test," however, is necessary and comes into play where a single act is used to charge both the murder and the underlying offense. See, *e.g.*, *Pelt*, 207 Ill. 2d at 442-43 (felony murder conviction overturned where same act formed basis for aggravated battery and felony murder); *Morgan*, 197 Ill. 2d at 447-48 (felony murder conviction reversed where same shooting formed basis for aggravated battery, aggravated discharge of firearm and felony murder).

The State further argues that it did not improperly charge Mitchell with felony murder to inappropriately eliminate self-defense or second degree murder because Mitchell denied intending to kill Dwayne Jones or anyone else (State's brief, p. 32). But the prosecution was on notice right from the start that self-defense was going to be an issue at trial. At a video bonding hearing conducted on May 19, 2016, prosecutor Patelli told the judge that Mitchell told police "he had a gun and apparently discharged, according to him, several shots because he felt Mr. Mayfield was being attacked" (R5). Prosecutor Patelli went on to say that "[t]he

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State will file at least one more count of first-degree murder eventually alleging a felony murder-type of situation" (R5). The State initially filed an information charging Mitchell with knowledge murder and aggravated battery (C3-4). Following the above hearing, Mitchell was indicted for, *inter alia*, felony murder (C6-12). Note as well that the defense subsequently provided notice of its intent to raise the affirmative defense of justified use of force in defense of person or persons (C603).The only correct conclusion is that the State did improperly charge felony murder to avoid self-defense or second degree murder. By doing so, the State nullified the jury's verdict of guilty of second degree murder.

The State insists that Mitchell's decision to commit mob action "caused Jones's murder, not the other way around" (State's brief, p. 32). No. Mitchell's firing his gun caused Jones' murder. He was therefore properly prosecuted for Count I knowledge first degree murder, but not for Count II felony murder.

The State further maintains that Mitchell is liable for felony murder because he "brought a gun to a stick fight" (State's brief, p. 33). So now, apparently, the State has changed its theory from mob action based on brandishing a gun and making threats to mob action based on possession of a weapon. In any event, the State's claim repeats its unfounded theory that Mitchell went to the Roberson residence with a plan and purpose to commit violence and disturb the peace. As discussed above, the evidence shows that was not the case.

In Part IB3 of its brief, the State alternatively argues the "same-act test" was satisfied here because Mitchell engaged in felonious conduct different from the act causing Dwayne's death, specifically, that Mitchell committed mob action by brandishing a gun and making threats (State's brief, pp. 33-35). As discussed above, such conduct was an unsuccessful attempt to calm the situation and prevent

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the Roberson group from making good on their threats. At worst, brandishing a gun and making threats constitutes a Class C misdemeanor (720 ILCS 5/12-1 (2018)), not a forcible felony necessary to support a charge of felony murder. See 720 ILCS 5/2-8 (2018) (forcible felonies); 720 ILCS 5/9-1(a)(3) (2018) (felony murder). The State then goes on, once more, to change its theory when it claims that firing shots other than the one that struck Dwayne constituted mob action (State's brief, pp. 34-35). The State's position is inconsistent with this Court's *Morgan* decision in which the defendant fired shots killing two persons but this Court reversed his felony murder conviction. It is also inconsistent with the trial prosecutor's failure in this case to identify which shot killed Dwayne. The teaching of *Morgan* and this Court's precedent is that Mitchell could legally be prosecuted for shooting both Dwayne and Nate, but he could not legally be prosecuted for felony murder.

Summary

Mitchell Bush respectfully renews his request that this Court reverse his conviction of felony murder, reinstate the jury's verdict of guilty of second degree murder, and remand this cause for sentencing for that offense.

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II. This Court should reverse Mitchell Bush's convictions and remand for further proceedings because he was deprived of a fair trial where (1) the circuit court improperly denied his motion *in limine* seeking the admission of a rap video which met the requirements set out in 725 ILCS 5/115-10.1 (2018), and Rules 607 and 801(d)(1)(A)(2) of the Illinois Rules of Evidence, and (2) the circuit court allowed a juror to remain empaneled on the jury after the juror revealed an implied bias.

The State characterizes Mitchell's Issue II argument as a cumulative error claim (State's brief, pp. 35-36). That is indeed the way it was presented to the appellate court. But the appellate court found none of the three components of that claim constituted error. *People v. Bush*, 2022 IL App (3d) 190283, ¶¶ . Consequently, the question before this Court in Issue II is whether reversible error was committed when the judge refused to allow the defense to admit into evidence a rap video and/or when a juror related to two key prosecution witnesses was allowed to remain on the jury. Mitchell asserts that these errors, individually or cumulatively, denied him a fair trial and this Court should therefore reverse and remand for a new trial.

A. Prior inconsistent statements

Judge Vespa made two errors in denying the defense motion *in limine* to introduce the Gulley brothers' rap video at trial. Specifically, he erred by (1) deciding that a prior inconsistent statement must be truthful or reliable in order to be admitted for impeachment or as substantive evidence, and (2) ruling that a rap video is a work of art that can never be truthful or reliable (R207-24).

The State concedes that if a prior inconsistent statement satisfies the requirements of 725 ILCS 5/115-10.1 to be admitted as substantive evidence, no

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additional evidence of reliability need be shown. *People v. Carlos*, 275 Ill. App. 3d 80, 83-84 (4th Dist. 1995); *People v. Pursley*, 284 Ill. App. 3d 597, 607 (2d Dist. 1996); *People v. Govea*, 299 Ill. App. 3d 76, 85-86 (1st Dist. 1998). But the State claims the trial judge nonetheless has authority to require additional proof of reliability (State's brief, p. 57). The State cites no authority supporting its position other than a civil case that did not concern prior inconsistent statements. Accepting the State's impractical position would create absolute havoc in our circuit courts – leaving admissibility of hearsay statements up to the whims of individual judges presiding over individual cases regardless of established statutory and case law. The State's position here should be quickly rejected.

Notably, the State does not argue that additional evidence of reliability is required where a prior inconsistent statement is introduced to impeach a witness. Such an argument would likewise be frivolous. See, *e.g.*, *People v. Popovich*, 295 Ill. 491, 495 (1920) ("It is always competent to show, as a matter of impeachment, that a witness made a statement outside of court concerning material matters inconsistent with his testimony on the witness stand"); Ill. R. Evid. 607 (*eff.* Jan. 1, 2011).

The State goes on to argue that the Gulley brothers' rap video was not sufficiently reliable to be admitted at Mitchell's trial "because it was an artistic expression," and "the reliability of a statement is diminished when it is created as part of an artistic endeavor" (State's brief, pp. 57-58). Because there is no requirement that the judge find a prior inconsistent statement truthful or reliable in order for the statement to be admitted to impeach a witness or as substantive evidence, the State's contention is irrelevant and is not a point this Court need even consider. Whether the video or the Gulleys' testimony was more credible would simply have been a jury question had the video been introduced into evidence.

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Having said that, the State's defense of Judge Vespa's opinion and the appellate court's agreement that a rap video is a work of art that can not be truthful or reliable does not withstand close scrutiny. First, the Illinois case which the State relies on for its premise, *People v. Cross*, 2021 IL App (4th) 190114 (State's brief, pp. 57-58), is inapposite because it concerned the admissibility of a statement against penal interest, not a prior inconsistent statement. A statement against penal interest can only be admitted if it was made under circumstances that provide considerable assurance of its reliability by objective indicia of trustworthiness. *Id.* ¶¶ 28-29. Second, the New Jersey case on which the State relies, *State v. Skinner*, 218 N.J. 496 (2014) (State's brief, p. 58), is factually distinguishable, and the State provides a quote from that case taken out of context. In *Skinner*, the State sought to introduce the defendant's rap lyrics against him in his attempt murder case to show his motive and intent. *Id.* at 503. The State conceded, however, that most of the lyrics were composed long before the commission of the charged offense. *Id.* at 503. As a result, the lyrics "were unconnected to the specific facts of the attempted-murder charge." *Id.* at 505. While the State accurately quotes from *Skinner* (State's brief, p. 58), it omits the court's rejection of the proposition that "probative evidence about a charged offense can be found in an individual's artistic endeavors *absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced*." 218 N.J. at 522 (emphasis added). *Skinner* is factually distinguishable from the instant case because the Gulleys' video was recorded after the shooting and was all about the shooting for which Mitchell was prosecuted.

Mitchell's opening brief cited case law from other federal and state jurisdictions holding that rap lyrics are admissible against the defendant in a criminal trial as long as the lyrics concern the offense(s) for which the defendant

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is being prosecuted (Defendant's brief, p. 33). The State does not address any of these cases. There are many more like them. E. Lutes, J. Purdon, H. Fradella, "When Music Takes The Stand: A Content Analysis Of How Courts Use And Misuse Rap Lyrics In Criminal Cases," 46 Am. J. Crim. L. 77, 77 (Summer 2019) ("rap music is routinely used against defendants in criminal proceedings"). Like *Skinner*, all of these cases require a judicial finding that the rap lyrics specifically pertain to the crime(s) for which the defendant is on trial. Note that a bill has been introduced into the United States Congress, the "Restoring Artistic Protection Act of 2022," that would likewise require proof of such a nexus to introduce artistic expressions against a defendant in a federal criminal trial (Appendix). Mitchell is simply arguing that, with this protection in place, rap lyrics and other artistic expressions should be admissible to impeach a prosecution witness or as substantive evidence in Illinois.

The concerns expressed by the judge and the State – that rap lyrics are a form of art and may often be fictional – should not automatically bar the introduction of such evidence. As long as evidence is first presented that the lyrics in question directly pertain to the charge(s), the evidence should be admitted as long as it otherwise meets statutory and case law requirements for the introduction of prior inconsistent statements. Then, the reliability or truthfulness of such statements can be argued by the parties and judged by the trier of fact. See, *e.g.*, *United States v. Hankton*, 51 F.4th 578, 601 (5th Cir. 2022) (the co-defendant "may well be correct that the lyrics were subject to interpretation, but that interpretation was within the province of the jury to determine"); *United States v. Herron*, 2014 WL 1871909, *4 (E.D. N.Y. 2014) ("Defendant is free to argue that the videos were designed as entertainment and are the result of creative license . . . . However, these issues go the weight of the evidence[,] not its admissibility").

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Note, too, that not all artistic expressions are fiction. One prime example is Gordon Lightfoot's hit song, "The Wreck Of The Edmund Fitzgerald" (Appendix). Another is John Trumbull's famous painting depicting the signing of the Declaration of Independence. Many artistic expressions are produced for mass consumption in order to entertain *and* to educate. Consider, for example, Ken Burns' documentaries about the Civil War, the history of baseball, and our national parks. Judge Vespa's belief that "you've got to have some indication of a necessity to be honest, to be true, to be accurate, and I don't think there's that guarantee, or close to a guarantee, in making a rap video" (R219), was an overly broad statement this Court must reject.

Finally, the State argues that any error was harmless because Mitchell was nonetheless able to present his defense to the jury (State's brief, pp. 59-60). The State's position is undermined by the closeness of the evidence in this case, as demonstrated by the jury's finding Mitchell guilty of second degree murder as a lesser-included offense of knowledge first degree murder, and of both aggravated discharge of a firearm and its lesser-included offense, reckless discharge of a firearm. The State's position should also be rejected because the Gulleys' rap video not only would have contradicted the Gulleys' testimony that they stood peacefully in front of the Roberson residence and were not armed (R658, 660, 682), but it would have contradicted the State's theory of the case that the Roberson group acted peacefully and that the only ones acting violently and with violent dispositions were Mitchell and Henry. Had the video been admitted into evidence, the jury may well have found Mitchell not guilty of felony murder and mob action.

B. Biased juror

The State begins its discussion of the juror bias issue much as it did the

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preface to its discussion of Mitchell's Issue II argument – by discussing cumulative error (compare State's brief, pp. 35-36, to State's brief, pp. 36-43). As discussed above in connection with the rap video issue, the appellate court found no error at all, let alone cumulative error. Consequently, Mitchell's petition for leave to appeal asked this Court to, *inter alia*, separately address the boundaries of the implied bias doctrine and the appellate court's creation of a work of art exception to 725 ILCS 5/115-10.1. The petition did not ask this Court to address cumulative error. This Court should review the appellate court's resolution of these two issues individually and find errors were committed that, individually or cumulatively, denied Mitchell a fair trial.

In Part IIA2 of its brief, the State argues the judge's decision to allow Juror Proctor to remain on the jury cannot be challenged as plain error because trial defense counsel acquiesced to Proctor's continued presence on the jury (State's brief, p. 43). The State claims it would be unfair for counsel to "sandbag" and to have "two bites of the apple" (State's brief, p. 44). This argument ignores the fact that counsel's post-trial motion specifically stated that he did not request the juror's removal because he did not hear her say her daughter was married to the Gulleys' mother; he mistakenly thought the juror's daughter was just a friend or acquaintance of the Gulleys' mother. The motion stated the family relationship justified removal for cause and that counsel thus erred in failing to request her removal (C1000). Counsel therefore was not guilty of sandbagging anyone in this case. Presumably, the judge heard that there was a family relationship between the juror and the Gulley brothers. The judge thus erred by refusing to excuse Proctor for cause and/or by denying counsel's post-trial motion. See *United States v. Annignoni*, 96 F.3d

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1132, 1138 (9th Cir. 1996) (under implied bias doctrine, judge must excuse juror for cause who is related to principal in case).

We are all familiar with the phrase, "blood is thicker than water." Family ties are among the strongest connections that bind human beings to one another. Hence, the unquestioned popularity of genealogy search firms like ancestry.com, legacytree.com, and myheritage.com, and television shows like "Finding Your Roots." Consciously or subconsciously, a family relationship with a litigant or witness is likely to impact a juror's decision. Case law from other jurisdictions discussed in Mitchell's opening brief (pp. 39-42) recognizes such jurors have an implied bias regardless of whether they state their belief they can be fair and impartial. This Court, too, has said that, where implied bias exists, the juror is disqualified and "it is not necessary to establish that bias or partiality actually exists." *People v. Cole*, 54 Ill. 2d 401, 413 (1973). Accord, *Ittersagen v. Advocate Health and Hospitals Corp.*, 2021 IL 126507, ¶ 42. Such individuals should thus be excused from the jury as a matter of law, not judicial discretion. *Id.* ¶ 47 (whether juror's relationship with a party or other trial participant supports presumption of bias is matter of law subject to *de novo* review).

Had the shoe been on the other foot in this case – had Juror Proctor been Mitchell's grandmother – the prosecutors would have immediately requested that she be excused from the jury. Trial defense counsel's post-trial assertion that he would have requested her removal had he correctly understood her relationship to the Gulleys was thus credible and a convincing rebuttal to the State's sandbagging/two-bites-of-the-apple contention before this Court.

The State relies heavily on Proctor's assertion that she could be fair and impartial (State's brief, p. 45). If the juror has an implied bias, such assurances,

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while perhaps sincere or well-intentioned, are irrelevant. As argued in Mitchell's opening brief (p. 40): "Because implied bias deals in categories prescribed by law, the question whether a juror's bias may be implied is a legal question, not a matter of discretion for the trial court. [Citations omitted.] The test focuses on 'whether an average person in the position of the juror in controversy would be prejudiced. [Citations omitted.]'" *United States v. Mitchell*, 690 F.3d 137, 142-43 (3d Cir. 2012). This Court should find the implied bias doctrine extends to grandmothers and that the judge's refusal to excuse Proctor from the jury (based on his illogical thought that it was not even a close call (R779) was plain error, both because the evidence at trial was closely balanced, and because the error was so serious that it denied Mitchell a fair trial regardless of the closeness of the evidence. Illinois Supreme Court Rule 615(a) (2018); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (discussing both prongs of plain error rule). This Court should also rule that the appellate court's reliance on the facts that Proctor was not related to the prosecutors and did not have a close relationship with the Gulleys (2022 IL App (3d) 190283, ¶ 113) were irrelevant considerations that did not justify rejection of this claim.

In Part IIA3 of its brief, the State contends that trial defense counsel was not ineffective for not requesting Proctor's removal because the judge's comments indicate he would have denied such a request (State's brief, pp. 50-51). The State further argues that the judge was correct that it was not a close call (State's brief, p. 51). As discussed above, family ties are among the strongest connections people have to one another, and there was far too great a risk that Proctor, consciously or subconsciously, would side with her grandsons over the man who was charged with shooting at them and injuring one of them, especially given the competing

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theories presented at trial as to which side included the initial aggressors and which side were legally defending themselves. As this Court recently noted in *Ittersagen*, "'our system of law has always endeavored to prevent even the probability of unfairness.'" 2021 IL 126507, ¶ 40 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). That Judge Vespa might have refused a request to unseat Proctor was no reason for trial counsel not to make the request. And the record shows his only reason for not making the request was his misunderstanding about Proctor's relationship to the Gulleys.

The State contends that trial counsel made a strategic reason not to challenge Proctor (State's brief, pp. 51-52). But, again, the record shows that was based on his misunderstanding. There is a split of authority whether counsel can waive an implied bias challenge. *People v. Brazelton*, 557 F.3d 750, 754-55 (7th Cir. 2009). But even if counsel can strategically forego such a challenge, he can only do so if he has all the facts at hand and understands the relationships between the parties, in contrast to what happened in the instant case. The State offers reasons why counsel might have strategically decided not to challenge Proctor (State's brief, p. 52), but that is pure speculation not supported by the record. This argument is therefore improper and should be rejected.

Finally, the State argues any error was harmless (State's brief, pp. 54-55). But the record shows the evidence was closely balanced, and the jury's various verdicts shows the jurors believed much of Mitchell's testimony.

Summary

Mitchell Bush renews his request that this Court reverse and remand his felony murder and mob action convictions because the judge denied admission of the rap video and/or refused to replace Proctor with an alternate juror.

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Mark D. Fisher
MARK D. FISHER
Assistant Appellate Defender

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APPENDIX

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CONGRESS.GOV

H.R.8531 - Restoring Artistic Protection Act of 2022

117th Congress (2021-2022)

Sponsor: Rep. Johnson, Henry C. "Hank," Jr. [D-GA-4] (Introduced 07/27/2022)
Committees: House - Judiciary
Latest Action: House - 11/01/2022 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. (All Actions)

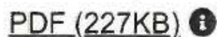
Introduced

There is one version of the bill. **Text available as:**

XML/HTML

XML/HTML (new window)

TXT



Shown Here:
Introduced in House (07/27/2022)

117TH CONGRESS
2D SESSION

H. R. 8531

To amend the Federal Rules of Evidence to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant in a criminal proceeding, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

JULY 27, 2022

Mr. JOHNSON of Georgia (for himself and Mr. BOWMAN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Evidence to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant in a criminal proceeding, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Restoring Artistic Protection Act of 2022".

SEC. 2. LIMITATION ON ADMISSIBILITY OF DEFENDANT'S CREATIVE OR ARTISTIC EXPRESSION.

(a) IN GENERAL.—Article IV of the Federal Rules of Evidence is amended by adding at the end the following:

Rule 416. Limitation on admissibility of defendant's creative or artistic expression.

"(a) CREATIVE AND ARTISTIC EXPRESSIONS INADMISSIBLE.—Except as provided in subsection (b), evidence of a defendant's creative or artistic expression, whether original or derivative, is not admissible against such defendant in a criminal case.

"(b) EXCEPTION.—A court may admit evidence described in subsection (a) if the Government, in a hearing conducted outside the hearing of the jury, proves by clear and convincing evidence—

"(1)_(A) if the expression is original, that defendant intended a literal meaning, rather than figurative or fictional meaning; or

"(B) if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant's own thought or statement;

"(2) that the creative expression refers to the specific facts of the crime alleged;

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"(3) that the expression is relevant to an issue of fact that is disputed; and

"(4) that the expression has distinct probative value not provided by other admissible evidence.

"(c) RULING ON THE RECORD.—In any hearing under subsection (b), the court shall make its ruling on the record, and shall include its findings of fact essential to its ruling.

"(d) REDACTION AND LIMITING INSTRUCTIONS.—If the court admits any evidence described in subsection (a) pursuant to the exception under subsection (b), the court shall—

"(1) ensure that the expression is redacted in a manner to limit the evidence presented to the jury to that which is specifically excepted under subsection (b); and

"(2) provide appropriate limiting instructions to the jury.

"(e) DEFINITION.—In this section, the term 'creative or artistic expression' means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols, including music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.".

(b) CLERICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by inserting after the item relating to rule 415 the following:

"416. Limitation on admissibility of defendant's creative or artistic expression.".

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HankJohnson
CONGRESSMAN FOR GEORGIA'S 4TH DISTRICT

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Congressmen Johnson, Bowman Re-Introduce Bill To Protect Artists' 1st Amendment Rights

April 28, 2023 Press Release

"Congress shall make no law...abridging the freedom of speech."

"Freddy Mercury did not confess to having 'just killed a man' by putting 'a gun against his head' and "pulling the trigger. Bob Marley did not confess to having shot a sheriff. And Johnny Cash did not confess to shooting 'a man in Reno, just to watch him die'

WASHINGTON, D.C. – Today, Congressmen Hank Johnson (GA-04) and Jamaal Bowman Ed.D. (NY-16) re-introduced the Restoring Artistic Protection Act (RAP Act) to protect artists from the wrongful use of their lyrics against them in criminal and civil proceedings.

Watch Capitol Hill Press Conference **Here**

The legislation, originally introduced in the 117th Congress, is the first bill of its kind at the federal level. The RAP Act adds a presumption to the Federal Rules of Evidence that would limit the admissibility of evidence of an artist's creative or artistic expression against that artist in court.

As of 2020, prosecutors in more than 500 criminal cases have used artists' lyrics as evidence against the artist.

"This legislation is long overdue," said Congressman Johnson. "For too long, artists – particularly young Black artists – have been unfairly targeted by prosecutors who use their lyrics as evidence of guilt, even though there is no evidence that the lyrics are anything more than creative expression. When you allow music and creativity to be silenced, you're opening the door for other realms of free speech to be curtailed as well. The government should not be able to silence artists simply because they write, draw, sing, or rap about controversial or taboo subjects. The Restoring Artistic Protection Act (RAP Act) would protect artists' First Amendment rights by limiting the admissibility of their lyrics as evidence in criminal and civil proceedings."

"Rap, hip-hop and every lyrical musical piece is a beautiful form of art and expression that must be protected," said Congressman Jamaal Bowman Ed.D. (NY-16). "I am proud to introduce the RAP Act alongside Rep. Hank Johnson. Our judicial system disparately criminalizes Black and brown people, including Black and brown creativity. For example, Tommy Munsdwell Canady is a young 17-year-old kid serving a life sentence whose conviction heavily relied upon lyrics he wrote. I was deeply moved to hear that Mr. Canady continues to pursue his art in the face of our carceral systems that would otherwise stifle Black art. He is not an outlier. Evidence shows when juries believe lyrics to be rap lyrics, there's a tendency to presume it's a confession, whereas lyrics for other genres of music are understood to be art, not factual reporting. This act would ensure that our evidentiary standards protect the First Amendment right to freedom of expression. We cannot imprison our talented artists for expressing their experiences nor will we let their creativity be suppressed."

The First Amendment guarantees the right to freedom of expression. But freedom of expression is stifled when safeguards are not in place to ensure that an artist's art is not wrongfully used as evidence against that artist.

The RAP Act puts those safeguards in place to ensure that First Amendment protection is a reality for all artists in America.

Cosponsors: Reps. Jamaal Bowman (Co-Lead), Bush, Carson, Carter (LA), Crockett, Garcia (Robert), Jackson Lee, Jayapal, Kamlager-Dove, Lee (CA), Lee (PA), McGovern, Mullin, Ocasio-Cortez, Payne Jr. Porter, Thompson (MS), Tlaib, Williams, Wilson (FL).

To read the bill, click **HERE**.

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The New York Times https://www.nytimes.com/2023/05/02/arts/music/gordon-lightfoot-edmund-fitzgerald-song.html

How 'The Wreck of the Edmund Fitzgerald' Defied Top 40 Logic

Gordon Lightfoot's 1976 folk ballad told the true story of a shipwreck on Lake Superior. One of his old friends called it "a documentarian's song."

By Mike Ives

Published May 2, 2023 Updated May 3, 2023

Gordon Lightfoot, the Canadian folk singer who died on Monday at 84, had one hit in particular that famously defied Top 40 logic.

"The Wreck of the Edmund Fitzgerald," his 1976 folk ballad, was unusual partly because, at more than six minutes long, it was about twice as long as most pop hits. It also retold a real-life tragedy — the 1975 sinking on Lake Superior of a freighter with 29 crewmen aboard — with meticulous attention to detail.

"It's a documentarian's song, when you think about it," said Eric Greenberg, a longtime friend of the singer who interviewed Mr. Lightfoot as a student journalist in the late 1970s and later co-wrote a song with him.

The plotline of a typical Top 40 hit usually consists of "boy meets girl, boy breaks up with girl, or come back, or you left me, or whatever," Mr. Greenberg said, speaking by phone from New York City. "Not a five-, six-, seven-minute story — a factual story, in Gordon's case, painstakingly checked to make sure that all the facts are right."

Here's the true story that inspired "The Wreck of the Edmund Fitzgerald," and a look at the song that kept its memory alive.

Gordon Lightfoot - Wreck Of The Edmund Fitzgerald (Official Audio)

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A disappearing ship

The Edmund Fitzgerald was a 729-foot ore carrier and one of the largest freighters on the Great Lakes when it left Superior, Wis., on Nov. 9, 1975, carrying iron pellets bound for Detroit.

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The next day, the ship was caught in a storm with winds that averaged 60 to 65 miles an hour. Its captain reported 20- to 25-foot waves washing over the decks and water pouring in below deck through two broken air vents.

That night, the Edmund Fitzgerald sank near the coasts of Ontario and Michigan, in water that was only about 50 degrees. A nearby ship reported seeing its lights disappear in the driving snow.

The Coast Guard later found lifeboats, life rings and other debris from the ship. But the lifeboats were self-inflatable, so their discovery did not necessarily indicate that they had been used. None of the 29 crew members survived.

An unlikely success

The morning after the Fitzgerald went down, the rector of Mariners' Church of Detroit tolled its bell 29 times, once for each man lost. An Associated Press reporter knocked on the church's door, interviewed the rector and filed an account that was published in newspapers.

Mr. Lightfoot read the article. Soon afterward, he started singing a song about the wreck during a previously scheduled recording session. His band joined in, and the first version of the song that they recorded was later released, according to "Gordon Lightfoot: If You Could Read My Mind," a 2020 documentary.

There was no expectation that the song would become a hit single, because its length made it too long for airplay on the radio. But it would spend 21 weeks on the Billboard charts and peak at No. 2, one notch behind Mr. Lightfoot's only No. 1 hit, "Sundown." It also turned the tale of the sinking into a modern legend.

Yet unlike songs that use a real-life story as the basis for embellishment, Mr. Lightfoot's ballad hewed precisely to the real-life details. The weight of the ore, for example — "26,000 tons more than the Edmund Fitzgerald weighed empty" — was accurate. So was the number of times that the church bell chimed in Detroit.

Decades later, Mr. Lightfoot changed the lyrics slightly after investigations into the accident revealed that waves, not crew error, had led to the shipwreck. In the new lyrics, he sang that it got dark at 7 that November night on Lake Superior — not that a main hatchway caved in.

"That's the kind of meticulous, looking-for-the-truth kind of guy that he was," Mr. Greenberg said.

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An enduring legacy

"The Wreck of the Edmund Fitzgerald," like its creator, endured as a Canadian classic long after slipping off the Top 40 charts. The bluegrass guitarist Tony Rice (who also released an entire album of Lightfoot cover songs) and the rock bands Rheostatics and the Dandy Warhols were among those who sang covers over the years.

"The melodies are so powerful and he's such a good storyteller and such a beautiful lyricist," the Canadian singer-songwriter Sarah McLachlan said in the 2020 documentary. "And the combination of those things just really makes for a great song."

Mr. Lightfoot remained proud of it for decades, and he kept newspaper clippings and items given to him by the crew members' surviving families in his home, Mr. Greenberg said.

The song's success had one downside: It turned the wreck, which lies in Canadian territory at a depth of about 500 feet, into a trophy for divers, upsetting the lost sailors' families. In 2006, the government of Ontario adopted a law protecting the site.

Mike Ives is a general assignment reporter. @mikeives

A version of this article appears in print on , Section B, Page 10 of the New York edition with the headline: For a Tragic Tale That Climbed the Charts, the Legend Lives On

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No. 128747

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	))))	Appeal from the Appellate Court of Illinois, No. 3-19-0283. There on appeal from the Circuit Court of the Tenth Judicial Circuit,
-vs-	)))	Peoria County, Illinois, No. 16 CF 373.
MITCHELL DEANDRE BUSH, Defendant-Appellant.	)))	Honorable John P. Vespa, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Ms. Jodi Hoos, Peoria County State’s Attorney, 111 Courthouse, 324 Main St., Peoria, IL 61602-1366, sao@peoriacounty.org;

Mr. Mitchell D. Bush, Register No. Y36455, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 5, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mailbox in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Nicole Weems
LEGAL SECRETARY
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us

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