No. 128747

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

After a jury trial, Mitchell D. Bush was convicted of first-degree murder, aggravated battery with a firearm, and unlawful possession of a weapon by a felon. Bush was sentenced to sixty-five years' imprisonment for first-degree murder to run consecutively to fifteen years' imprisonment for aggravated battery with a firearm. These terms were to be served concurrently with a term of seven years' imprisonment for unlawful possession of a weapon by a felon.

The Third District Appellate Court reversed Bush's conviction for aggravated battery with a firearm, vacated the jury's finding of guilty of reckless discharge of a firearm, and remanded the cause for a further proceedings on those counts. *People v. Bush*, 2022 IL App (3d) 190283, ¶ 1.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether Mitchell Bush was 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.

II. Whether 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 music 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.

STATUTES AND RULES INVOLVED

§ 115-10.1. Admissibility of Prior Inconsistent Statements.

In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and
(b) the witness is subject to cross-examination concerning the statement, and
(c) the statement--
(1) was made under oath at a trial, hearing, or other proceeding, or
(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
(A) the statement is proved to have been written or signed by the witness, or
(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or
(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

725 ILCS 5/115-10.1 (2016)

Rule 607. Who May Impeach
The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage. The foregoing exception does not apply to statements admitted pursuant to Rules 801(d)(1)(A), 801(d)(1) (B), 801(d)(2), or 803.

Ill. R. Evid. 607

Rule 801. Definitions
The following definitions apply under this article:

* * *

(d) Statements Which Are Not Hearsay. A statement is not hearsay if
(1) Prior Statement by Witness. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
(A) inconsistent with the declarant's testimony at the trial or hearing, and--
(1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or

(2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and
(a) the statement is proved to have been written or signed by the declarant, or
(b) the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or
(c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording; or
(B) one of identification of a person made after perceiving the person.

* * *

Ill. R. Evid. 801(d)(1)

STATEMENT OF FACTS

Based on a continuous series of gunshots that killed Dwayne Jones ("Dwayne") and injured Lathaniel Gulley ("Nate"), Mitchell Bush ("Mitchell") and Henry Mayfield ("Henry") were charged by superceding indictment on June 7, 2016, with knowing first-degree murder; felony murder predicated on mob action; aggravated battery with a firearm; and two counts of mob action. Mitchell was also individually charged with knowing first-degree murder and unlawful possession of a weapon by a felon (C6-12). Henry and Mitchell proceeded to trial separately (C577-79, 580-82; R158-64).

On November 28, 2018, defense counsel filed a motion *in limine* to determine the admissibility of a music video recorded and produced by Nate and Gabriel ("Gabe") Gulley, which recounted the events leading up to, and including, the shooting of Dwayne (C713; Supp. Rap Video). At a hearing on the motion, the State argued only that the video should not be admitted as a prior inconsistent statement because it was the State's position that the video was not a statement, but merely a work of art (R224). The circuit court, ultimately, denied the motion *in limine*, despite stating that "the defense appear[ed] to satisfy [725 ILCS 5/115-10.1]" (R223-24).

A jury trial began in March 2019 (R280, 456). During the State's case-in-chief, Cory Montgomery ("Cory") testified that he was confronted at a bus stop regarding an expensive belt (R565-66). This led to a verbal disagreement at Minnie ("Minnie") Roberson's house that began between Minnie's family, Jayurion Mayfield ("Jayurion"), and Tresean Dillard ("Tresean") (R566, 1060). The dispute was about an expensive belt being sold to one of Minnie's children, and Jayurion and Tresean wanting to retake possession of the belt (R580-81). Minnie's son, Cory, stated that

the belt was gone (R581). Tresean and Jayurion left, but returned later with Laterra Price ("Laterra") to try again and retrieve the belt (R582).

A second altercation occurred between Minnie's family and Tresean, Jayurion, and Laterra (R489). The altercation was both physical and verbal. Jayurion and Tresean were hit during the altercation; Nate, Minnie's boyfriend at the time, admitted to hitting one of the boys (R664, 680-81, 1068-69). Police were called to the scene and witnessed Minnie arguing with Laterra, Jayurion, and Tresean, who were stationed outside Minnie's house in the road (R489-90). Eventually, police got Laterra, Jayurion, and Tresean to return to Laterra's home so they could separately interview the occupants of Minnie's house and the occupants of Laterra's car (R487-93). Minnie and Nate subsequently left Minnie's house; they went to drop off Nate's son at Nate's mother's house and then picked up Dwayne and Gabe for protection before returning home (R664-67).

While Nate and Minnie were away from the house, Tresean received threatening messages on Facebook from Minnie's daughters (R1147-49). In response, Sharonda Brown ("Sharonda"), Tresean's mother, drove by Minnie's house three or four times, yelling at the occupants of the house about the previous altercation (R711, 1140, 1151). Sharonda was told that Minnie had left but would return (R1152). Eventually, Sharonda drove by and saw other cars in the street in front of Minnie's house. Sharonda pulled up to Minnie's house with Tresean, Jerrica Williams ("Jerrica"), and possibly Laterra in the car (R857, 881).

While the second altercation was occurring at Minnie's house, Henry, Jayurion's father, was at dialysis. Henry planned to spend time with Mitchell, his friend, after dialysis. Kim Williams ("Kim"), Jayurion's mother, picked up Henry and then picked up Mitchell (R1099-1100). Laterra then called Kim and told her about the altercation that had taken place at Minnie's house. Laterra

also told Kim that Jayurion was waiting at Laterra's house for her and Henry to pick him up (R1100). Kim then drove Henry and Mitchell to Laterra's house to pick up Jayurion (R1102). Neither Sharonda nor Jerrica contacted Kim and asked her to drive over to Minnie's house (R1159-61).

Mitchell testified that when he was picked up by Kim–and prior to learning about the altercation with Jayurion–he was carrying a firearm. Mitchell stated that he wanted to meet with Henry about selling the firearm. Mitchell did not tell Kim or Henry that he was carrying the firearm when he was picked up (R914-16, 919). Mitchell testified that he did not hear the details of the call between Kim and Jayurion (R919).

After Kim and Henry picked up Jayurion, Jayurion told them that he was "jumped on" at Minnie's house (R1102-04). In response, Kim drove to Minnie's house with the intention of speaking to Minnie (R1102-04). Kim did not tell Mitchell that she was planning on going to Minnie's house (R1104). In fact, when Mitchell arrived at Minnie's house, he thought that he and Henry were going to "chill" together at that house (R920-21). When Kim, Henry, Jayurion, and Mitchell arrived at Minnie's house, Kim parked by the curb and got out of the car before she asked to speak with the parent of the house. There were already people congregating in Minnie's yard when Kim arrived. After Kim asked to speak with the parent, other cars began pulling up alongside Kim (R1104-08; People's Ex. 3 & 6). Thereafter, Minnie exited her house while video-recording on her phone and carrying a sock that appeared to contain a can (R1110, 1161). Additionally, there was testimony that Minnie's daughters were carrying knives while out in Minnie's yard (R862, 864, 1076, 1080, 1090). During this time, Mitchell was not near Minnie's driveway because Henry told him to "go up the street" (R923-24; People's 3 & 6). At this

time, Nate, Gabe and Dwayne all took positions in the driveway, opposite the group in the street.

Several witnesses testified that lots of yelling and shouting ensued (R561, 644; People's Ex. 3 & 6). Mitchell heard the individuals in Minnie's yard threaten him and other folks in the street (R926-27). Mitchell, specifically, heard Nate make threats to him; in response, Mitchell brandished his firearm and told Nate, "you're not going to do anything to me" (R927-28). Nate responded by saying, "f*** that gun, we got guns, too" (R929). Mitchell then cocked the gun in his waistband and said, "This ain't no toy. I'm not playing" (R930). Mitchell also believed that Nate possessed a gun because he was grabbing at his waistband (R866, 929, 932, 952). Nate stated that he was not worried about Mitchell possessing a firearm because he did not think that Mitchell would shoot anyone with so many people present (R675, 684).

During this interaction, Henry took a mop handle from someone in the street (R1005; People's Ex. 3 & 6). Mitchell next saw the men in the driveway–Nate, Gabe, and Dwayne–charge at Henry and struggle over the mop handle (R930-31). Seeing Henry and Dwayne struggle over the mop handle made Mitchell scared for his own and Henry's safety, especially considering Henry's fragile state (R931). Henry had a catheter in his chest that was connected to his heart and his arm because he was going through kidney failure (R889-90, 900-01). Based on Mitchell's fear, he then pulled out his firearm and fired (R947). Mitchell stated that he fired his gun to try and get the men in the driveway to back off; he was not trying to shoot anybody (R947). Mitchell was not aware that he shot anyone after firing multiple rounds (R946). Mitchell, ultimately, fatally shot Dwayne in the abdomen and wounded Nate in the arm (R804). Several rounds were later recovered from

inside and outside of Minnie's house (R788, 804; Ex. 17-23).

After the shooting, everyone scattered. Mitchell helped Henry into Kim's car and drove him to Mitchell's house (R947-48). Mitchell then dropped Henry off and drove to Joliet where he threw the gun over the "74 bridge" (R973). Kim and Jayurion were interviewed after the shooting and identified Mitchell as the shooter (R987, 995-96; People's Ex. 30). When Mitchell was interviewed by police after the shooting, his account of the shooting differed from his testimony at trial; during the interview, he both denied shooting the firearm and also stated that he retrieved a dropped firearm during the altercation and shot Dwayne with that misplaced firearm (People's Ex. 24).

Additionally, during the trial, Juror Proctor indicated to the court and the parties that she was the step-grandmother of Nate and Gabe–her daughter was married to Nate and Gabe's mother (R775-79). Proctor stated that she did not recognize the witnesses by their names alone; she only pieced together her relationship to Nate and Gabe after seeing her daughter-in-law in the gallery and then seeing Nate's and Gabe's faces when they entered the courtroom to testify. Proctor indicated to the court that she could remain fair and impartial. Defense counsel did not ask to have her stricken (R775-79).

At the close of the case, Mitchell was found guilty of felony murder, second-degree murder, aggravated battery with a firearm, reckless discharge of a firearm, and two counts of mob action (R1362-63). The State introduced Mitchell's certified conviction for unlawful possession of a controlled substance into evidence (R1365). After receiving this further evidence, the jury returned a guilty verdict on the bifurcated count of unlawful possession of a weapon by a felon (R1367).

On May 9, 2019, defense counsel filed a timely motion for a new trial, and,

later, a supplemental motion (C987-92, 999-1000). In the supplemental motion, defense counsel argued that a new trial should be granted because Proctor improperly served on Mitchell's jury (C999-1000). Defense counsel acknowledged that he did not ask for Proctor's removal because counsel did not properly hear the extent of Proctor's relationship with the witnesses at the time the issue was brought before the court (C1000). After a hearing, the circuit court denied the motions for a new trial (R1387).

Thereafter, a sentencing hearing was held, and the court sentenced Mitchell to a term of 65 years' imprisonment for felony murder consecutive to a term of 15 years' imprisonment for aggravated battery with a firearm. These terms were to be served concurrently with a term of 7 years' imprisonment for unlawful possession of a weapon by a felon (R1422-23). A timely motion to reconsider was filed and denied (C1026-27; R1437). Bush appealed (C1040-43).

On appeal, Bushed argued that (1) he was not proven 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) there was no independent felonious purpose shown separating the offenses of mob action and murder; (2) a new trial was required because the jury rendered legally inconsistent verdicts; and (3) his sentence was excessive and the circuit court improperly disregarded significant factors in mitigation. Additionally, Bush argued that he was deprived of a fair trial due to cumulative error where (1) the jury rendered legally inconsistent verdicts; (2) the circuit court improperly excluded a music video as a prior inconsistent statement; (3) the circuit court improperly allowed Gabe and Nate's step-grandmother to serve as a juror; and (4) defense counsel was ineffective for indicating that self-defense was not a defense to mob action and for implying that Mitchell was part

of "Mob B." *People v. Bush*, 2022 IL App (3d) 190283.

The Third District Appellate Court held that the State proved Mitchell guilty of mob action beyond a reasonable doubt, and that the offenses of mob action and felony murder were separate, where Mitchell acted with Henry and other members of Laterra's group against Minnie's group; Nate's testimony showed that Henry yelled "shoot" and Mitchell fired; testimony showed that Mitchell was present when Laterra told Kim on speaker phone that Jayurion had been jumped; testimony showed that Mitchell was present when Jayurion told Kim and Henry about the prior altercation; evidence showed that Henry swung a broom at Minnie's group, and Mitchell showed up with others at Minnie's house. *Id.*, ¶¶ 92, 98. Next, the reviewing court held that the trial court did not err when it found that the music video made by Nate and Gabe Gulley was not admissible because "the rap video was made solely for entertainment purposes and was not akin to a prior statement by the witness." *Id.*, ¶ 112. Finally, the court held that there was no implied juror bias because there was no claim that Proctor was related to the parties, nor was there any indication that Proctor was suffering from a disqualifying state of mind such that she was actually biased. *Id.*, ¶ 113.

The Third District Appellate Court, ultimately, reversed Bush's conviction of aggravated battery with a firearm, vacated the jury's finding of guilty of reckless discharge of a firearm, and remanded the cause for a new trial because the appellate court agreed that the jury's findings of guilty of both offenses were legally inconsistent. 2022 IL App (3d) 190283, ¶ 105.

The Third District Appellate Court denied Bush's petition for rehearing on June 27, 2022. This Court allowed Bush leave to appeal on September 28, 2022.

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.

STANDARD OF REVIEW

Defendant makes a two-pronged attack on his conviction of first-degree felony murder. He first argues that the evidence was insufficient to prove him guilty of the offense. The applicable standard of review is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the offense were proven beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). He alternatively argues that the offense of mob action did not properly serve as the predicate felony for his murder conviction. This is purely a legal question subject to *de novo* review. *People v. Davison*, 236 Ill. 2d 232, 239 (2010).

ARGUMENT

After a jury trial, Mitchell Bush ("Mitchell") was found guilty of first-degree felony murder, second-degree murder, aggravated battery with a firearm, two counts of mob action, reckless discharge of a firearm, and unlawful possession of a weapon by a felon (C971, 1031). Mitchell's conviction for felony murder was predicated on the offense of mob action (C12). Mitchell submits that his murder conviction must be reversed for one or both of the following reasons: (a) he was not shown to have committed the underlying offense of mob action, and (b) mob action could not form the basis for felony murder because no independent felonious purpose was shown in the commission of mob action and felony murder.

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

720 ILCS 5/9-1(a)(3) (2016) provides that a person who kills another without lawful justification commits first-degree murder if the killing occurs in the course of attempting or committing a forcible felony other than second-degree murder. This Court has held that mob action can form the basis for felony murder. *People v. Davis,* 213 Ill. 2d 459, 475 (2004); *People v. Davison,* 236 Ill. 2d 232, 244 (2010).

Mob action is punished by 720 ILCS 5/25-1 (2016). The felony murder charge in this case specifically cited 720 ILCS 5/25-1(a)(1) (2016), which proscribes "the knowing or reckless use of force or violence disturbing the public peace by two or more persons acting together and without authority of law" (C12). In *In re B.C.*, 176 Ill. 2d 536, 549 (1997), this Court observed that "[t]o sustain a conviction for mob action it must be shown that the defendant was part of a group engaged in physical aggression reasonably capable of inspiring fear of injury or harm." See also *People v. Tamayo*, 2012 IL App (3d) 100361, ¶ 23 (affirming conviction of felony murder predicated on mob action where defendant and others became aggressors in fight, and "thus acted without lawful authority," precluding a self-defense claim). Further, the State must show that Mitchell and Henry "acted together" and disturbed the peace by force or violence. *People v. Kent,* 2016 IL App (2d) 140340, ¶ 20; *People v. Barnes*, 2017 IL App (1st) 142886, ¶ 68. For mob action,"acting together" requires a "concerted action–that is, a common purpose or agreed-upon course of action among the '2 or more people' who engage in 'the use of force or violence disturbing the public peace.'" *People v. Barnes*, 2017 IL App (1st) 142886, ¶ 68.

In *Kent*, the Second District Appellate Court held that the State failed to prove defendant guilty of mob action when it failed to show a commonality of purpose between Kent and another person during Kent's commission of a battery. *Id.*, ¶ 22. The *Kent* Court noted that the State offered no evidence that anyone other than Kent threatened or touched the victim during the altercation; thus, the State failed to show intent or a commonality of purpose between Kent and anyone else to batter the victim. *Id.*

Likewise, here, the State presented no evidence that Mitchell participated with Henry in the altercation prior to the shooting. Here, the State's theory at trial was that Mitchell and Henry became involved in a fight that had been brewing between Sharonda, Laterra, Tresean, Jayurion, Minnie, Nate, and Minnie's children, before Mitchell and Henry arrived at Minnie's house (R1245-56). The State argued that around the time that Mitchell and Henry arrived at Minnie's house, people got out of their cars, walked up to Minnie's fence, and started banging sticks on Minnie's fence (R1255-56). Minnie and her children were in the front yard, while Nate, Gabe, and Dwayne stood in the driveway (R1256). Henry, eventually, grabbed a stick from someone, walked over to Dwayne, and swung the stick at him (R1256). As this altercation ensued, Mitchell walked up to the altercation, pulled out a firearm, and shot at the individuals in Minnie's driveway (R1256). The State did not proffer evidence showing that Mitchell committed any act of violence against Minnie's group prior to shooting the firearm, which is an element inherent in the offense of murder itself. The evidence relied on by the State was insufficient to support the conviction for mob action underlying felony murder, especially considering that Mitchell's actions during the altercation were inherent in the offense of murder itself.

The State's focus on Mitchell's mere presence at the scene is problematic under *People v. Barnes*, 2017 IL App (1st) 142886, ¶ 38. A person cannot be convicted of mob action for simply being at the scene of a crime with another person. "Guilt by association is a thoroughly discredited doctrine." *People v. Perez*, 189 Ill. 2d 254, 266 (2000). In *Barnes,* the reviewing court noted that the joint-action element of mob action required something "beyond merely doing the same thing at the same time." *Id.,* ¶ 38. Specifically, the reviewing court stated that "simultaneous or parallel activity is not enough; to be 'acting together,' an intent to join with others in a mutual pursuit—like the members of a gang—is typically required." *Id*. "An individual's mere presence in a place where a riot or disturbance is taking place does not support a conviction of mob action." *Kent*, 2016 IL App (2d) 140340, ¶ 19 (citing *People v. Roldan*, 54 Ill. 2d 60, 64 (1973)).

The fact that Mitchell was at Minnie's house with Henry and others as they committed acts of violence against the residents of Minnie's house is not sufficient to support a conviction for felony mob action against Mitchell. Even Henry's act of swinging a broomstick at Nate and Dwayne fails to establish that Mitchell was acting with Henry where Mitchell did not use force or violence separate from the act of shooting Dwayne. The State presented no evidence that Henry and Mitchell had an agreement that Henry would harm Dwayne or that Mitchell would shoot at Dwayne during this altercation. Instead, Henry told Mitchell to go up the street so as to avoid the altercation (R923-24). And, the evidence shows that Mitchell did not know whose house he arrived at with Henry, did not know Jayurion was involved in an altercation earlier that day, and did not know that an altercation was occurring at Minnie's residence until after he exited the car (R919-26). Overall, the fact that Henry may have completed acts necessary to be convicted of mob

action, based on his actions and the actions of the other members of Laterra's group, did not prove Mitchell guilty of mob action, especially where the State could not identify separate acts Mitchell took to support a conviction for this offense. The State argued that Mitchell was guilty of mob action solely based on his proximity to others acting together to commit violence; this was precisely the rationale that was rejected in *Barnes* (R471-72, 1245-56, 1380). 2017 IL App (1st) 142886, ¶ 38 ("Two strangers who happen to be sitting next to each other on an airplane are doing the same thing at the same time, and quite near each other, but we would not describe these strangers as 'traveling together.' Nor would we would describe two strangers, sitting next to each other at the lunch counter of a coffee shop, as 'eating together.' Such simultaneous or parallel activity is not enough . . ."). *Barnes* expressly reaffirmed this Court's disavowal of "'guilt by association.'" *Id.*, ¶ 42 (quoting *People v. Perez*, 189 Ill. 2d 254, 266 (2000). This Court should continue to disavow that doctrine.

The State presented insufficient evidence to show that Mitchell had a common plan with Henry to use force or violence to disturb the peace, even where Nate testified that Henry yelled "shoot" and that Mitchell shot. *Bush*, 2022 IL App (3d) 190283, ¶ 92. The joint-action element of mob action requires a concerted action of some kind between two or more people who engage in the use of force or violence to disturb the public peace. Nate's testimony that Henry yelled "shoot" and that Mitchell shot was not a concerted action by Mitchell that is independent from the elements required to prove felony murder. *Barnes*, 2017 IL App (1st) 142886, ¶ 38; *People v. Davison*, 236 Ill. 2d 232, 240 (2010) (citing *People v. Morgan,* 197 Ill. 2d 404, 447, 458 (2001)). The focus here is on the fact that Mitchell's act–that he shot Dwayne–was the same act used to establish felony murder and Mitchell's

participation in mob action. The reliance on this singular act, to substantiate both the offenses of mob action and felony murder, is both troubling and improper. Endorsing this practice, in effect, allowed the State to "avoid the burden of proving an intentional or knowing first degree murder" in this case because the acts that caused Dwayne's death also constituted a lesser felony in addition to murder. *Davison*, 236 Ill. 2d at 240 (citing *Morgan*, 197 Ill. 2d at 447). This rationale also improperly precluded Mitchell from asserting a claim of self-defense to murder, since self-defense is not a valid defense to felony murder, despite the jury's verdict in this case finding this defense to be partially substantiated (C973).

Next, evidence that Mitchell was present when Laterra told Kim on speaker phone that Jayurion had been jumped and that Mitchell was in the car when Jayurion told his parents about the prior altercation he was in with Nate was also not sufficient show that Mitchell satisfied the joint-action element of mob action. *Bush*, 2022 IL App (3d) 190283, ¶ 92. Mitchell's knowledge that two or more people were going to Minnie's house and that an altercation might ensue, may satisfy the elements of mob action under Sections 25-1(a)(2) or (3); however, this offense is a misdemeanor and cannot form the basis for felony murder–and it was certainly not the offense with which Mitchell was charged (C7, 12). Under Sections 25-1(a)(2) and (3), the legislature criminalizes a defendant's unlawful assembly when the purpose of that assembly is to commit a criminal offense or violence against a person or to property. 720 ILCS 5/25-1(a)(2)-(3) (2016). However, to be convicted of the felony form of mob action, the State has to show that a defendant engaged in "the knowing or reckless use of force or violence disturbing the public peace. . .". 720 ILCS 5/25-1(a) (2016). As such, the State was required to show that Mitchell knowingly used force or violence to disturb the peace, apart

from his actions that caused the death of Dwayne. The evidence relied on by the State does not support such a conviction.

Moreover, the State claimed that it met the elements of mob action because Sharonda, Jerricca, and Henry "were out there swinging poles at people," "[s]houting threats," and "[s]creaming and yelling" (R1257). *Bush*, 2022 IL App (3d) 190283, ¶ 92. The evidence at trial did not show, and the State did not argue, that Mitchell participated in the physical altercation that occurred outside Minnie's house (R1257-58). Mitchell did not approach Minnie's fence, did not swing a mop handle, and did not engage in the altercation until he reasonably believed that Henry's life was at risk (R944-46; People's Ex. 6). The State has not identified any act, apart from the shooting itself, that Mitchell participated in with Henry that showed that the pair shared the same purpose to attack Nate and Dwayne.

The appellate court's support for Mitchell's conviction for mob action based on the acts of uncharged bystanders was improper. *Bush*, 2022 IL App (3d) 190283, ¶ 92. Both counts of mob action against Mitchell were based on the theory that Mitchell and Henry were acting together in the use of force or violence to disturb the public peace (C8). It violates Mitchell's right to due process and a fair trial, and the notions of fair play, to *post-hoc* affirm Mitchell's conviction for felony murder based on the uncharged conduct of other bystanders. The appellate court's reasoning was improper because it endorsed using a fatal variance to support Mitchell's conviction for felony murder. Mitchell was charged with committing mob action with Henry. He was not on notice that he could be convicted of mob action based on any of the other actions taken by the members of Laterra's group. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006) (noting that defendant's due process right to notice of the charges brought against him prevents him from being "convicted

of an offense he has not been charged with committing"). Accordingly, this Court's finding that Mitchell was properly convicted of mob action and felony murder based on the acts of Laterra's group– which were not included in the indictment–was improper.

In short, the evidence presented at trial failed to prove crucial elements of mob action. As a result, no rational trier of fact could have found Mitchell guilty of felony murder based on the predicate felony of mob action beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970) (due process clause protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute charged offense); *People v. Wheeler,* 226 Ill. 2d 92, 114 (2007). For this reason, Mitchell Bush requests that this Court reverse outright his conviction for first-degree felony murder and remand this cause for sentencing for the offense of second-degree murder.

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.

This Court should also reverse outright Mitchell's conviction of felony murder and remand for sentencing for second-degree murder because the State failed to prove that Mitchell was "attempting or committing a forcible felony" distinct from "performing the acts which" killed Dwayne. 720 ILCS 5/9-1(a)(3) (2016). The State alleged that Mitchell killed Dwayne while committing mob action (C7, 12), but at trial argued that the shooting both constituted the crime of mob action *and* formed the basis for the felony murder charge. Because the "acts constituting [the] forcible felon[y]" were "inherent in the act of murder itself" and lacked an "independent felonious purpose," they could not constitute felony murder. *Davison*, 236 Ill. 2d at 240 (citing *Morgan*, 197 Ill. 2d at 447, 458). The State also argued,

for the first time at the post-trial motion hearing, that Mitchell committed mob action prior to the shooting (compare R1380 and R1257-58; C6-12). However, as discussed above, Mitchell did not participate in the altercation prior to shooting at the individuals in Minnie's driveway. In no way did the State offer evidence from which a reasonable fact-finder could conclude beyond a reasonable doubt that Mitchell was committing a forcible felony prior to performing the acts that killed Dwayne, and hence conclude that he was guilty of felony murder. Consequently, Mitchell Bush requests that this Court reverse outright his conviction for first-degree felony murder and remand this cause for sentencing for the offense of second-degree murder.

Under Illinois law, a person commits first-degree murder if, "in performing the acts which cause the death" of an individual, the person "is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (2016). Based on the structure of the first-degree murder statute and related statutes, this Court has interpreted "forcible felony" in Subsection (a)(3) implicitly to exclude crimes that would meet the statutory definition of "forcible felony," but which are either "inherent in the act of murder itself" or lack "an independent felonious purpose" from the murder. *Davison*, 236 Ill. 2d at 240 (citing *Morgan*, 197 Ill. 2d at 447, 458). The reason for this is twofold. First, because acts that cause a person's death frequently constitute a lesser felony in addition to murder, interpreting "forcible felony" to include acts that "arise from and are inherent in the act of murder itself'" would allow the State to "avoid the burden of proving an intentional or knowing first degree murder" in almost any case, essentially rendering subsections 9-1(a)(1) and (2) superfluous, in violation of the rule against

surplusage. *Davison*, 236 Ill. 2d at 240 (quoting *Morgan*, 197 Ill. 2d at 447); see also *People v. Magette*, 195 Ill. 2d 336, 350 (2001) (rule against surplusage).

Second, the same tactic would permit the State to eliminate the offense of second-degree murder based upon serious provocation or unreasonable belief in self-defense, 720 ILCS 5/9-2(a) (2016), again violating the rule against surplusage, because there is no second-degree felony murder. 720 ILCS 5/9-1(a)(3) (2016); *Davison*, 236 Ill. 2d at 240. Consequently, in order to prove Mitchell guilty of the felony murder of Dwayne, the State was required to prove that, in performing the acts that killed Dwayne, Mitchell was attempting or committing a forcible felony that was not inherent in the acts that killed Dwayne, and that he possessed an independent purpose other than killing Dwayne. *Davison*, 236 Ill. 2d at 240.

The State did not do so. Here, the indictment charged Mitchell with mob action as the predicate offense for first-degree felony murder, and alleged: "[Defendant], without authority of law and while acting together with [Henry], knowingly by the use of violence or force disturbed the public peace and caused injury to Dwayne" (C12). The felony murder charge cited the same instance of injury to support its allegation of murder (C7, stating that Mitchell knowingly discharged a firearm at Dwayne and thereby caused Dwayne's death). As a result. the underlying predicate of mob action did not have an independent felonious purpose from the murder.

Moreover, since mob action was the predicate charge underlying Mitchell's felony murder count, the circuit court included a mob action instruction, which informed the jury that violent infliction of injury is a necessary component: "A person commits the offense of Mob Action involving the violent infliction of injury when he acting together with one or more persons and without authority of law

knowingly disturbs the public peace by the use of force or violence; and one of the participants in the mob action violently inflicts injury to the person of another" (C928). The State utilized the same–and only–infliction of injury by Mitchell against Dwayne to form the basis of its mob action charge and the charge of felony murder. Accordingly, the evidence of felonious purpose for the mob action was the same as that for the murder.

Under the facts of this case, mob action could not form the basis for felony murder. Mitchell's action of shooting was not just inherent in Dwayne's death, it was the sole cause of Dwayne's death. The acts constituting a forcible felony are inherent in a killing, and hence not a legally permissible predicate for felony murder, if they include the sole "act that caused the killing." *People v. Davis*, 213 Ill. 2d 459, 474 (2004); accord *People v. O'Neal*, 2016 IL App (1st) 132284, ¶ 47 ("direct and only cause of [the victim's] death"). The felony is a permissible predicate only if there is a more distant "'cause and effect relationship'" between it and the victim's death, with additional or intermediate causes standing between them. *Morgan*, 197 Ill. 2d at 446-47 (quoting *People v. Shaw*, 186 Ill. 2d 301, 322 (1999)). In other words, a felony is a permissible predicate for felony murder if it "set[s] in motion a course of events that later led to the victim's death." *O'Neal,* 2016 IL App (1st) 132284, ¶ 43. If the underlying felony consists of violence directed toward the victim, it is a permissible "predicate felony" only if was "complet[e] . . . before the end of the aggression that eventually resulted in the victim's death." *Davison*, 236 Ill. 2d at 242; accord *Davis*, 213 Ill. 2d at 474-75.

A good example of a forcible felony inherent in a resulting death is offered in *O'Neal,* 2016 IL App (1st) 132284, where the defendant saw a van driving the wrong way down a one-way street toward a party and, fearing that it was being

driven by rival gang members, fired multiple shots at the van; one of the bullets struck his friend across the street and killed him. *Id.* ¶¶ 1, 6-9. The State charged the defendant with, *inter alia*, felony murder predicated on aggravated discharge of a firearm (in shooting at the occupied van), and the jury found him guilty as charged. *Id.* ¶¶ 2-3, 17.

The appellate court reversed, holding that the predicate of aggravated discharge "was inherent in the murder itself." *Id.* ¶ 42. The "cluster of shots" fired was the only act alleged, and the State "never made any attempt to differentiate among the various shots in the cluster." *Id.* There was no "remov[al] in time" between the aggravated discharge and the victim's death, and the same evidence was used to prove both the aggravated discharge and the victim's death: "Proof of the predicate felony and proof of the murder were one and the same." *Id.* ¶¶ 47-48. These facts illustrated that there was no causal separation between the aggravated discharge and the victim's death: "Defendant's acts were not completed before the end of the series of events that caused [the victim's] death; his act was the *only* event, the direct and only cause of [the victim's] death." *Id.* ¶ 47 (emphasis in original). Because aggravated discharge was inherent in the victim's death, it was an improper predicate felony for felony murder, and the court reversed the defendant's conviction. *Id.* ¶ 54.

The present case is not significantly distinguishable from *O'Neal*: like the aggravated discharge in that case, the mob action in this case–Mitchell fired a series of shots into the crowd–was the direct and only cause of, and inherent in, Dwayne's death (See C7, 12) (charging defendant with felony murder based on him knowingly discharging a firearm at Dwayne thereby causing his death). The cause of death was a single gunshot wound (R804). However, the evidence does

not show which of the several shots fired by Mitchell caused Dwayne's death. As in *O'Neal*, there was no argument or proof that any one shot in particular killed Dwayne. Finally, and arguably most revealingly, the State relied on the same evidence to prove the underlying mob action and the murder. Indeed, the State explicitly argued to the jury that the same shots, fired from the same weapon, satisfied the elements of both mob action and felony murder (R1257-58, 1270-71). There was no logical or causal gap between the alleged mob action and the charged murder.

Further, contrary to the appellate court's decision here, Mitchell's presence at Minnie's residence while others fought with the residents of Minnie's home was not sufficient to show that there was an independent felonious purpose to commit felony mob action. *Bush*, 2022 IL App (3d) 190283, ¶ 98. Pursuant to 720 ILCS 5/25-1(a)(1), the State was required to show that Mitchell *engaged in* the knowing or reckless *use of force or violence* disturbing the public peace by two or more persons acting together and without authority of law. As argued above, Mitchell's mere presence at the scene while others engaged in force or violence was not sufficient to satisfy the elements of felony mob action separate from the acts of felony murder. 720 ILCS 5/25-1(a)(1) (2016) (emphasis added); *Barnes*, 2017 IL App (1st) 142886, ¶ 38; *Kent*, 2016 IL App (2d) 140340, ¶ 19 (citing *People v. Roldan*, 54 Ill. 2d 60, 64 (1973)). The evidence at trial did not show, and the State did not argue, that Mitchell participated in the physical altercation that occurred outside Minnie's house prior to the shooting (R1257-58). Mitchell did not approach Minnie's fence, did not swing a mop handle, and did not engage in the altercation until he reasonably believed that Henry's life was at risk (R944-46; People's Ex. 6). Neither the State nor the appellate court identified any act, apart

from the shooting itself, that Mitchell engaged in with Henry that showed that the pair used force or violence with the shared purpose of causing injury to Dwayne (C7, 12).

It is helpful to note how this case is different from cases where mob action directed at a victim was found to be a legally permissible predicate for felony murder; in those cases, the victim's death was not attributable to any one act, let alone a particular act of the defendant, and the defendant's commission of mob action was therefore distinct from the victim's death. See, *e.g., Davison*, 236 Ill. 2d at 242; *Davis*, 213 Ill. 2d at 474. In *Davison*, the State presented evidence that the defendant was part of a four-person mob that searched for, chased, and fatally beat and stabbed the victim; an autopsy showed that the victim died "as a result of blood loss from 20 stab wounds, including an abdomen wound that punctured his aorta." *Davison*, 213 Ill. 2d at 234-35. In his defense, the defendant testified that he chased and threw a bat at the victim and stabbed him once in the arms, hands, or shoulders, after which the other members of the mob continued to stab and beat the victim. *Davison*, 213 Ill. 2d at 237-38. He was convicted of felony murder predicated on mob action based on the beating of the victim. *Id.* at 234, 238.

On appeal, this Court affirmed the defendant's conviction, holding that "the defendant's conduct was not an act inherent in, or arising from, the victim's murder." *Id.* at 241. The victim had died as a result of cumulative blood loss, "rather than any particular wounds inflicted by the defendant alone." *Id.* at 243. In light of this, the defendant's commission of mob action was complete prior to all of the acts that led to the victim's death, and "the same evidence was not used to prove both the predicate felony of mob action and the murder." *Id.* at 241.

> Defendant admitted he threw a bat at the victim during the pursuit. Defendant also engaged in some sort of physical interaction with the victim when he first caught up to the victim during the pursuit, causing the victim to fall and drop a knife. Defendant stabbed the victim only toward the end of the pursuit. After stabbing the victim, defendant retreated and watched his three co-offenders repeatedly stab and hit the victim with a bat. This evidence supports a conclusion that defendant acted with other individuals to use force or violence to disturb the public peace, completing the predicate felony of mob action, before the end of the aggression that eventually resulted in the victim's death.

Id. at 242. Because of this, "defendant's conduct constituting the mob action was neither inherent in, nor arose from, the murder itself." *Id.* at 243; accord *Davis*, 213 Ill. 2d at 474 ("It is undisputed that many of the blows [the victim] received were from the 10 to 20 other assailants. . . . [T]o convict the defendant of mob action, it was not necessary to prove that defendant struck [the victim], much less performed the act that caused the killing.").

Here, unlike in both *Davison* and *Davis*, Dwayne's death was caused by a "particular wound[] inflicted by the defendant alone"–the gunshot wound to Dwayne's abdomen (R804). The State made no effort to discriminate between the different shots and, indeed did not offer any evidence that Dwayne was not struck and killed by the first shot fired. The State's own closing argument used the same evidence to prove both the mob action and the murder (R1257-58. 1270-71). And, as indicated above, the evidence did not show that Mitchell participated in any force or violence prior to shooting Dwayne. As such, the mob action was inherent in Dwayne's death. It cannot legally constitute the predicate for felony murder.

In sum, the State failed to prove defendant guilty of mob action beyond a reasonable doubt. And, because mob action was the predicate offense for felony murder, the State failed to prove felony murder beyond a reasonable doubt. Thus,

Mitchell's conviction for felony murder cannot stand. Alternatively, mob action as charged in this case could not form the basis for felony murder because both charges alleged the same conduct and the evidence did not show that defendant acted with independent felonious purposes with respect to the two offenses. For either or both of these reasons, Mitchell Bush requests that this Court reverse outright his conviction for first-degree felony murder and remand this cause for sentencing for the offense of second-degree murder.

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 music 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.

STANDARD OF REVIEW

Reviewing courts generally analyze the trial court's decision whether to admit certain testimony for an abuse of discretion. *People v. Lovejoy*, 235 Ill. 2d 97, 141 (2009).

A trial court has broad discretion in deciding how to handle and respond to allegations of juror bias that arise during trial. *People v. Runge*, 234 Ill. 2d 68, 105 (2009). After a trial court has made an appropriate inquiry into a claim of juror bias, the trial court's decision will not be disturbed on appeal absent an abuse of discretion. *Id.* at 105. "[A]n abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. McDonald*, 2016 IL 118882, ¶ 32.

ARGUMENT

Defendant has a due-process right to a fair trial guaranteed by both the federal and state constitutions. See *People v. Blue*, 189 Ill. 2d 99, 138 (2000). "[W]hen a defendant's right to a fair trial has been denied, this court must take corrective action so that [it] may preserve the integrity of the judicial process." *Blue*, 189 Ill. 2d at 138. Mitchell was denied his right to a fundamentally fair trial where the circuit denied his motion *in limine* seeking the admission of a music 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. Additionally, Mitchell was denied a fair trial where the circuit court allowed a juror to remain empaneled on Mitchell's jury after the juror revealed an implied bias. These errors, alone or considered cumulatively, substantially impacted Mitchell's right to a fair trial to such a degree that it cannot be said that Mitchell's trial was fundamentally fair. Accordingly, Mitchell requests that this Court reverse his remaining convictions and remand this cause for further proceedings. *People v. Speight*, 153 Ill. 2d 365, 376 (1992).

Importantly, it is worth noting that this case will already be remanded for a new trial for aggravated battery with a firearm and reckless discharge of a firearm where nearly all of the same evidence will be introduced (compared to the evidence produced at the initial trial) because the Third District Appellate Court found that the circuit court received inconsistent verdicts that it failed to clarify before it entered Mitchell's conviction for aggravated battery with a firearm. Thus, the errors described below, combined with the fact that Mitchell will already be getting a new trial with substantially the same evidence, weigh in favor of granting Mitchell a new trial on all existing counts.

A. Prior Inconsistent Statements

Mitchell was denied his fundamental right to impeach a crucial prosecution witness with his prior inconsistent statements at trial. The required evidentiary and statutory prerequisites were met to admit Gabe's statements made in a music video, yet the trial judge improperly ignored these rules because he "c[ould] not get past the hurdle in [his] head" that music videos are made for entertainment purposes only and, thus, are not credible (R220-24). The Third District Appellate

Court's analysis of this issue was perfunctory and limited to: "Considering th[e] standard of review and the evidence before the court on this matter, we cannot find that the trial court erred in denying defendant's request to admit the rap video. As the State correctly notes, the rap video was made solely for entertainment purposes and was not akin to a prior statement by the witness." *People v. Bush*, 2022 IL App (3d) 190283, ¶ 112. This Court should reject the Third District Appellate Court's creation of the work-of-art exception to Section 115-10.1 and Rule 801(d)(1)(A)(2), and find that Mitchell met the evidentiary requirements for admission of the music video, and remand this cause for further proceedings because it cannot be said that Mitchell's trial was fundamentally fair.

Hearsay evidence, an out-of-court statement offered to prove the truth of the matter asserted, is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). One such exception is that prior inconsistent statements of a testifying witness may be admitted to impeach the witness' credibility. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 33; Ill. R. Evid. 607 & 801(d)(1)(A)(2). Prior inconsistent statements may also be admissible as substantive evidence under 725 ILCS 5/115-10.1 (2018). Section 115-10.1 provides, in relevant part, that a prior inconsistent statement may be offered as substantive evidence if "the witness is subject to cross-examination concerning the statement[;]" the statement "narrates, describes, or explains an event or condition of which the witness had personal knowledge[;]" and "the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1(a), (b), (c)(2)(C) (2018). Under Section 115-10.1, a tape recording of a witness' statement is admissible as substantive evidence

if the statement is inconsistent with the witness' trial testimony and the witness is subject to cross examination. *People v. Vera*, 277 Ill. App. 3d 130, 139 (1st Dist. 1995). Once the proponent of the statement has proved it was accurately recorded, no further showing of reliability is required. *Id.*

A witness' prior statement does not have to directly contradict trial testimony to be considered inconsistent within the meaning of Section 115-10.1. *People v. Flores*, 128 Ill. 2d 66, 87 (1989). "Inconsistent" statements include evasive answers, silence, or changes in position. *Flores*, 128 Ill. 2d at 87. Where a witness "claims to be unable to recollect a matter, a former affirmation of it should be admitted as a contradiction." (Internal citations omitted.) *Id.* In some circumstances, when considering whether or not to admit a statement pursuant to Section 115-10.1, the mere tendency of that statement to be inconsistent with the testimony at trial will be enough to merit admission of the statement. *People v. Salazar*, 126 Ill. 2d 424, 458 (1988).

The statements counsel sought to admit and publish to the jury were admissible as both substantive and impeachment evidence under Section 115-10.1 and Rule 607 and 801(d)(1)(A)(2) of the Illinois Rules of Evidence. Prior to trial, defense counsel filed a motion *in limine* seeking to admit a recorded music video as a prior inconsistent statement to impeach Gabe Gulley (C713). Defense counsel showed that the video accurately narrated the events of the shooting, of which Gabe had personal knowledge. In fact, during the hearing on the motion *in limine*, the circuit judge noted, "I see this as–well, State, what I've been handed by defendant, which would be 725 ILCS 5/115-10.1, the defense appears to satisfy that statute" (R223). Further, Gabe's testimony at trial was contradictory to the statement he gave in the music video, and Gabe's statements in the music video

were damaging to the State's case because he described that he was solicited to come to Minnie's house to fight, he was at Minnie's house with the intent to fight, and the Gulleys initiated the physical altercation (Compare R656-59 and Supp. Rap Video).

However, at trial, Gabe testified that he did not remember much from the day of the shooting because of the passage of time and because he "overdosed" on alcohol (R656-58). Gabe also said that everyone was just standing outside during the shooting, and that he and Nate were not arguing with anyone (R658-59). This comparison shows that Gabe's trial testimony was inconsistent with his pretrial music-video statements. The differences between Gabe's video statement and testimony should have permitted counsel's introduction of the music video.

The required evidentiary and statutory prerequisites for admission of the music video were met, yet the trial court improperly ignored the set rules and procedures enumerated by Section 115/10.1 and the Illinois Rules of Evidence when it refused to admit the video. See "Arbitrary," Black's Law Dictionary (11th ed. 2019). The music video should have been admitted into evidence for the jury's consideration, yet the circuit court denied Mitchell's motion *in limine* and found that trial counsel could not impeach Gabe at trial with the music video describing the events leading up to, and including, the shooting because defense counsel could not otherwise prove the truth of the statements contained within the music video (R224). The court, especially, took issue with determining the truthfulness of the video because it was a purported work-of-art (R222-24). In making its finding, the trial judge improperly focused on an additional truthfulness test not enumerated in the Illinois Rules of Evidence or the Illinois code (R220). 725 ILCS 5/115-10.1 (2018); Ill. R. Evid. 607 & 801(d)(1)(A)(2). Contrary to the circuit judge's finding,

Section 115/10.1 and Rules 607 and 801(d)(1)(A)(2) do not require an additional litmus test for truthfulness; the statute and the rules sufficiently outline the requirements for admissibility. *People v. Cook,* 2018 IL App (1st) 142134, ¶ 41; *People v. Barker*, 298 Ill. App. 3d 751, 760-61 (1st Dist. 1998). The music video satisfied Section 115/10.1 and Rules 607 and 801(d)(1)(A)(2), and thus was sufficient for admission. Any additional litmus test employed on an *ad-hoc* basis by the trial judge runs contrary to the Illinois Rules of Evidence and the Illinois code. Thus, it was an abuse of discretion for the trial judge to improperly deny Mitchell's motion *in limine*.

Moreover, admissibility of this evidence does not detract from the reality that the fact-finder is still tasked with determining the weight of this evidence, whether the witness made the prior statement, and the credibility of that witness. Illinois Pattern Jury Instruction, Criminal, No. 3.11 (approved Oct. 17, 2014) (herein after IPI 3.11). Overall, the music video met the standards set forth in Section 115-10.1, Rule 607, and Rule 801(d)(1)(A)(2). Therefore, it should have been admitted at trial, where the jury could then determine the weight it would give that evidence in its determination of whether Mitchell acted in defense of Henry.

Additionally, this Court should consider the pretense given by the State, and adopted by both the trial and appellate courts, to find this video inadmissible. At the motion *in limine* hearing, the only reason given by the State to exclude the music video was that "it's not a prior statement. It's purported to be a work of art" (R215). The appellate court's perfunctory adoption of this rationale should not be adopted by this Court because entertainment is not an enumerated exception to Section 115-10.1, Rule 607, or Rule 801(d)(1)(A)(2), and should not be a valid

reason for finding the prior inconsistent statement inadmissible. *People v. Bush*, 2022 IL App (3d) 190283, ¶ 112.

Jurisdictions across the country have addressed the similar issue of whether to admit a defendant's own musical lyrics at his trial; courts have generally found that lyrics are admissible when "'there is a strong nexus between the specific details of the artistic composition and the circumstances of the offense.'" *Montague v. State*, 471 Md. 657 (2020) (quoting *State v. Skinner*, 218 N. J. 496, 522 (2014); see also *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (finding the defendant's rap lyrics admissible at trial because the lyrics showed that the defendant had specialized knowledge relevant to the crimes for which he was facing trial); *Greene v. Commonwealth,* 197 S.W.3d 76, 86-87 (Ky. 2006) (admitting rap lyrics when the song discussed the very crime for which the defendant was charged); *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004) (admitting rap lyrics where the victim was found in the same location described in the song).

Here, the music video closely resembled the actual events surrounding Dwayne's death. Gabe stated that the shooting occurred on May 17th and resulted in the death of his friend "Weezy" (Supp. Rap Video). The record showed that the shooting occurred on this date and that Dwayne's nickname was "Weezy" (R677, 707-08, 722-23, 877-78, 1059-60). Gabe described how Nate beat up a group of children when they were talking about firearms (Supp. Rap Video). Tresean and Jayurion testified that they were beat up by a man at Minnie's house (R878, 1070-71, 1076). Nate's testimony at trial revealed that he hit one of the kids (R698). In the video, Gabe indicated that Nate called him and Gabe asked to be picked up because he was ready to join in the altercation. Gabe also indicated that "Weezy"

came for that same purpose. Gabe then stated that four cars drove up while he and three others were standing in the driveway. Gabe stated that they were ready to fight, and that Weezy got hit with a pole (Supp. Rap Video). The video footage of the altercation shows that several cars parked in front of Minnie's house, four men were standing in the driveway blocking access to Minnie's yard, and someone swung a pole at Dwayne prior to the shooting (People's Ex. 3 & 6; R682, 930). Then, Gabe stated in the video that someone fired several shots and hit two of Gabe's "bros." Gabe then ran into the house and saw "Weezy" laying on the floor bleeding and Nate with a gunshot through his arm (Supp. Rap Video). The testimony at trial tended to show that Mitchell fired several shots, one of which hit Dwayne and another of which hit Nate in the arm (R788, 804, 944). In sum, there was a sufficient nexus between the shooting and the music video such that the music video should have been admitted at trial.

Moreover, the appellate court's decision and the State's argument advocating for the work-of-art exception will alter criminal trials in Illinois. Because of technological and social media advances, it is not uncommon for a witness' statement to be recorded for a purpose other than a police investigation, and these statements may have some artistic or entertainment value. Despite any entertainment value, the recorded statements should be admissible at trial so long as the requirements of Section 115-10.1 and the Illinois Rules of Evidence are met. Both prosecutors and defendants will be impacted by this exception the Third District Appellate Court created. Based on the appellate decision in this case, parties will not be able to admit previously recorded statements made by turncoat witnesses if the prior statements were made for entertainment purposes. An "entertainment purpose" or a recording that is a "work of art" is incredibly broad and will likely preclude

the admission of videos, like this, that were posted initially on social media, because social media is considered an entertainment platform.

Of equal, if not even more fundamental, importance, the appellate court's creation of this new exception to Section 115-10.1 and Rule 801(d)(1)(A)(2) also adversely affects criminal defendants in exercising their constitutional rights to present a complete defense and to confront the witnesses against them. See U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §8; *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). A central issue in this case involved the application of self-defense, the determination of the initial aggressor, and the application of imperfect self-defense. A defendant's ability to mount a defense, especially in a case such as this, is severely impacted when he is not able to present relevant substantive evidence at trial. For instance, here, Mitchell's ability to mount a defense was severely impacted where he was not able to present evidence that the Gulleys were planning to fight with LaTerra's group and, in fact, initiated the dispute that led to Dwayne's death. Not only did the music video highlight that Nate beat up children in LaTerra's group, which initiated the chain of events that led to the shooting, the music video also showed, for the first time, that Nate was calling people to get them to come his house to instigate another altercation (Supp. Rap Video). Gabe specifically highlighted that he asked to be picked up because he was "ready to go" be a part of a further altercation (Supp. Rap Video). This evidence would have not only impeached Gabe's trial testimony, but also would have supported Mitchell's claim of self-defense because it showed that the Gulleys initiated and planned to continue the altercation. Yet, according to the appellate court, Mitchell was not permitted to present this evidence, despite Gabe's complete lack of recollection at trial, because Gabe's statement in the form of a

music video was made only for entertainment purposes. *Bush*, 2022 IL App (3d) 190283, ¶ 112. Thus, under the appellate court's interpretation of the statute, Mitchell and other, similar defendants are deprived of their constitutional right to test the State's case and the witnesses against them.

This issue has been properly preserved for review by this Court. Defense counsel preserved this issue for review by filing a motion *in limine* requesting that the music video be admitted at trial as impeachment evidence (C713); *People v. Denson*, 2014 IL 116231, ¶ 18 (to preserve an issue for review, a defendant must raise it in either a motion *in limine* or an objection at trial, and in a post trial motion). Further, at the hearing on the motion *in limine*, defense counsel sought to also admit the music video as substantive evidence pursuant to 725 ILCS 5/115-10.1 (2018) (R223).

In sum, the exclusion of the music video based on a new work-of-art exception to the rules regarding prior inconsistent statements is fundamentally unfair, interferes with the aim of truth-seeking in criminal proceedings, and severely impacts the admissibility of relevant evidence just because it has an entertainment purpose–an exception manufactured by the Third District Appellate Court in its perfunctory decision. *Bush*, 2022 IL App (3d) 190283, ¶ 112. This is especially problematic in a case, such as this, where the trial court agreed that the prior inconsistent statement met the requirements laid out in Section 115-10.1 (R223). And, Gabe's prior statement bore evidentiary value based on the fact that at trial, Gabe claimed he could not recollect most of what happened on the day of the shooting. That evidentiary value did not diminish simply because Gabe made his statements in a music video. Accordingly, this Court should reject the Third District Appellate Court's creation of the work-of-art exception to Section 115-10.1

and Rule 801(d)(1)(A)(2), find that Mitchell met the evidentiary requirements for admission of the music video, and remand this cause for further proceedings because it cannot be said that Mitchell's trial was fundamentally fair.

B. Biased Juror

Jeanette Proctor served on the jury that found Mitchell Bush guilty of various offenses, including first-degree murder (C972-78). Proctor suffered from an implied bias resulting from her relationship with one of the victims and a witness in this case. Here, Proctor revealed halfway through the trial that she was the step-grandmother of Nate and Gabe Gulley, as Proctor's daughter was married to Nate and Gabe's mother, who Proctor saw watching the trial (R776). Even worse, Proctor did not disclose any of the facts showing this implied bias until she had already been sworn as a juror, thus negating Mitchell's ability to use a peremptory challenge against her to avoid having his fate judged by someone with such a close connection to one of the victims and a witness.

1. It was error for Proctor to remain on Mitchell's jury after her bias was discovered.

"The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). No amount of rehabilitation by the circuit court or the juror herself can save a juror suffering from implied bias as the disqualifying bias results solely from the juror's connection to one or more of the parties in the case. *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

Prior to her selection, the circuit court asked Proctor, along with those sitting in her venire panel: "Do you know any of the attorneys, the Defendant, anyone on the witness list or me? Please raise your hand if the answer is yes" (R320). Proctor did not raise her hand even though the Gulleys' names had been read

aloud as potential witnesses (R320-29). Thereafter, Proctor was accepted onto the jury panel and sworn in as a juror (R403, 446).

On March 5, 2019, after a day of *voir dire*, the trial began (R456, *et seq.*). The next day, Proctor came forward after she recognized her daughter-in-law sitting in the gallery and then realized that her daughter-in-law's children were both witnesses–one of whom was also a victim in this case (R773-76, 778). Proctor denied knowing Nate, beyond recognizing his mother, and denied knowing about the shooting in which Nate and Gabe were involved (R778). Proctor also claimed that she did not recognize the men's names from the witness list that was read when she was a venireperson because "[she doesn't] talk to them like that" (R778). Proctor was never asked if she talked to any other juror about her relationship with Nate and Gabe. Proctor was not admonished to refrain from discussing the case with anyone, especially her daughter, daughter-in-law, and the trial witnesses. Proctor only stated that her relationship to Nate and Gabe's mother did not affect her ability to be fair and impartial (R777).

After brief questioning of Proctor, the court momentarily dismissed her and proceeded to have further in-chambers discussions. The court said, "my initial reaction is the same as my reaction now, she stays on the jury. I don't think it's even a close call" (R779). In response, neither the prosecution nor the defense asked to be heard further on the issue (R780). Proctor was not replaced, despite the presence of an alternate juror.

Case law demonstrates that it was error for counsel not to contemporaneously object and the court to allow the victim and witness' step-grandmother to sit on the jury and for the circuit court to refuse to excuse Proctor after the parties discovered her implied bias. A criminal defendant has the fundamental right to

an unbiased, open-minded trier of fact. U.S. Const., amends. V, VI, XIV. An impartial jury, moreover, being fundamental to a fair hearing in a fair tribunal, is a basic requirement of constitutional due process. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). That obligation includes "assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice." *People v. Bradshaw*, 171 Ill. App. 3d 971, 975-76 (1st Dist. 1988). The decision whether to replace a juror is a matter within the discretion of the circuit court, and it will be disturbed where the court has abused its discretion. *People v. Strawbridge*, 404 Ill. App. 3d 460, 466 (2d Dist. 2010).

Reviewing courts have distinguished between two types of challenges for cause: those based on actual bias, and those based on implied bias. See, *e.g., Dennis v. United States*, 339 U.S. 162, 167-68 (1950); *United States v. Wood*, 299 U.S. 123, 133 (1936). Implied bias is "bias conclusively presumed as [a] matter of law," or, put another away, "bias attributable in law to the prospective juror regardless of actual partiality." *Wood*, 299 U.S. at 133.

The Third Circuit Court of Appeals explained the rationale underpinning the implied bias doctrine:

> This doctrine is rooted in the recognition that certain narrowly-drawn classes of jurors are highly unlikely, on average, to be able to render impartial jury service despite their assurances to the contrary. *E.g.*, *Dennis*, 339 U.S. at 175, 70 S.Ct. 519 (Frankfurter, J., dissenting); [citation and footnote omitted]. For example, the victim of a crime might insist that she can serve as an impartial juror in her assailant's trial. But, understanding that the average person in her situation likely would harbor prejudice, consciously or unconsciously, the law imputes bias to her categorically and mandates her excusal for cause. *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring); [citation omitted].

> 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. *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) [citation omitted]. The test focuses on "whether an average person in the position of the juror in controversy would be prejudiced." [citations omitted]. Courts look to the facts underlying the alleged bias to determine if they would create in a juror an inherent risk of substantial emotional involvement. [citations omitted]. A prospective juror's assessment of her own ability to remain impartial is irrelevant for the purposes of the test. [citation omitted]. Because the right to an impartial jury is constitutive of the right to a fair trial, "[d]oubts regarding bias must be resolved against the juror." [citations omitted].

United States v. Mitchell, 690 F. 3d 137, 142-43 (3d Cir. 2012).

In *United States v. Haynes*, 398 F. 2d 980, 984 (2d Cir.1968), the Second Circuit Court of Appeals traced the implied bias doctrine back to Chief Justice John Marshall's opinion in *United States v. Burr*, 25 F.Cas. 49 (C.C.D.Va.1807), one of several opinions in the prosecution of former Vice President Aaron Burr. There, the Chief Justice addressed the ways in which the law strives to assure an impartial jury:

> Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose conne[ct]ion with a party is such as to induce a suspicion of partiality. 25 F.Cas. at 50.

The Second Circuit listed additional grounds on which jurors were excusable for presumptive bias under the common law: kinship, interest, former jury service in the same cause, or because the prospective juror was a master, servant, counselor, steward, or a member of the same society or corporation. *Haynes*, 398 F. 2d at 984.

This Court has similarly held there are certain relationships between a juror and a party to the litigation which are so direct they raise a presumption of bias and require the juror be disqualified. *People v. Cole*, 54 Ill. 2d 401, 413 (1973). "In such a case it is not necessary to establish that bias or partiality actually exists." *Id.*

In *People v. Parmly*, 117 Ill. 2d 386, 400-02 (1987), the special concurrence would have given the defendant a new trial because one of the jurors knew the murder victim and the circuit court erred in not excusing this juror for cause. "Nor can there be any serious contention that a juror who is a friend of the murder victim can impartially decide the fate of the accused killer." *Id.* at 405 (Clark, C.J., specially concurring, joined by Simon, J.). Chief Justice Clark noted the circuit court's abuse of discretion was "further strengthened by the fact that the inconvenience of [the juror's] disqualification would have been negligible; at that point the proceedings had not advanced beyond selection of the jury, and alternate sworn jurors were available." *Id.* at 407.

Chief Justice Clark's special concurrence is not an outlier. Other jurisdictions have found implied bias in jurors with connections to the victim via family or friends. See, *e.g., United States v. Brazelton*, 557 F. 3d 750, 753-55 (7th Cir. 2009) (while finding issue explicitly waived by counsel's decision not to strike juror, discussing potential implied bias where juror was the victim's second cousin); *Smith v. Commonwealth*, 734 S.W. 2d 437, 444 (Ky. 1987) (juror's wife was defendant's second cousin); *Stone v. Commonwealth*, 418 S.W. 2d 646, 652 (Ky. 1967) (juror was a close friend of defendant for thirty-five years); *State v. Brown*, 496 So. 2d 261, 263-66 (La. 1986) (two prospective jurors knew victim's parents and one juror's son dated the victim a few times); *State v. Holliman*, 529 S.W. 2d 932, 940-41

(Mo. Ct. App. 1975) (prospective juror was a friend of the victim's father and knew the victim); *McHugh v. Proctor & Gamble Paper Products Co.*, 776 A. 2d 266, 271 (Pa. Super. Ct. 2001) ("Decisions to automatically exclude a prospective juror from a jury are based upon 'real' or 'close' relationships between the juror and the case due to financial, situational or familial ties with the parties, counsel, victims or witnesses"). But see *State v. Webster*, 865 N. 2d 223, 238 (Iowa 2015) (juror only knew victim's family in passing and juror's daughter was a Facebook friend of victim's stepsister).

People v. Brisbon, 89 Ill. App. 3d 513 (1st Dist. 1980), is also instructive. In that case, the parties learned after the trial's start that a juror had been a friend and neighbor of the murder victim. *Id.* at 515-16. Although the juror stated that she could "be objective" and that she had not been "very close" to the victim, the court discharged the juror and replaced her with an alternate. The appellate court noted that the juror had been "properly excused to avoid the possibility of improper influence." *Id.* at 516, 521.

Here, the circuit court erred by not dismissing Proctor from the jury because her familial relationship with a victim and a prosecution witness caused her to suffer from an implied bias. Proctor was related by marriage to Nate and Gabe Gulley; Proctor's daughter was married to Nate and Gabe Gulleys' mother (R773-76, 778). When Proctor was questioned regarding her relationship with Nate and Gabe, she claimed that she did not recognize the men's names from the witness list because "[she doesn't] talk to them like that" (R778). She also indicated that her knowledge of Nate and Gabe's mother did not affect her ability to be fair and impartial (R777). While Proctor said she could be fair and impartial, and that answer would normally rehabilitate her ability to serve, it does not rehabilitate

a juror who has an implied bias. *Mitchell*, 690 F.3d at 143; *Cole*, 54 Ill. 2d at 413. The appellate court, like the trial court, should not have relied in any way on Proctor's assurances of impartiality; instead, the appellate court should have examined the inherent risk of substantial emotional involvement in the average relationship between step-grandparents and step-grandchildren. See *Bush,* 2022 IL App (3d) 190283, ¶ 113; *Mitchell*, 690 F.3d at 142-43.

An objective examination of the familial relationship between Proctor and the Gulleys should have resulted in Proctor's dismissal from the jury because, when there is a close familial relationship, "the law errs on the side of caution"–ensuring the right to a fair deliberation. *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000) ("[A] court must excuse a juror for cause if the juror is related to one of the parties in the case . . . Such a juror may well be objective in fact, but the relationship is so close that the law errs on the side of caution"). Mitchell's right to a fair deliberation was not protected here, considering the direct familial relationship between a victim, a prosecution witness, and a juror. And, the circuit judge's error was only exacerbated in this case by the presence of an alternate juror who was released at the close of trial and who could have been used to take Proctor's place to ensure a fair deliberation (R374, 421, 426, 430-31, 1345-46). Accordingly, this Court should find that it was an abuse of discretion not to disqualify Proctor, the step-grandmother of a witness and victim, from serving on Mitchell's jury.

2. Defense counsel was ineffective for failing to object to Juror Proctor's continued presence on Mitchell's jury.

As counsel indicated in the post-trial motion, he failed to contemporaneously object to Proctor's presence on the jury because he did not correctly hear the

relationship between Proctor, Gabe, and Nate (C999-1000). Defense counsel acknowledged that "it was error for defense counsel not to request her removal" (C1000). Accordingly, this Court should also find that counsel provided ineffective assistance for failing to request Proctor's dismissal.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 690-91 (1984); U.S. Const., amends. VI, XIV; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); Ill. Const. 1970, art. I, §8. The standard for determining the merits of a claim of ineffective assistance of trial counsel is the two-pronged test announced in *Strickland v. Washington*, which requires a showing that counsel committed unprofessional acts or omissions, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Ivy*, 313 Ill. App. 3d 1011, 1017-18 (4th Dist. 2000); *Strickland*, 466 U.S. at 690, 694. In considering whether trial counsel's assistance was ineffective, a reviewing court should examine the totality of the circumstances and make the fundamental fairness of the proceedings the ultimate focus of its inquiry. *Strickland*, 466 U.S. at 695-96. Generally, counsel's actions are presumed to be the product of sound trial strategy, but they are not immune from review. *Strickland*, 466 U.S. at 689; *People v. Metcalfe*, 202 Ill. 2d 544, 559-63 (2002).

A criminal defendant has the fundamental right to an unbiased, open-minded trier of fact. U.S. Const., amends. V, VI, XIV. That obligation includes "assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice." *People v. Bradshaw,* 171 Ill. App. 3d 971, 975-76 (1st Dist. 1988). Counsel's role is to protect the fundamental right to a fair trial, and

specifically, the right to an unbiased jury. *Strickland*, 466 U.S. at 684-85; see also *Miller v. Webb*, 385 F.3d 666, 672 (6th Cir. 2004)(citing *Miller v.* Francis, 269 F.3d 609, 615 (6th Cir. 2001)) (counsel must always "protect the accused's right to a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense").

And although the defendant bears the burden of overcoming the presumption that counsel's decisions regarding the jury make-up were sound strategy, any review must still consider whether those actions were objectively reasonable. See *People v. Jones*, 2012 IL App (2d) 110346, ¶79; *Miller*, 385 F.3d at 673 (citing *Francis*, 269 F.3d at 616, and *Strickland*, 466 U.S. at 681).

As indicated above, defense counsel conceded that he erred. Further, as discussed in Issue II(B)(1), it was objectively unreasonable for counsel not to object to Proctor's presence on the jury. Proctor was related to one of the victims in this case and another witness against Mitchell. Proctor's continued presence on the jury, considering that she is a close relative of a victim and another prosecution witness, is the type of error that cannot be considered reasonable trial strategy. See *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring) (finding that this type of error is so egregious that "the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances"). "Sound trial strategy is made of sterner stuff." *People v. Moore,* 279 Ill. App. 3d 152, 159 (5th Dist.1996). Further, counsel's admission during the post-trial stage supports the conclusion that counsel acted unreasonably. Here, counsel claimed that he did not properly hear Proctor describe her relationship between herself, Nate, and Gabe; however, counsel indicated that he would have objected to Proctor's presence on the jury had he correctly heard the details of their relationship (C1000). The more reasonable

action here would have been for counsel to ask Proctor to repeat the details of her relationship with Nate and Gabe during the sidebar, not to forego an opportunity to object because of carelessness.

Mitchell was prejudiced by counsel's inaction because there was a reasonable probability that the outcome of the trial would have been different. "Notably, this standard does not require a defendant to demonstrate that counsel's conduct more likely than not altered the outcome in the case. Instead, a reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" *People v. Patterson*, 192 Ill. 2d 93, 122 (2000) (quoting *Strickland*, 466 U.S. at 694).

Here, the State's case was far from overwhelming. The case largely boiled down to a credibility contest between Mitchell's account and the accounts of the State's witnesses regarding the applicability of self-defense, and trial counsel's failure to seek Proctor's dismissal created a substantial risk that the jury's credibility assessment was impacted by Proctor. See *People v. Sebby*, 2017 IL 119445, ¶¶ 60-63 (even though "[m]inor inconsistencies clouded" both side's versions of events, the evidence was close because the testimony of each side's witnesses was "largely consistent" and neither side's accounts were fanciful). Neither Gabe's nor Nate's version of events was objectively more credible than Mitchell's. Indeed, the fact that Gabe produced a music video detailing some of the events leading up to the shooting that contradicted his testimony at trial calls his credibility into question (Compare R656-58 and Supp. Rap Video). Further, there was conflicting testimony about who was the first aggressor, the presence of weapons on Minnie's property that would justify the use of deadly force by Mitchell, and how the street brawl unfolded (R656-60, 664-85).

The video evidence, contained in People's Exhibits 3 and 6, does not even heavily favor the State regarding the issue of self-defense. Defense counsel highlighted instances for the jury which showed not only the propriety of self-defense in this instance, because of the fragility of Henry, but also showed the jury the likelihood that there were other weapons at the brawl, which would necessitate the use of self-defense (R633-34, 862, 864, 1161, 1171, 1282-83). Despite presenting this evidence, Gabe and Nate maintained that they did not possess any weapons (R660, 698). Thus, the jury was tasked with determining who was more credible. Given that Proctor was related to one of the victims and to another witness who was present on Minnie's property on the day of the brawl, she may well have influenced the other jurors to believe the Gulleys and the other State witnesses over Mitchell. Given the closeness of the evidence, there is at least a reasonable probability that the potential improper influence affected the verdict. See *People v. Stremmel*, 258 Ill. App. 3d 93, 114 (2d Dist. 1994).

C. Conclusion

The singular, and cumulative, effect of the foregoing errors resulted in Mitchell being denied his due process right to a fundamentally fair trial. Mitchell's entire trial was permeated with error: beginning with jury selection, continuing with the evidentiary phase, and concluding with the rendering of the verdict. It cannot be said that the trial was fundamentally fair given the extent of the errors. Accordingly, Mitchell requests that this Court reverse his convictions and remand for further proceedings.

CONCLUSION

For the foregoing reasons, Mitchell D. Bush, defendant-appellant, respectfully requests that this Court reverse outright his conviction for first-degree felony murder, and remand this cause for sentencing for the offense of second-degree murder either because the State failed to prove defendant guilty of mob action (as the predicate for felony murder) beyond a reasonable doubt, or because mob action as charged in this case could not form the basis for felony murder where the evidence did not show that defendant acted with independent felonious purposes with respect to the two offenses. Alternatively, Mitchell requests that this Court reverse his convictions and remand for further proceedings because Mitchell was not given a fair trial where (1) the circuit court improperly denied his motion *in limine* seeking the admission of a music 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. Further in the alternative, if this Court reverses outright Mitchell's conviction for first-degree felony murder and finds that Mitchell was denied his right to a fair trial (as discussed in Issue II), Mitchell requests that this Court reverse his convictions and the guilty verdict for second-degree murder and remand this cause for further proceedings, limited to a prosecution for second-degree murder regarding the death of Dwayne.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 49 pages.

/s/Amber Hopkins
AMBER HOPKINS
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Mitchell D. Bush No. 128747

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CAUSE NO. 16-CF-00373-1

THE STATE OF ILLINOIS

VS

BUSH, MITCHELL DEANDRE

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People vs. Mitchell Deandre Bush
3-19-0283

16CF373

R1	Report of Proceedings of May 19, 2016 - Video Bond Hearing
R10	Report of Proceedings of June 9, 2016 - Arraignment
R15	Report of Proceedings of Aug. 5, 2016 - Motion to Continue
R19	Report of Proceedings of Sep. 23, 2016 - Motion to Continue
R24	Report of Proceedings of Dec. 2, 2016 - Scheduling Conference
R28	Report of Proceedings of Dec. 12, 2016 - Hearing
R34	Report of Proceedings of Jan. 5, 2017 - Hearing
R47	Report of Proceedings of Feb. 3, 2017 - Reschedule
R50	Report of Proceedings of Mar. 9, 2017 - Continuance
R54	Report of Proceedings of Apr. 6, 2017 - Continuance
R58	Report of Proceedings Apr. 27, 2017 - Continuance
R62	Report of Proceedings of June 13, 2017 - Continuance
R68	Report of Proceedings of July 12, 2017 - Review Status
R77	Report of Proceedings of Aug. 18, 2017 - Review
R88	Report of Proceedings of Oct. 12, 2017 - Continuance
R93	Report of Proceedings of Nov. 30, 2017 - Continuance
R99	Report of Proceedings of Jan. 26, 2018 - Attorney Appearance
R105	Report of Proceedings of Feb. 23, 2018 - Continuance
R109	Report of Proceedings of May 10, 2018 - Scheduling Conference

R113 Report of Proceedings of July 11, 2018 - Scheduling Conference

R124 Report of Proceedings of Aug. 1, 2018 - Hearing

R129 Report of Proceedings of Aug. 23, 2018 - Hearing

R148 Report of Proceedings of Aug. 30, 2018 - Motion to Continue

R153 Report of Proceedings of Sep. 10, 2018 - Set for Jury Trial

R158 Report of Proceedings of Sep. 20, 2018 - Continuance

R164 Report of Proceedings of Nov. 15, 2018 - Review

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R207 Report of Proceedings of Nov. 28, 2018 - Motion Hearing

R234 Report of Proceedings of Dec. 3, 2018 - Hearing

R274 Report of Proceedings of Feb. 21, 2019 - Scheduling Conference

R280 Report of Proceedings of March 4, 2019 - Jury Trial (Day 1)

R456 Report of Proceedings of March 5, 2019 - Jury Trial (Day 2)
A.M. Session

Witness	DX	CX	RDX	RCX
Eric Ellis	R487	R507		
Stevie Hughes Jr.	R520	R534		
Myron Fisher	R537	R550		
Corey Montgomery	R555	R571	R575	
Minnie B. Roberson	R578			

R616 Report of Proceedings of Mar. 5, 2019 - Jury Trial (Day 2)
Afternoon Session

Witness	DX	CX	RDX	RCX
Minnie B. Roberson		R627	R648	
Denise White	R650	R654		
Gabriel Gulley	R656	R662	R662	
Lathaniel Gulley	R663	R692	R705	

Witness	DX	CX	RDX	RCX
Lee Ann Russell	R707	R718		
William England	R724			
David Buss	R736	R759	R759	

R771 Report of Proceedings of Mar. 6, 2019 - Jury Trial (Day 3)

Witness	DX	CX	RDX	RCX
Brittany Martzluf	R785			
Amanda Youmans, M.D.	R795			R804
Keith McDaniel	R809	R822	R839	R840

R848 Report of Proceedings of Mar. 7, 2019 - Jury trial (Day 4)
Afternoon Session

Witness	DX	CX	RDX	RCX
Jerricca Williams	R853	R869	R874	
Tresean Dillard	R876			
Mitchell Bush	R888	R950	R976, R977	R977
Keith McDaniel	R982			
Jason Leigh	R984	R989	R990	
Clint Rezac	R992	R1009		

R1052 Report of Proceedings of Mar. 7, 2019 - Jury Trial (Day 4)
A.M. Session

Witness	DX	CX	RDX	RCX
Jayurion Mayfield	R1059	R1081	R1092	
Kimberly Williams	R1094	R1113	R1131	
Sharonda Brown	R1139	R1167	R1199	

R1204 Report of Proceedings of Mar. 8, 2019 - Jury Trial (Day 5)

R1371 Report of Proceedings of May 9, 2019 - Post-Trial Motions/Sentencing

R1430 Report of Proceedings of May 15, 2019 - Motion to Reconsider Sentence

2022 IL App (3d) 190283

Opinion filed May 18, 2022

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	Appeal No. 3-19-0283 Circuit No. 16-CF-373
v.	)	The Honorable John P. Vespa,
MITCHELL DEANDRE BUSH,	)	Judge, presiding.
Defendant-Appellant.		

JUSTICE DAUGHERITY delivered the judgment of the court, with opinion.
Presiding Justice O'Brien and Justice Hauptman concurred in the judgment and opinion.

OPINION

¶ 1 After a bifurcated jury trial, defendant, Mitchell Deandre Bush, was found guilty of multiple felony offenses, including first degree felony murder (felony murder) (720 ILCS 5/9-1(a)(3) (West 2016)), aggravated battery with a firearm (id. § 12-3.05(e)(1)), and unlawful possession of a weapon by a felon (id. § 24-1.1(a)). Defendant was sentenced to consecutive prison terms of 65 years for felony murder and 15 years for aggravated battery with a firearm

[1]Pursuant to defendant's request, defendant's jury trial was bifurcated as to defendant's unlawful possession of a weapon by a felon charge.

and to a concurrent prison term of 7 years for unlawful possession of a weapon by a felon. No sentences were imposed on the remaining findings of guilty. Defendant appeals, arguing that (1) he was not proven guilty beyond a reasonable doubt of felony murder; (2) under the facts of the instant case, mob action could not properly serve as the underlying felony for the felony murder conviction; (3) the jury verdicts were legally inconsistent; (4) he was deprived of a fair trial due to cumulative error; and (5) his sentences for felony murder and aggravated battery with a firearm were excessive. We agree with a portion of defendant's third argument (inconsistent verdicts). We, therefore, affirm defendant's convictions and sentences of felony murder and unlawful possession of a weapon by a felon, reverse defendant's conviction of aggravated battery with a firearm, vacate the jury's finding of guilty of reckless discharge of a firearm, and remand the case for a new trial on defendant's aggravated battery with a firearm charge.

¶ 2 I. BACKGROUND

¶ 3 On May 17, 2016, defendant and his cousin, Henry Mayfield (Mayfield), were involved with several other people in a neighborhood brawl on Virden Street in Peoria, Illinois. During the brawl, defendant shot and killed Dwayne Jones and shot and injured Lathaniel Gulley (Gulley). Portions of the brawl and of the shooting were captured on two different cell phone videos. The following month, defendant and Mayfield were charged in a superseding indictment with one count of first degree murder (strong probability murder), one count of felony murder, one count of aggravated battery with a firearm, and two counts of mob action, arising out of the neighborhood brawl. In addition to the joint charges, defendant was also charged individually with one count of first degree murder (strong probability murder) and one count of unlawful possession of a weapon by a felon.

¶ 4 In November 2018, during pretrial proceedings, defendant filed a motion in limine seeking to admit into evidence at trial as a prior inconsistent statement a rap video that was made by two of the State's witnesses, Gabriel (Gabe) Gulley and Gulley. During the video, Gabe described what had happened when the shooting occurred. Prior to doing so, Gabe stated on the video that what he was going to say was true. At a hearing on the motion held that same day, the State objected to defendant's request, arguing that the video was a work of art and was not necessarily a prior statement. After considering the arguments of the attorneys and watching the video, the trial court denied defendant's motion in limine.

¶ 5 In March 2019, a jury trial was held in defendant's case.[2] The trial took five days to complete. During the evidence phase of the trial, several witnesses were called to testify. In addition, numerous exhibits were admitted into evidence, including the two cell phones videos that were filmed during the shooting; screenshot photographs from the two videos; photographs of the home where the shooting took place showing bullet strikes to the front of, and inside, the home; certain items of physical evidence (spent shell casings, a bullet, and a mop handle) that were recovered from the scene of the shooting by the police; photographs showing where those items of physical evidence were recovered; and the recorded police interview of defendant.

¶ 6 Many of the facts surrounding the shooting were either not in dispute or were captured on the cell phone videos. As to those facts, the evidence presented as trial established the following. On May 17, 2016 (the day of the shooting), an argument arose between members of Minnie Roberson's family and members of Laterra Price's family over an expensive belt that Price's son, D.J., had sold to Roberson's son, M.F., but then Price wanted returned. The belt belonged to Price.

[2]Defendant's and Mayfield's cases were severed prior to trial.

¶ 7 Roberson lived with her children at the Virden Street home where the shooting took place, and Price lived a few minutes away in the same neighborhood. Roberson's home was a single story, rectangular-shaped home with a front yard that was enclosed by a waist-high, chain-link fence that separated the front yard from the sidewalk and the street. When viewed from the street, the front yard sloped up from the street and sidewalk to the front of the home, the front door was located in about the center of the home, a small set of concrete steps led up to the front door, and a concrete driveway was located on the right side of the front yard. At the driveway, the fence recessed further into the front yard to where an opening or gate was located.

¶ 8 The argument over the belt escalated over the course of the day with members of Price's family returning to Roberson's home several times, a physical confrontation ensuing, and the police being called. During the physical confrontation, Roberson's boyfriend, Gulley, and/or other members of Roberson's family struck Tresean Dillard and Jayurion Mayfield (Jayurion), who were the teenaged-cousins of Price. Dillard was the son of Sharonda Brown, and Jayurion was the son of Mayfield and Kimberly Williams (Williams). When the police arrived after the first physical confrontation, they found Price, Dillard, and Jayurion standing next to Price's car in the street in front of Roberson's home, arguing with Roberson, who was standing in her front yard. Brown, Dillard's mother, arrived shortly thereafter. After repeated requests by the police, Price and the two teenagers (Dillard and Jayurion) left the premises and went home. Brown also left the premises. The police talked to Price shortly thereafter, and she assured the police that she would not return to Roberson's home.

¶ 9 While the first physical confrontation was occurring, Jayurion's father, Mayfield, was at dialysis. Mayfield was on dialysis for kidney failure and had a catheter in his chest that was connected to his heart and his arm. Mayfield planned to spend the rest of the day after dialysis

with defendant, who was Mayfield's cousin. Jayurion's mother, Williams, picked up Mayfield from dialysis and then picked up defendant. Unbeknownst to Williams and Mayfield, defendant was carrying a handgun that day. According to defendant, he had found the gun in his family's garage and was hoping to talk to Mayfield about possibly selling the gun to make some money. While Williams was driving, she received a phone call from Price, who was Williams's niece. Williams put the call on speaker phone. Defendant was in Williams's car when that phone call took place. During the call, Price told Williams about the first physical confrontation and stated that Jayurion had been "jumped" by the people at Roberson's house.

¶ 10 Williams went to Price's home and picked up Jayurion. Once inside the vehicle, Jayurion told Williams and Mayfield what had happened. Defendant was still in the vehicle when that conversation took place. Williams drove with Mayfield, Jayurion, and defendant in her vehicle to Roberson's home and parked her vehicle on the side of the street. As Williams was arriving at the home, two or three other cars pulled up and parked in the street. Several people got out of those cars, including Price, Dillard, and Brown. In total, there were about 8 to 20 people on the street or sidewalk in front of Roberson's home.

¶ 11 Shortly before the cars arrived at Roberson's home, Roberson had left with Gulley to pick up Gulley's son from school. While they were out, Roberson received a phone call from her children about a commotion at the house and became concerned. Gulley also received a call from a neighbor, who told Gulley that people were gathering in front of the house. Roberson and Gulley dropped Gulley's son off at Gulley's mother's house and picked up Gulley's younger brother, Gabe, and Gulley's friend, Jones, for additional support or protection.

¶ 12 After Roberson and Gulley returned to the home and the cars pulled up in the street, the members of Roberson's family and those with them went outside to see what was going on. Two

groups formed one behind the fence in Roberson's front yard (Roberson's group) and the other on the opposite side of the fence in the street or on the sidewalk (Price's group). Tensions quickly escalated as various members of the two groups shouted back and forth at each other. Mayfield grabbed a mop handle from Brown and went toward the gate to strike at Gulley and Jones. As Mayfield swung, Jones grabbed the mop handle, and he and Mayfield struggled over it. Defendant moved forward and fired several shots toward Roberson's group and home. One of the shots struck Jones in the abdomen; another struck Gulley in the arm. Roberson's group fled into the home, and Price's group fled the area. Jones died shortly thereafter.

¶ 13 The main issues at defendant's jury trial were whether Roberson's or Price's group was the aggressor in the brawl, whether defendant had fired the shots to protect himself and/or Mayfield, and whether it was legally proper for defendant to do so. On those issues, the underlying facts were in dispute. The State presented witness testimony to try to suggest that Price's group was the aggressor and that defendant fired the gun without reason or justification. The testimony of those witnesses in that regard can be summarized as follows.[3]

¶ 14 Roberson testified that during the earlier incident at her house that day, a confrontation arose between Dillard, Jayurion, and Price on one side and Roberson, Gulley, Roberson's daughter, and Roberson's daughter's boyfriend on the other side. According to Roberson, during that earlier incident, Jayurion and the other boy (Dillard) started to threaten Roberson and her family on Roberson's property. Roberson did not recall who took the first swing and did not see if any physical contact was made between anybody at that point because she was trying to separate people. The most contact was made between Roberson's daughter fighting with Mayfield's son, Jayurion. When the police came to Roberson's home shortly thereafter, Dillard,

[3]Gulley's brother, Gabe, also testified for the State but generally claimed not to remember anything, other than that Gulley and Jones had been shot.

Jayurion, and Price were standing outside of Price's car in the street in front of Roberson's home in an uproar. The police officer kept instructing the three of them to get back into the car and leave the premises. Instead of doing so, Price, Dillard, and Jayurion kept jumping in and out of the car, threatening and saying things outside of the vehicle, and ignoring the officer's commands.

¶ 15 As the argument continued to escalate during the afternoon, Dillard's mother, Brown, pulled up to Roberson's house twice and tried to lure Roberson's family to the street corner, saying to Roberson's family, "You're not going to call the police, right?" Roberson and her family did not go down to the street corner to meet with Brown. Roberson did not know Brown and thought that Brown was trying to lure her to the corner to be killed. An altercation had already started, and Roberson felt threatened. After Brown pulled up the second time, two other cars pulled up with at least 20 other people. Roberson was standing on the front porch of her home recording on her cell phone in an obvious manner what Brown and the other people were saying and doing. Roberson later gave her phone to the Peoria Police Department so that they could extract the video.

¶ 16 According to Roberson, the people that were getting out of the cars and were in the street had sticks, brooms, or other items in their hands and were screaming obscenities. Gulley; Gulley's brother, Gabe; Jones; Jones's brother; and all of Roberson's children were in the driveway or front yard while Roberson was over by the front porch. Roberson did not see anyone, including her daughters, with knives, and no one in Roberson's yard had any weapons. The people from the street were coming up into the gate area of Roberson's home while Roberson was still recording. Roberson could see that one of the men in the street had a gun on his hip. When Roberson saw the gun, she screamed to Gulley that the man had a gun. Roberson

did not see anything get physical during the second confrontation; she was focusing on the man with the gun. At one point during the second confrontation, a woman got out of one of the cars and said that she wanted to talk to a parent. Roberson thought that the woman wanted to talk peace with her. Roberson did not have a chance to talk to the woman, however, because the shooter opened fire almost immediately.

¶ 17 On cross-examination, Roberson acknowledged that she did not call the police as the second incident (the shooting) was unfolding. Roberson also wavered during her testimony on whether she had any type of weapon during the incident, saying that to her knowledge, she did not; that if she did, it was not a deadly weapon; and that if it was, she was in her home and had the right to defend her home. Roberson could not recall if she had stuffed something inside a stocking and had been waving that around.

¶ 18 Gulley testified that on the day of the shooting, earlier in the afternoon, he got into an altercation with Dillard at Roberson's house. During that altercation, Dillard was threatening Roberson, and Price was arguing back and forth about the belt. After Price and Roberson had finished arguing, Jayurion and Dillard started directing their comments at Gulley. Gulley asked Dillard (presumably) to repeat himself, and Dillard stated that they "play[ed] with guns." Dillard went to say some other stuff, and a physical confrontation ensued. Gulley did not remember if he hit Dillard first or if Dillard hit him; Gulley just knew that Dillard was on the ground. At about that same time, Roberson's children started fighting with Jayurion. The police came to Roberson's house and got the situation under control. Price, Jayurion, and Dillard left, and Gulley and Roberson left as well to pick up Gulley's son from school.

¶ 19 While Gulley and Roberson were out picking up his son, the neighbor called Gulley and told him that there were several people outside of the house running their mouths. Gulley did not

want to return to the house alone, so he stopped and picked up Jones for protection. When Gulley, Roberson, and Jones returned to Roberson's home, there was a car out in front of the house. A woman (Brown), who was irate, was yelling for Gulley to bring his "b*** a***" to the corner. Gulley refused. The woman left and then came back a short time later. That was when everything "broke loose."

¶ 20 When the woman returned to Roberson's house, a couple of other cars came with her. A lot of other people, about 13, got out of those cars. Gulley; his brother, Gabe; and Jones were standing in Roberson's driveway. Gulley had stayed in front of the house after the woman had left to see what was going on. Neither Gulley nor Jones had any type of gun, knife, or stick. Upon arriving at Roberson's house, the people in the cars got out and were running their mouths and saying all types of stuff. Gulley was standing there to see if anyone was planning to run up the driveway. Roberson was up by the house.

¶ 21 Some of the people who had showed up to the house during that second confrontation were Mayfield, Jayurion's father; Jayurion; Dillard; and defendant. Gulley had never seen defendant before but was not really worried about him. Gulley saw that defendant had a gun but did not think that defendant would use it because there were too many people present. Mayfield swung a broomstick and tried to hit Gulley. Jones grabbed the stick and attempted to take it away from Mayfield. Mayfield yelled shoot, and defendant shot. Gulley took off running. Jones got hit by one of the bullets first, and then Gulley got shot in the arm. Gulley did not remember how many times defendant had fired. Everyone on Roberson's side, including Gulley, ran for the house. When Gulley got into the house, Jones was on the floor. Gulley knew that Jones was hurt but did not know that Jones was dead.

¶ 22 At the time of the shooting, Gulley was about 24 years old. Dillard and Jayurion were teenagers, about 17 or 18. When asked why he was fighting with someone so much younger than him, Gulley said that Dillard looked like he was 18 and that Dillard should not have been making threats and talking about coming back to the house with guns and stuff. Although Gulley took Dillard seriously when he said that, Gulley did not call the police. Gulley also did not call the police after the neighbor called him and told him about the people at Roberson's house.

¶ 23 During cross-examination, Gulley admitted that leading up to shooting, he was ready to fight and wanted to fight. Gulley acknowledged that he hit Dillard when Dillard made a threat about shooting up Roberson's house. Gulley did not remember what was being said between the two groups just prior to the shooting there were too many people present. Gulley also acknowledged that he had been convicted of a recent felony for cannabis and that he had a conviction in 2012 for failing to register as a sex offender.

¶ 24 Roberson's neighbor, Lee Ann Russell, testified that she lived on Virden Street directly across from Roberson. On the day of the shooting, when Russell came home from work shortly after 3 p.m., she noticed that Roberson and another woman were standing in front of Roberson's house, arguing back and forth. Russell went into her own home and called the police a short time later when things got more intense verbally outside. The first time around, the police were there for about 15 minutes trying to get everyone calmed down and to get people back in their cars and on their way. Roberson got into her car and left as well.

¶ 25 After Roberson and the police had left, the other woman kept returning to Roberson's house. The woman came back three or four times and was antagonizing Roberson's daughters. The woman would stop in front of the house and would be yelling at the house. The woman would leave but would then return. The next time that the woman came back, she had another

woman with her. The two women were mad and were yelling and were rattling Roberson's garbage cans and fence.

¶ 26 About 45 minutes later, Roberson returned. The woman came by again at that time or shortly thereafter. The woman saw that Roberson had some other people in her car so she left again, and Roberson and the people with her went into the house. About 10 minutes later, the woman returned with two carloads of people. The groups of people that came to Roberson's house were yelling and screaming at everyone inside the house. Roberson and the people in her house stayed inside and tried to ignore them. Some of the men who had shown up began leaning up against the fence. They were banging the fence and shaking it and yelling at everybody in the house. The men had something blue or green in their hands that looked like a pool noodle and were shaking it onto the fence.

¶ 27 Roberson and the people in her house came outside. Roberson was filming the entire incident. Roberson's group and the group in the street (Price's group) started to yell and scream at each other. The group in the street was shaking the fence and exchanging words with Roberson's group. It was starting to get intense again. All of a sudden, gunshots began going off. Russell ducked down to her kitchen floor. She did not see who was shooting.

¶ 28 Roberson's son, M.F., testified that he was about 12 years old on the date of the shooting. Earlier that day, when Price, Dillard, and Jayurion came to Roberson's house looking for the belt, an argument broke out between Roberson and Price. During that argument, Dillard said a threat or something, and Gulley "swung on him." Later that day, just prior to the shooting, Price and members of her family returned to Roberson's home. They came to Roberson's home in two cars and were standing in the street. There were eight or nine people in Price's group. M.F. did not see any member of either group (Roberson's group or Price's group) with any weapons. The

two groups were arguing back and forth, until one of the male members of Price's group tried to swing a broomstick at the crowd (presumably, at Roberson's group) and missed. Five or six seconds later, M.F. heard gunshots, and he and most of the other people in the front yard ran into the house. M.F. did not know who had swung the broomstick or who had fired the shots.

¶ 29 Roberson's other son, C.D., testified that he was about nine years old on the date of the shooting. When the shooting occurred, C.D. was standing on the outside stairs in front of the house. He did not have a gun or a knife, did not see anyone in the front yard with a gun or a knife, and did not see Roberson swinging any type of stick or anything. Just prior to the shooting, both sides were angry. There was a lot of yelling, and both sides were arguing and making threats back and forth. C.D. did not see anyone on his side of the fence with a weapon and did not remember whether anyone in Price's group had any weapons, like brooms or anything else. When the shots were fired, C.D. ran into the house. There were about seven shots in total. C.D. did not see the person who had fired the shots.

¶ 30 Peoria police Sergeant Keith McDaniel testified that he and Detective Clint Rezac interviewed defendant at the police station the day after the shooting. The interview was recorded on audio and video. The recording was admitted into evidence without objection and played for the jury. During the interview, defendant's story changed a few times. It went from defendant not being the shooter to defendant picking up the gun after someone had dropped it at the scene to the gun being defendant's gun from home. As the interview progressed, McDaniel and Rezac showed defendant still photos (screenshots) that had been taken from the cell phone videos that the police had obtained. The photos were admitted into evidence without objection and some of the photos were shown to the jury. According to McDaniel, defendant eventually

admitted during the police interview that he had the gun with him in Williams's car but maintained throughout the interview that he was scared when the shooting took place.

¶ 31 In opposition to the State's theory of the case, the defense presented witness testimony at defendant's jury trial to try to suggest that Roberson's group was the aggressor and that defendant had fired the gun to protect himself and Mayfield. The testimony of the defense witnesses in that regard can be summarized as follows.

¶ 32 Jayurion testified that he was about 16 years old when the shooting occurred and that Dillard was about 18 or 19 years old. Price was Jayurion's cousin and was a lot older than Jayurion. On the day of the shooting, right before the first physical altercation took place, Jayurion, Dillard, and Price were walking up to Roberson's house (presumably, to talk to them about the belt) when six or seven people came out of the house and began yelling and screaming at them. Price was eight- or nine-months pregnant at the time so Jayurion and Dillard were holding Price back. The people at the house began punching and kicking Jayurion and Dillard. Jayurion and Dillard did not fight back because there were too many people on the other side. Gulley was fighting Dillard, and the rest of the people from the house were fighting Jayurion. Jayurion did not think that he had done anything to provoke the people in the house. The physical fight took place in the street because the people from the house were pushing Jayurion and Dillard out of the yard. Eventually, the beating stopped. The police showed up, but did not really say or do anything about what had happened.

¶ 33 Later that day, Jayurion returned to Roberson's home with his mother, Williams, and his father, Mayfield. Defendant was also with them at that time. Williams, Mayfield, and defendant had picked Jayurion up at Price's house. When Jayurion got into Williams's car, he told

Williams that they had just gotten "jumped." Price's house was only a minute or two away from Roberson's house. Jayurion and the others went to Roberson's house in Williams's car.

¶ 34 When they got to Roberson's home, Jayurion saw that the people from the house had gotten about 10 other people to be there with them. Some of the people from the house were in the driveway; others were in the street. Williams got out of the car and said that she was there to talk to the mom. The group from the house (Roberson's group) got loud. They had knives, bats, broomsticks, cans in socks, and other items, although Jayurion did not remember who specifically had those weapons. There was some arguing back and forth, and Roberson's group was telling Jayurion's group (Price's group) to fight. Some of the people from Roberson's group were already out in the road. Jayurion feared for his safety at that point because some of the members of Roberson's group had weapons. He also feared for his mother's and father's safety as well. Jayurion did not see his father (Mayfield) fighting with anyone. Although Roberson's group was trying to attack Jayurion's father, Jayurion's father just sat there quietly the whole time and did not say anything back to Roberson's group. Jayurion did not remember anyone screaming out, "shoot him!" Jayurion was paying attention to himself and did not see what defendant was doing. Everything happened very quickly. As the arguing was going on, Jayurion heard shots being fired and ran back to Price's house.

¶ 35 Williams testified that she and Henry Mayfield were Jayurion's parents. Williams first saw Mayfield that day when she picked him up from dialysis, which Mayfield was on due to kidney failure. Mayfield had a catheter in his chest that was connected to his heart and his arm. After Williams picked up Mayfield from dialysis, she also stopped and picked up defendant. Usually after dialysis, Mayfield and defendant would go to Williams's house and play a game. Mayfield would be kind of ill and would not be able to do much, except go somewhere and sit.

As they were driving, Williams's niece, Price, called Williams and told her that Jayurion had been "jumped on" by multiple adults and other people. Williams was trying to get to the bottom of the situation so she went and picked up Jayurion at Price's house. On the way, Williams told Mayfield what had happened. Williams did not know if defendant was paying attention at that time; it was a matter between Williams and Mayfield.

¶ 36 When Jayurion got into Williams's car, Williams asked Jayurion what had happened. Jayurion told Williams that multiple adults and children "jumped on" him, Dillard (who had a broken leg), and Price (who was pregnant). Williams asked Jayurion where the house was located where the incident had occurred. She then went to Roberson's home, which was a few blocks over from Price's house, and asked if she could speak to the parent. Williams was not going to there to fight; she was hoping to squash the situation before it turned into what it turned into. Williams just wanted to resolve the situation and find out why all of those adults "jump[ed] on" her 16-year-old child. Williams told Mayfield where she was going but did not tell defendant. Mayfield did not get angry at that point and agreed with Williams's efforts to resolve the situation.

¶ 37 Williams and the other people in her car went to Roberson's home and parked on the street next to the curb, not in the middle of the street. Williams did not call anyone on the phone and did not tell anyone that she was going to Roberson's home. At some point, other cars pulled up with people in them that Williams knew. Williams had no idea the other people were coming to Roberson's home. According to Williams, she went to Roberson's home with peaceful intentions. She did not know anyone at that house or know who was going to be at the house. Williams was hoping to talk to a parent.

¶ 38 When Williams arrived and asked to speak to a parent, the mom (Roberson) came out on the porch with her cell phone in her hand recording and said that she was the mom. That was when other cars pulled up. Williams assumed that Roberson was filming because Roberson stated that she had this on camera. Roberson said that loudly enough for everyone to hear. Roberson also stated to Williams and the others that if they wanted the belt, to come take it. Williams was trying to be respectful of Roberson's home and to have an adult-type chat with Roberson about their children fighting earlier. Williams knew some of the people in the cars that had pulled up, like her daughter, Jerricca Williams (Jerricca); Dillard; and Dillard's mother, Brown. Williams assumed that Brown and Dillard came to Roberson's home because the people from the house had "jumped on" Dillard as well.

¶ 39 Shortly after Williams got out of the car, the people on the house side of the fence (Roberson's group) became very hostile. Williams stood there in disbelief, surprised by the reaction of Roberson's group. Some of the people in Roberson's group had weapons knives, sticks, and something in socks. They were all in a guarded position, ready to fight. The people with the weapons were standing along the driveway, like a front line. Williams did not remember what was said. There was no indication that the people in Roberson's group wanted to speak peacefully with anyone. Williams did not have any broomsticks or metal poles in her car when she arrived at Roberson's home. Also, to her knowledge, she did not have a gun in her car. Williams did not bring defendant with her to Roberson's home for protection. When Williams talked to the detectives after the shooting, she only knew that defendant had fired the gun from what the detectives had told her. Williams did not bring anyone to the scene to shoot anybody. That was not her intention.

¶ 40 As the incident was unfolding, there was a lot of arguing back and forth between the two groups. Then, gunshots went off. Williams ran away. She did not go back to her car and did not stick around to see what had happened. According to Williams, shortly before the shooting occurred, one of the guys in Roberson's group, she thought it was the guy who had been killed, kept running up toward Mayfield in an aggressive manner. Williams did not remember if that person was saying anything. As far as Williams knew, Mayfield went to Roberson's home with peaceful intentions. Mayfield took some aggressive actions because someone was trying to approach him and hurt him. Williams did not see who fired the gun. Everything happened so fast.

¶ 41 Brown testified that she was the mother of Dillard. During the afternoon of the shooting, Price called Brown and told her that Dillard had "got[ten] jumped" very badly. Dillard's leg was already broken at the time, and he was on crutches. When Price called Brown, Price was yelling and screaming on the phone, so Brown went to that location. Although Brown lived just around the corner from Roberson's home, she did not know Roberson and had never been to Roberson's house.

¶ 42 When Brown got to the residence (shortly after the first physical confrontation), the police were already there. Brown spoke to the police officer but could not remember his name. The officer told Brown not to worry about the people in the home because they were getting kicked off the block anyway, that the people at the home always started trouble, and that the people in the home would be off the block really soon.

¶ 43 As Brown was on her way home, she got a call from Dillard telling her that the people at the house were sending him threatening messages and were telling him to come back to the residence. Brown was in her car at the time. Brown went back to Roberson's home to see if the

mother was there, but she was not. Brown did not call the police at that time because the police did not do anything the first time around.

¶ 44 Brown had been told that it was adults that had "jumped" the kids. Brown thought that the mom would have wanted to talk because the whole thing was a big misunderstanding. Dillard was not feeling safe, so Brown just wanted to go talk to the mom herself. Brown was hoping for a peaceful resolution. The mom was not there when Brown went to the home the first time, so Brown left and came back later. Other people were there, just not the mom. Brown did not make any threats to the people at the house; she just asked if the mom was there. The people at the house told Brown that the mom was not home but that she would be back later. According to Brown, the kids at the house threatened her at that time and told her that the mom was going to get people when the mom got back. Brown did not get out of the car; she just told the kids at the house to let her know when their mom returned home. The threat made Brown afraid at first, but she did not call the police. She was ready to talk to the mom and was expecting a different response from the mom. Brown did not think the mom was a threat at that time.

¶ 45 Brown went back to, or by, Roberson's home a couple of times, but the mom was not home yet. Brown did not threaten the people at Roberson's home and did not ask them to come down to the street corner and fight. Brown was never able to speak to the mom one-on-one. The last time Brown went to Roberson's home was the incident when the shooting occurred. Brown was still hoping to talk to the mom at that time (before the shooting occurred), but there was screaming, yelling, and commotion. When Brown stopped at Roberson's home the last time, Roberson was there, as was Gulley, and some other people whose names Brown did not know.

¶ 46 Brown knew Williams because Williams was her cousin. Brown did not remember whether Williams was there at that time but did remember that Williams was there at some point

that day. Brown also did not remember if anyone was with her in her car the last time she went to Roberson's home, other than Dillard. Brown did not know defendant and did not remember if defendant was there that day since everything happened so fast. Brown went back the last time because she still wanted to talk to the mom. Brown did not call anyone and did not tell anyone to meet her at Roberson's home. Brown did not remember how many cars were parked in the street but did remember that there were other cars parked there besides hers. Dillard was in the car with Brown and had shown her the messages that the girl at Roberson's home had sent him.

¶ 47 When Brown got to Roberson's home the last time, there was a lot of screaming, yelling, and back and forth. The people (presumably, Roberson's group) had knives and stuff that they were throwing. They also had socks with canned goods inside of them. One person had his shirt off and was beating his chest. It was just a lot of commotion. People were making verbal threats to Brown. Brown did not hear the people on her side of the fence (Price's group) making threats. She heard her cousin, Williams, saying that she just wanted to talk to the mom. Brown did not get in her car and go away because she wanted to settle it. She felt that the police did not do anything at first, and she did not want the problem. Brown was scared for her safety when Roberson's group started coming toward them. That was when Brown grabbed a stick (mop handle) from the garbage. It was all a blur for Brown after that point. Brown thought it was Roberson's group that had fired the shots.

¶ 48 Brown knew that Mayfield was her cousin's father and saw Mayfield at Roberson's residence. Brown did not remember giving Mayfield the stick. Everything happened so fast. Everyone was screaming and yelling, and people were arguing. As the people from Roberson's group were coming toward Price's group, Brown heard shots being fired, and everyone took off. Brown did not remember whether she got in her car or just ran away.

¶ 49 During her testimony, Brown denied that she had tried to get the people from Roberson's house to come down to the street corner and fight and said why would she do that when there were so many people on the other side. When Brown went to Roberson's home the first time, some of the grown men there were threatening Brown, telling her to come back and that they had something for her. Brown told one of the kids at Roberson's home to call her when their mom got back because she wanted to talk to the mom.

¶ 50 On cross-examination, Brown indicated that she did not call the police because she thought the mom was civilized to talk. Brown stated that when she told the mom to come to the corner and talk, the mom said, "f*** you." Brown and the others stayed there arguing. During her testimony, Brown was shown a photograph in court and acknowledged that she was the person in the photograph holding the stick. Brown admitted that she had parked her vehicle in the middle of the street and said that she had done so because she had seen a lot of people there. When Brown heard that Dillard had been in a fight, she was more scared than angry.

¶ 51 Brown denied that she brought any sticks, poles, or weapons of any kind to the residence. Brown also denied that she knew that either of the other two cars were going to Roberson's home. Brown was surprised to see all of those people coming to that location and to see all of the people in the house, especially the grown men. Brown denied that she tried to initiate a fight or physical confrontation with anyone at any time.

¶ 52 Jerricca testified that she was the daughter of Williams and Henry Mayfield. Shortly before the shooting occurred, Jerricca went to Roberson's home because she had been told by her cousin, Price, that her little brother, Jayurion, had gotten "jumped on." Jerricca rode to Roberson's home in Brown's car. Brown was another one of Jerricca's cousins. Jerricca did not remember talking to her mom or dad about Jayurion getting "jumped"; she was at Price's house.

She also did not talk to defendant that day. Jerricca was upset when she heard that Jayurion had gotten "jumped" and wanted to see why the people at the house had "jumped" Jayurion. She was not going to the residence to get revenge for her brother. Jerricca knew Roberson's daughters and had said hello to them at times from around the neighborhood. One of Roberson's daughters had previously had a crush on Jayurion so Jerricca thought things would be peaceful when she went there. Jerricca's mom, Williams, was being the peacemaker. Jerricca thought that they could settle the issue peacefully.

¶ 53 When Jerricca got to the altercation (the second physical confrontation) at Roberson's home, Jayurion and a bunch of other people were already there, and the whole neighborhood was outside. There were several people in Roberson's front yard, and a lot of yelling and screaming were taking place. Jerricca started yelling and screaming as well because other people were yelling and screaming at her. One of Roberson's daughters was very aggressive toward Jerricca. Two of the people in Roberson's group had knives, including one of Roberson's daughters. Jerricca had a little plastic broomstick but did not remember where she had gotten it from. She had the stick, not because she was getting ready to attack the other people, but because the other people had knives. Jerricca threw the stick away after it bent when she hit the fence with it. Jerricca saw that her father, Mayfield, was there, arguing with Gulley. She did not see her father with a pole or swinging a pole, but her attention at that time was on the girl with the knife.

¶ 54 It was a very chaotic scene. There was a lady on the porch, a guy ripping his own shirt off, and people being aggressive. Jerricca interpreted what the people in Roberson's group were doing as an indication that they wanted to fight. She heard someone yell out, "We got guns too," and threats being made. After hearing some more yelling, Jerricca heard shots being fired. She could not tell who was doing the shooting. Jerricca ducked and ran, and everyone scattered.

¶ 55 On cross-examination, after being questioned about what she had told the police following the shooting, Jerricca remembered that she had gone to the Virden Street address earlier that day as well and that a young girl had opened the window and had yelled to her that her mother was not home. The young girl said her mother would be back later so Jerricca left. Jerricca acknowledged on the witness stand that she was being aggressive when she hit Roberson's fence with a pole.

¶ 56 Dillard's testimony indicated that he was about 18 years old at the time of the shooting. According to Dillard, he did not get into a fight with Gulley on that day Gulley just punched him. They were breaking up two females who were fighting, Price and some other woman. Price was Dillard's cousin. The fight was about a belt. At that time, it was Dillard, Jayurion, and Price. Jayurion had said that he had gotten "jumped," but Dillard did not see that happen. The first physical confrontation was a big fight with a lot of people fighting each other. Dillard did not remember how that fight stopped.

¶ 57 Brown was Dillard's mother. Later in the day, Dillard went back to Roberson's home with his mom, but he stayed in the car and let her talk it out with the adults. Dillard was on crutches at the time and was not really paying attention when the shooting occurred. He was still in the car and was probably on his cell phone. Dillard could hear people arguing and a lot of yelling but could not really hear what was being said. According to Dillard, he did not remember much from that day and had tried to forget it. Dillard did not know defendant and had never seen defendant before.

¶ 58 The 36-year-old defendant testified that on the day of the shooting, Williams and Mayfield picked him up at his home after Mayfield's dialysis. Defendant was Mayfield's cousin. Defendant's plans for the evening were to smoke some weed, relax, and watch a basketball game

on television with Mayfield. Defendant usually spent Tuesday and Thursday evenings with Mayfield after Mayfield's dialysis session had finished for the day. Mayfield was a diabetic with kidney failure and had been on dialysis for about a month.

¶ 59 Defendant believed that Mayfield was in poor medical condition. Mayfield spoke to defendant all the time about his disease and had a catheter in his chest. About a week or two prior to the shooting, defendant saw Mayfield have a problem with the catheter. One of the caps came off, and the tube was leaking blood. The way defendant viewed Mayfield was that Mayfield was disabled and that he should not be involved in a physical altercation due to his condition. During defendant's testimony, a photograph of Mayfield's catheter was admitted into evidence without objection and was shown to the jury.

¶ 60 According to defendant, before he arrived at Roberson's home that day, there was no indication that he and Mayfield were going to be involved in a physical altercation. Defendant had not spoken to Mayfield before Mayfield and Williams had picked him up and was merely following his regular routine of getting together with Mayfield after Mayfield's dialysis session. Defendant had a gun on him when he got into Williams's car but did not tell Mayfield or Williams. Defendant had found the gun the previous day when he was rummaging through his family's garage looking for some props for a music video he was filming. Defendant planned to show the gun to Mayfield and was hoping that Mayfield might know someone who was willing to purchase the gun. The gun had no case, was a .45-caliber, and had some World War memorabilia on it, which defendant thought made it more valuable. Defendant did not show Mayfield the gun in the car because he did not want Williams to know he had a gun. Williams would not have allowed defendant in the car if she had known. Defendant did not hear any of the phone call that came into the car, was looking at his cell phone when Jayurion got in and not

paying attention, and was not aware of any problems that were happening with Jayurion that day. Neither Williams nor Mayfield seemed upset when defendant was in the car, and there was no indication that anything was wrong.

¶ 61 As defendant, Williams, and the others arrived at Roberson's home, defendant saw that there were some people standing outside, which, according to defendant, was not unusual. Defendant thought that Mayfield and Williams knew the people that were outside and assumed that the location was where he and Mayfield were going to relax for the evening. After defendant and the others got out of Williams's car, defendant heard Williams yell that she wanted to speak to the mother. That was when defendant's "alert system" went off, and defendant felt the tension right away. A lady on the porch with her phone out videotaping responded, "I'm the mom." Defendant knew he was being videotaped at that time. The gun was on defendant's waist, but he was not thinking about the gun at that moment.

¶ 62 A lot of yelling started. At first, it was just a bunch of commotion. Defendant could not make out what was being said because he was still 5 or 10 feet away. Defendant asked Mayfield what was going on. Mayfield told defendant to just go up the street, that it had nothing to do with defendant. Mayfield was defendant's older cousin, and defendant usually took Mayfield's advice, so he started walking up the street. Defendant did not know why Williams was trying to find out who the mom was and did not know that Jayurion had gotten into a fight earlier that day. Defendant did not hear anyone speaking about a fight while he was in Williams's car.

¶ 63 Defendant got just past the driveway when he started hearing threats. Some of the threats were being made directly to him by Gulley. Defendant did not know who Gulley was at that time. After hearing the threats, defendant pulled out his gun so that Gulley could see it and told Gulley that Gulley was not going to do anything to defendant. Defendant knew that Gulley saw

the gun. Gulley looked defendant straight in the eyes and stated, "f*** that gun, we got guns, too." Defendant believed Gulley and felt even more afraid. Defendant was overcome by fear and his alertness was heightened. Defendant cocked the gun back and told Gulley, "This ain't no toy. I'm not playing." Defendant believed that Gulley saw him do that. Gulley did not respond.

¶ 64 According to defendant, the people in the driveway tried to charge. Defendant looked to his side to see where Mayfield was located. Mayfield was struggling with another person over a broomstick. Defendant thought the broomstick came from Roberson's group because he knew that the people in Williams's car did not bring any broomsticks with them to that location and he had not seen anyone on the street side of the fence pass a broomstick to Mayfield. Defendant was terrified seeing Mayfield struggling over the broomstick because he knew Mayfield's physical condition. Defendant believed that Roberson's group had guns and feared that they were ready to do damage to Price's group. Members of Roberson's group had said so and were clutching at their waistbands. One guy in Roberson's group took his shirt off; another guy already had his shirt off. Defendant took that to mean that the people in Roberson's group were ready to fight. Defendant thought that Roberson's group was going to come out onto the street at any moment. Defendant also believed that Gulley had something to match defendant's gun since Gulley did not care about defendant's gun. Defendant feared that he or Mayfield could get seriously hurt or killed if Roberson's group got a hold of either of them.

¶ 65 Defendant felt that he was in a lot of danger. The only people defendant knew out there were Mayfield, Williams, and Jayurion. Defendant saw the other two cars pull up but did not know anyone in those other two cars. He thought they might be a threat to him as well. Defendant felt that the other people behind him were also a threat, even though he did not hear the people behind him making any threats to him. Essentially, defendant felt that everyone out

there was a threat. Defendant claimed that on the video, he could clearly be seen turning around looking at everyone and trying to watch his back, side, and front. Defendant was as scared for Mayfield as he was for himself. Defendant fired the gun when he saw that Mayfield was in a physical altercation and was struggling with someone else over the broomstick.

¶ 66 Defendant did not know if the first shot he fired had struck anyone. He fired a second shot because the people in Roberson's group were still in a fighting stance and were acting like they were going to charge again. Defendant did not remember how many shots he fired in total. According to defendant, when he fired all of the shots, he was not aiming at a particular person and was not trying to hit anyone. He was just trying to get Roberson's group to back off because he was scared and because he felt that firing the gun was the only option he had left. The entire incident happened in 30 seconds or less. Defendant fired the first shot while aiming at the ground and fired the remaining shots while aiming over everyone else's heads.

¶ 67 After defendant fired the gun, he noticed that Mayfield had hit the ground so defendant picked Mayfield up and ran to Williams's car. Defendant opened the passenger door and placed Mayfield inside. Defendant got in the driver's side, took off, and drove to his own house. There was no conversation between defendant and Mayfield at that time. They were both shocked. Defendant got out and told Mayfield he would call him later. Mayfield left in the car. The next day, Mayfield and defendant were arrested.

¶ 68 On the witness stand, defendant admitted that he was not being entirely truthful with the police at the beginning of his interview. Rather, according to defendant, he had tried to lie to the police because he did not think that he had the right to defend himself and Mayfield that way. Defendant believed that he was in imminent danger and that the only thing that was going to get him out of that situation was firing the weapon, but he did not think that he had a right to do so

because he was not licensed to carry a firearm. Defendant felt that firing the weapon was the last and only option he had left. Defendant showed Roberson's group that he had a gun; that was his warning. Roberson's group disregarded that warning and still charged. Defendant had never fired a gun before, did not have experience with guns, and did not believe that there was a strong probability of death to another person from firing the gun in the manner that he did so.

¶ 69 On cross-examination, defendant stated that he could not just get back into Williams's car, even though the car was unlocked, because he was already away from the car and everything happened so fast. Defendant admitted that he was the only person at the scene who pulled out, or fired, a gun. Defendant did not see anyone else with a gun, but the people in Roberson's group were clutching at their waistbands. Defendant acknowledged that Mayfield could be seen on one of the cell phone videos swinging the pole but denied that he saw Mayfield swing the pole when the incident was unfolding that day. Defendant also acknowledged that he was the person holding the gun in the video/screenshot and that he was pointing the gun even possibly before Mayfield was struggling with the pole. Defendant denied that when he pulled the gun, the people on the other side started to run up the driveway. According to defendant, he was just aiming at the ground and was not trying to hit anyone. Defendant admitted later during his testimony, however, that he did not point the gun at the ground and that he did not point the gun in the air or down the other side of the street. Defendant denied, though, that he pointed the gun at the level where the people were in front of him and stated that he might have pointed the gun in the direction of the other people but aimed it toward the ground.

¶ 70 Following the shooting, defendant drove to Joliet and threw the gun in a river because he did not want to get caught with the gun since he was unlicensed. According to defendant, he lied to the detective during the interview because he was worried he was going to get in trouble for

having an unlicensed firearm, not because he shot anybody. At the time, defendant did not know that he had a right to defend himself or his family when he was carrying an unlicensed firearm. Defendant did not load the gun; the gun was already loaded, and defendant knew that it was loaded. Defendant had some confidence, therefore, that when he pulled the gun out and pulled the trigger that a bullet would come out.

¶ 71 In addition to the evidence presented, during defendant's trial, a juror issue arose that is relevant to one of the issues raised in this appeal. On the third day of trial, when there was still one alternate juror available, one of the jurors realized and told the trial court that she was related by marriage to Gulley and his brother, Gabe. More specifically, the juror informed the trial court that her daughter was married to Gulley and Gabe's mother. Upon being questioned about the matter, the juror indicated that she had no preconceived opinions about Gulley, that she had never met Gulley, that she did not recognize Gulley's name when the witness list was read to the jury, and that her knowledge of Gulley and Gabe's mother did not affect her ability to be fair and impartial.[4] After the questioning was finished and the juror had gone back to the jury room, the trial court commented, "Does anybody want to be my initial reaction is the same as my reaction now, she stays on the jury. I don't think it's even a close call." The trial court asked the attorneys if they wanted to be heard on the matter, and both sides declined. The trial court then ruled that the juror would stay on the jury. Back in the courtroom but still outside the presence of the jury, the trial court judge stated for the record that he and the attorneys "all agree[d] that [the] juror should remain on the jury."

[4]The questions that the court and the attorneys asked the juror about this matter were generally targeted at the juror's knowledge of, and relationship with, the mother and Gulley and generally did not mention Gulley's brother, Gabe.

¶ 72 After all of the evidence had been presented, the attorneys made their closing arguments. The State argued that defendant was guilty of murder, aggravated battery with a firearm, and mob action and that defendant was not acting in self-defense when he fired the handgun. The defense argued that Roberson's group was the real mob that day; that Jones, Gulley, and some of the other members of Roberson's group were the ones who should have been charged with mob action; and that defendant fired the weapon to protect himself and Mayfield. In making those arguments, defense counsel acknowledged that there were other charges available to the jury if the jury believed that defendant had misinterpreted the situation or had overreacted, but defense counsel asserted to the jury that defendant had not done so. Defense counsel told the jury further that the jury would have to decide which group (Roberson's or Price's) was committing mob action that day and referred to Price's group (the group to which defendant arguably belonged) at one point during some of those comments as "Mob B." Defense counsel also told the jury that it would have to "pay close consideration" to the mob action charges because self-defense was not a defense to mob action.

¶ 73 Following the closing arguments, the trial court instructed the jury on the law. Pursuant to defendant's request, the jury was instructed on the lesser offenses of second degree murder (as a lesser mitigated offense of first degree murder), involuntary manslaughter (as a lesser included offense of first degree murder), and reckless discharge of a firearm (as a lesser included offense of aggravated battery with a firearm), and also on the affirmative defense of self-defense.[5] Without objection from defendant, the wording of some of the jury instructions was changed at

[5]The State initially opposed defendant's request to instruct the jury on involuntary manslaughter as a lesser included offense of first degree murder, but, after conducting additional research, the State informed the trial court that it believed that defendant was entitled to that instruction. After additional discussion, the State agreed further that by the same reasoning, defendant was also entitled to an instruction on reckless discharge of a firearm as a lesser included offense of aggravated battery with a firearm. The State prepared those lesser included offense instructions as a courtesy to defense counsel.

times to distinguish between defendant's felony murder charge and his other first degree murder charge.[6] The felony murder charge was referred to in the instructions and the verdict forms at times as "First Degree Murder (Type B)," and defendant's other first degree murder charge was referred to at times as "First Degree Murder (Type A)." See People v. Lester, 2016 IL App (3d) 140293, ¶¶ 9-12 (describing similar labels that had been used in the jury instructions in that case to distinguish between the defendant's felony murder charge and his other first degree murder charges).

¶ 74 As for a concluding instruction, without objection from defendant, the jury was given Illinois Pattern Jury Instructions, Criminal, No. 26.01J (4th ed. 2000) (hereinafter IPI Criminal 4th).[7] With regard to the offenses of aggravated battery with a firearm and reckless discharge of a firearm, the typewritten concluding instruction provided as follows:

> "The defendant is also charged with the offense of Aggravated Battery. You will receive two forms of verdict as to this charge. You will be provided with both a 'not guilty of Aggravated Battery', and a 'guilty of Aggravated Battery' form of verdict.
>
> From these two verdict forms, you should select the one verdict form that reflects your verdict pertaining to the charge of [Aggravated Battery] and sign it as I have stated. You should not write at all on the other verdict form pertaining to the charge of Aggravated Battery.

[6]The initial count of first degree murder (strong probability murder) that was filed against defendant and Mayfield jointly was dismissed prior to trial on motion of the State.

[7]It appears from the record that the concluding instruction was incorrectly labeled and incorrectly referred to in the trial court as IPI Criminal 4th No. 26.01I, rather than IPI Criminal 4th No. 26.01J. IPI Criminal 4th No. 26.01I is used when a defendant is charged with first degree murder, second degree murder, involuntary manslaughter, and no other charges, which was not the situation in the present case.

* * *

The defendant is also charged with the offense of Reckless Discharge of a Firearm. You will receive two forms of verdict as to this charge. You will be provided with both a 'not guilty of Reckless Discharge of a Firearm', and a 'guilty of Reckless Discharge of a Firearm' form of verdict.

From these two verdict forms, you should select the one verdict form that reflects your verdict pertaining to the charge of [Reckless Discharge of a Firearm] and sign it as I have stated. You should not write at all on the other verdict form pertaining to the charge of Reckless Discharge of a Firearm."

¶ 75 During its deliberations, the jury informed the trial court at various times that it had questions for the court to answer. One of the questions that the jury submitted to the trial court was whether the jury could find defendant guilty of both felony murder (first degree murder (type B)) and second degree murder. After discussing the matter with the attorneys, the trial court responded to the jury that it could find defendant guilty of both offenses.

¶ 76 Upon completing its deliberations, the jury found defendant guilty of felony murder, second degree murder, aggravated battery with a firearm, reckless discharge of a firearm, two counts of mob action, and unlawful possession of a weapon by a felon.[8] The trial court ordered that a presentence investigation report (PSI) be prepared on defendant for sentencing, and the case was scheduled for a hearing on posttrial motions. The following month, defendant filed a motion for judgment notwithstanding the verdict or for new trial (and a supplement to that motion), which the trial court later denied. Defendant did not raise the issue of inconsistent verdicts in either his original or supplemental posttrial motion.

[8]As noted previously, defendant's jury trial was bifurcated as to the unlawful possession of a weapon by a felon charge.

¶ 77 In May 2019, the trial court held a sentencing hearing in defendant's case. At the time of the sentencing hearing, the trial court had before it defendant's PSI, two victim impact statements, and some letters written from jail personnel on defendant's behalf. The PSI indicated that defendant was 36 years old and had graduated from high school in 2001. Defendant had worked sporadically for several years and, prior to being incarcerated, was self-employed as a video editor for music videos, commercials, promotional videos, and entertainment business. In his work, defendant made about $1000 per month. Defendant was unmarried and had five children, ranging in ages from 7 to 20. Defendant had been convicted of numerous criminal offenses over the course of his adult life. Defendant had one prior felony conviction for manufacture or delivery of cocaine in 2002. He was initially sentenced to a period of probation for that offense, but his probation was later terminated unsuccessfully. Defendant had also previously been convicted of several traffic and misdemeanor offenses, including battery in 2001 (from a 2000 case) and 2009, possession of cannabis in 2006 and 2009, and two separate domestic batteries in 2010. In his prior adult offenses (including the prior felony offense), defendant had received probation or conditional discharge six times and had his probation or conditional discharge terminated unsuccessfully or revoked nearly every time.

¶ 78 As for the victim impact statements, the first victim impact statement was written and read by Kenisha Davis, Jones's mother. In that statement, Davis described how devastating it was for her to lose her son and for Jones's daughter (Davis's granddaughter) to lose her father. According to Davis, Jones's daughter was only four years old when Jones was killed and lost the only parent that she had ever known. The second victim impact statement was written and read by Nia King, Jones's sister. In that victim impact statement, King described how she, her siblings, Jones's daughter, and Jones's fiancée had struggled trying to cope with Jones's death.

As with Davis, King also commented in her victim impact statement upon the significance of the loss of Jones to Jones's daughter.

¶ 79 With regard to the letters in support of defendant, those have not been made part of the record on appeal. However, the comments that were made about those letters in the sentencing hearing indicate that the letters were submitted by a jail chaplain or chaplains and that the letters indicated that defendant had become a changed person in jail and had helped to counsel other inmates.

¶ 80 As for sentencing recommendations, the State recommended that the trial court sentence defendant to something more than the minimum sentence, which was 51 years in prison on the felony murder and the aggravated battery with a firearm convictions (20 years for felony murder with a 25 year firearm enhancement and 6 six years for aggravated battery with a firearm, with the sentences to run consecutively). In making that recommendation, the State commented upon defendant's prior criminal history, defendant's belief that he was a victim in the whole situation, and defendant's dangerous character. Defense counsel, on the other hand, asked the trial court to impose only the minimum prison sentence (51 years) upon defendant. As part of his recommendation, defense counsel asked the trial court to consider in mitigation the fact that the jury found that defendant's self-defense or defense-of-others claim was sincere but unreasonable, as evidenced by the jury's finding of guilty of second degree murder. Defense counsel also commented that defendant had no prior history of gun violence.

¶ 81 In response to defendant's request for the minimum sentence, the trial court stated:

> "Well, if I give him 51 which is the very minimum and he's got a prior felony conviction and five failed probations, okay, what do I give a guy who would stand before me convicted of these same charges who has no prior felony convictions

and no prior failed probation? What would I give him then if I'm giving your guy the minimum?"

¶ 82 Upon the trial court's request, defense counsel specifically addressed defendant's rehabilitation potential and stated that the letters that had been written on defendant's behalf showed that defendant was a changed person and that defendant could become a productive member of society.

¶ 83 After the attorneys had finished making their sentencing recommendations, defendant made a statement in allocution. Defendant told the trial court that he was sorry that Jones had died and that Gully had gotten shot, but that in defendant's heart and mind, he believed that he was forced to react to the situation. Defendant stated that he took the actions that he did when the shooting occurred, not because he wanted to kill anyone, but because he felt threatened and felt that he did not have a choice he was simply trying to protect his family and himself from great bodily harm. Defendant stated further that he lied to the police after the shooting occurred because he did not know better and because he was scared at the time. Defendant denied that he was guilty of mob action and stated that the situation leading up to the shooting was just two parents (presumably Williams and Mayfield) trying to keep the peace and to find out what had happened to their son.

¶ 84 Following defendant's statement in allocution, the trial court announced its sentencing decision. The trial court sentenced defendant to consecutive prison terms of 65 years (40 years plus a 25-year firearm enhancement) for felony murder and 15 years for aggravated battery with a firearm and to a concurrent prison term of 7 years for unlawful possession of a weapon by a felon. The trial court did not impose sentences on defendant for the remaining findings of guilty. In making its sentencing decision, the trial court found that there were no factors in mitigation

that applied to defendant but that there were two factors in aggravation that applied that defendant had a history of criminal activity and that a sentence was necessary to deter others from committing the same crimes.[9] The trial court commented that defendant had minimized the nature of the offenses and that defendant's version of events was contrary to what was shown in the cell phone videos of the incident. The trial court also noted the impact that Jones's death had on Jones's family and commented that defendant's prospects for rehabilitation were low as indicated by the fact that defendant had lied to the police, had thrown the gun off of a bridge, and had minimized the nature of the offenses in his statement in allocution.

¶ 85 Defendant filed a motion to reconsider sentence and again asked the trial court to consider in mitigation the fact that the jury had found that defendant had acted with an unreasonable belief in the need for self-defense or defense-of-others. After considering the arguments of the attorneys, the trial court denied defendant's motion. Defendant appealed.

¶ 86 II. ANALYSIS

¶ 87 A. Proof Beyond a Reasonable Doubt of Felony Murder

¶ 88 As his first point of contention on appeal, defendant argues that he was not proven guilty beyond a reasonable doubt of felony murder. More specifically, defendant asserts that the evidence was insufficient to prove the underlying mob action charge because the evidence failed to show that he and Mayfield were acting together or with a common plan or purpose at the time of the offense. On the contrary, defendant maintains, the evidence established that defendant did not know about the altercation that had occurred earlier in the day, whose home to which he had arrived, or the reason that he and the others were going to that home. In addition, defendant

[9]The trial court indicated that, in sentencing defendant, it was only going to consider defendant's prior misdemeanor convictions and not defendant's prior felony conviction because the prior felony conviction had already been used by the State to charge defendant with unlawful possession of a weapon by a felon.

contends, the State presented no evidence that defendant participated in the altercation with Mayfield prior to the shooting (before defendant believed that Mayfield's life was at risk) or that defendant and Mayfield had an agreement that defendant would shoot at Jones during the altercation. Based upon the alleged insufficiency of the evidence, defendant asks that we reverse outright his conviction for felony murder.

¶ 89 The State argues that defendant's felony murder conviction was proper and should be upheld. The State asserts that the evidence in this case was sufficient to show that defendant and Mayfield were acting together at the time of the offense as necessary to prove the underlying charge of mob action. According to the State, the witness testimony and video evidence presented at trial showed that defendant knew of the prior altercation and of the reason for going to Roberson's home and that defendant acted with Mayfield to attack Jones and Gulley. The State asks, therefore, that we affirm defendant's conviction of felony murder.

¶ 90 Pursuant to the *Collins* standard (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)), a reviewing court faced with a challenge to the sufficiency of the evidence must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). In applying the *Collins* standard, the reviewing court will allow all reasonable inferences from the record in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). The reviewing court will not retry the defendant. *People v. Austin M.*, 2012 IL 111194, ¶ 107. Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court. *People v. Emerson*, 127 Ill. 2d 12, 43 (1989). Thus, the *Collins* standard of review fully recognizes that it is the trier of fact's responsibility to fairly resolve conflicts in the

testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See *Jackson*, 232 Ill. 2d at 281. That same standard of review is applied by the reviewing court regardless of whether the evidence is direct or circumstantial or whether defendant received a bench or a jury trial, and circumstantial evidence meeting that standard is sufficient to sustain a criminal conviction. *Id.*; *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000). In applying the *Collins* standard, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt of the defendant's guilt. *Austin M.*, 2012 IL 111194, ¶ 107.

¶ 91 As noted above, defendant's felony murder conviction in the instant case was based upon the underlying felony of mob action. To sustain the charge of mob action as it was filed in the present case, the State had to prove, among other things, that defendant acted together with one or more persons without authority of law (the joint-action element). See 720 ILCS 5/25-1(a)(1) (West 2016). The joint-action element is satisfied when the evidence presented shows joint or concerted action or cooperative effort that the defendant and the other person or persons involved acted pursuant to an agreement or a common criminal purpose. See *People v. Barnes*, 2017 IL App (1st) 142886, ¶¶ 3, 26, 38-39, 68. To establish joint action, it is not enough for the State to merely show that the defendant and the other person were present at the same place and same time and were doing the same thing, since the law does not allow guilt by association. See *id.* ¶¶ 38, 42. Rather, to prove the joint-action element, "an intent to join with others in a mutual pursuit like the members of a gang is typically required." *Id.* ¶ 38.

¶ 92 In the present case, after reviewing the record from defendant's jury trial, we find that the evidence was sufficient to prove that defendant was acting together with Mayfield (and the other members of Price's group) when the underlying mob action allegedly occurred. The strongest

evidence of defendant and Mayfield's concerted action came from the testimony of Gulley, if the jury chose to believe him, wherein Gulley stated that, during the struggle over the broomstick, Mayfield yelled shoot and defendant fired. In addition to that evidence, the jury had before it two cell phone videos that showed some of the events that occurred just prior to, and during, the shooting. Through those videos, the jury could see and hear some of what actually took place as the shooting was unfolding. The jury was also presented with testimony that defendant was in the car when Price told Williams on speakerphone that Jayurion had been "jumped"; that defendant was also present in the vehicle when Jayurion told Williams and Mayfield what had happened during the prior altercation; and that defendant went to Roberson's home with Williams, Mayfield, and Jayurion at precisely the same time that several other people connected to Price also went to Roberson's home. The jury could have reasonably inferred from that evidence that defendant was aware of the prior altercation; that defendant was aware of Price's group's purpose for going to Roberson's residence; and that defendant, Mayfield, and the other members of Price's group had jointly gone to Roberson's home to fight Roberson's group or to take revenge for the altercation that had happened earlier that day. Defendant's assertions to the contrary are not supported by the video evidence that was presented, which showed defendant and Mayfield actively involved in the escalating confrontation immediately prior to the shooting. Viewing all of the evidence in the light most favorable to the State, as we are required to do on appeal (see Jackson, 232 Ill. 2d at 280), we find that the evidence presented was sufficient to satisfy the joint-action element of the mob action charge. We also conclude, therefore, that defendant was proven guilty beyond a reasonable doubt of felony murder.

¶ 93 B. Mob Action as the Underlying Felony for Felony Murder

¶ 94 As his second point of contention on appeal, defendant argues that the mob action charge could not properly serve as the underlying felony for the felony murder charge in this case because the act that formed the basis of the mob action charge which defendant describes on appeal as defendant firing a series of shots into the crowd at Roberson's home was the direct and only cause of Jones's death, was inherent in Jones's murder, and was not committed with an independent felonious purpose. Defendant asks, therefore, that we reverse outright his conviction for felony murder.

¶ 95 The State argues that defendant's felony murder conviction was appropriate and should be upheld. In support of that argument, the State asserts first that defendant forfeited this claim by failing to raise it in the trial court. Second, and in the alternative, the State asserts that even if this court reaches the merits of this issue, defendant's argument should still be rejected because the acts that gave rise to the mob action charge were not inherent in the felony murder charge and had a separate felonious purpose. Thus, the State contends that the mob action charge was a legally proper underlying felony for the felony murder charge in this case. For those reasons, the State asks that we affirm defendant's conviction of felony murder.

¶ 96 In response to the State's claim of forfeiture, defendant asserts, and we agree, that the forfeiture rule does not apply here because defendant's claim is considered to be a challenge to the sufficiency of the evidence and, as such, constitutes an exception to the forfeiture rule. See In re Dionte J., 2013 IL App (1st) 110700, ¶ 79. We, therefore, turn to the merits of defendant's argument on this issue.

¶ 97 The question of whether a certain forcible felony, such as the mob action charge in the instant case, can properly serve as the underlying felony for a defendant's felony murder conviction is a question of law that is subject to a de novo standard of review on appeal. People

v. Davison, 236 Ill. 2d 232, 239 (2010). The purpose behind the felony murder statute is to deter the commission of forcible felonies and to limit the violence that accompanies such offenses by subjecting anyone who commits a forcible felony to a first degree murder charge if another person is killed during the commission of that offense. Id.; People v. Dennis, 181 Ill. 2d 87, 105 (1998). However, because the offense of felony murder is unique in that it does not require the State to prove an intentional or knowing killing, unlike other forms of first degree murder, our supreme court has repeatedly expressed concern that a felony murder charge could, in effect, improperly allow the State to both eliminate the offense of second degree murder and to avoid the burden of having to prove an intentional or knowing killing as generally required for a first degree murder conviction, given that many murders are accompanied by the same underlying forcible felonies. See, e.g., Davison, 236 Ill. 2d at 239-40. Our supreme court has held, therefore, that when the acts constituting a forcible felony arise from and are inherent in the act of murder itself, those acts cannot also serve as the underlying felony for a felony murder charge. See id. at 240; People v. Morgan, 197 Ill. 2d 404, 447 (2001); Dionte J., 2013 IL App (1st) 110700, ¶ 71. Rather, in order to properly support a charge of felony murder, the underlying felony must have an independent felonious purpose a purpose or motivation that is independent and apart from the killing itself. Davison, 236 Ill. 2d at 243-44; Dionte J., 2013 IL App (1st) 110700, ¶ 79; People v. Colbert, 2013 IL App (1st) 112935, ¶ 13. In determining whether an independent felonious purpose exists, the factual context surrounding the killing is of crucial importance. See Colbert, 2013 IL App (1st) 112935, ¶ 14.

¶ 98 In the instant case, after considering the legal principles set forth above and the factual context of the killing, we find that the acts that gave rise to the mob action charge were independent from, and involved a different felonious purpose than, the acts that resulted in

Jones's death. The mob action offense was completed in this case when defendant, Mayfield, and the other members of Price's group went to Roberson's residence to fight Roberson's group and then started carrying out that common purpose using force or violence, such as when Mayfield swung at Jones and Gulley with the broomstick. That conduct was not inherent in the shooting that occurred immediately thereafter and involved a different felonious purpose. See id. ¶¶ 15-16 (finding that the acts that formed the basis of the defendant's mob action charge the defendant taking part in a street brawl in an effort to physically intimidate and harass fellow students from a rival neighborhood were independent from, and involved a different felonious purpose than, the acts that resulted in the murder victim's death the defendant and several of his codefendants striking the murder victim multiple times during the same street brawl); People v. Tamayo, 2012 IL App (3d) 100361, ¶ 27 (finding that the acts that formed the basis of the defendant's mob action charge the defendant beating up the murder victim's friend during a group fight were independent from, and involved a different felonious purpose than, the acts that resulted in the murder victim's death the defendant's cohort beating up the murder victim during the same group fight). We, therefore, conclude that under the facts of the present case, the mob action charge could properly serve as the underlying felony for defendant's felony murder conviction. Davison, 236 Ill. 2d at 243-44; Dionte J., 2013 IL App (1st) 110700, ¶ 79; Colbert, 2013 IL App (1st) 112935, ¶¶ 15-16; Tamayo, 2012 IL App (3d) 100361, ¶ 27. Accordingly, we affirm defendant's felony murder conviction.

¶ 99 C. Legally Inconsistent Verdicts

¶ 100 As his third point of contention on appeal, defendant argues that his convictions (and, presumably, the jury's findings of guilty) must be reversed and the case remanded for a new trial because of inconsistent verdicts. More specifically, defendant asserts that (1) the jury's finding

of guilty of reckless discharge of a firearm was legally inconsistent with its findings of guilty of felony murder and aggravated battery with a firearm because all three of the offenses were based upon the same continuous conduct of defendant firing the gun but involved mutually inconsistent mental states (reckless versus knowing conduct) and (2) the jury's finding of guilty of second degree murder was legally inconsistent with its finding of guilty of felony murder because the single murder in this case could not have been both mitigated (second degree murder) and unmitigated (felony murder). Defendant asserts further that upon receiving the inconsistent verdicts, the trial court should have given the jury additional instructions and ordered the jury to continue deliberating to resolve the inconsistency (if the jury had not already been discharged when the mistake was discovered) or ordered a new trial (if the jury had already been discharged). Instead, according to defendant, the trial court usurped the jury's function by choosing which findings of guilty to enter judgment and impose sentence upon. For those reasons, defendant asks that we reverse all of his convictions (and, presumably, all of the jury's findings of guilty) and that we remand this case for a new trial.

¶ 101 The State argues that the jury's verdicts were proper and should be upheld. In support of that argument, the State asserts first that defendant forfeited this claim by failing to properly preserve it in the trial court and by acquiescing in the jury's verdicts. Second, and in the alternative, the State asserts that even if this court chooses to reach the merits of this issue, defendant's argument should still be rejected because the jury's verdicts were not legally inconsistent. More specifically in that regard, the State contends that (1) the jury's finding of guilty of reckless discharge of a firearm was not legally inconsistent with its finding of guilty of felony murder and aggravated battery with a firearm, despite the different mental states involved, because the jury's findings of guilty pertained to multiple shots and multiple victims and (2) the

jury's finding of guilty of second degree murder was not legally inconsistent with its finding of guilty of felony murder because felony murder does not require the mental state necessary for murder and because the mitigating factors for second degree murder have no effect on the felony murder charge. In addition, according to the State, the jury instructions in this case were specifically tailored to prevent the jury from reaching legally inconsistent verdicts. For all of the reasons set forth, therefore, the State asks that we affirm defendant's convictions.

¶ 102 In response to the State's claim of forfeiture, defendant asserts, and we agree, that even if this issue has been forfeited, second prong plain error review would apply (assuming that an error had occurred) because this issue involves a claim of legally inconsistent verdicts. See People v. Ousley, 297 Ill. App. 3d 758, 764 (1998) (recognizing that a potentially forfeited claim of legally inconsistent verdicts should be reviewed under the plain error doctrine). In addition, despite the State's request, we decline to apply the concept of acquiescence here because our supreme court has placed the duty to take the necessary steps to prevent or cure legally inconsistent verdicts upon the trial court, rather than upon the potentially aggrieved party. See People v. Carter, 193 Ill. App. 3d 529, 533-34 (1990) (rejecting a similar argument by the State).

¶ 103 Turning to the merits of defendant's argument on this issue, we are mindful of the following legal principles that apply in analyzing claims of inconsistent verdicts. The determination of whether verdicts are legally inconsistent is a question of law that is subject to a de novo standard of review on appeal. People v. Price, 221 Ill. 2d 182, 189 (2006). Verdicts are legally inconsistent when an essential element of each crime must, by the very nature of the verdicts, have been found to exist and to not exist, even though the offenses arise out the same set of facts. Id. at 188; Leflet, 2016 IL App (3d) 140293, ¶ 20. Of potential relevance to this appeal, courts have found verdicts to be legally inconsistent in situations where (1) the offenses

at issue involved mutually inconsistent mental states and the jury found that both mental states existed (see, e.g., Price, 221 Ill. 2d at 188-89); or (2) the jury determined that a single murder was both mitigated for the purpose of a second degree murder charge and unmitigated for the purpose of a first degree murder charge (see, e.g., People v. Porter, 168 Ill. 2d 201, 214 (1995)).

¶ 104 When a jury returns legally inconsistent guilty verdicts, the trial court may not attempt to correct the problem by merely entering judgment on one or more of the verdicts and vacating the other verdicts. Id. To do so would be to usurp the jury's function to determine innocence or guilt. Id. Instead, the trial court must give the jury additional instructions and send the jury back for further deliberations to resolve the inconsistency. Id. If the trial court fails to do so, the inconsistent verdicts must be reversed and the case remanded for a new trial on those charges. People v. Mitchell, 238 Ill. App. 3d 1055, 1060 (1992) (interpreting the Illinois Supreme Court's case-law statement that the remedy for inconsistent verdicts is a retrial on all counts as meaning a retrial on all inconsistent counts); see People v. Formeax, 176 Ill. 2d 523, 535 (1997) (leaving the one conviction in place that the defendant did not contest and reversing and remanding the other convictions for a new trial where some of the jury's verdicts were legally inconsistent).

¶ 105 In the present case, after reviewing the record and considering the jury's verdicts, we find that the jury's verdict of guilty of reckless discharge of a firearm (referred to herein more simply at times as reckless discharge) was legally inconsistent with the jury's verdict of guilty of aggravated battery with a firearm (referred to herein more simply at times as aggravated

battery). [0] There is no dispute in this appeal that the reckless discharge offense and the aggravated battery offense involved mutually inconsistent mental states. Both charges pertained to defendant's act of shooting Gulley. For reckless discharge, the jury had to find that defendant had acted recklessly when he shot Gulley, and, for aggravated battery, the jury had to find that defendant had acted knowingly when he shot Gulley. In addition, it is clear from the jury instruction conference that defendant's request, and the intention of the parties, was that the jury would be instructed on reckless discharge of a firearm as a lesser included offense of the aggravated battery with a firearm charge. However, the jury instructions in this case were incorrect, and the jury was not instructed that it had to view the two offenses (aggravated battery and reckless discharge) as a greater and lesser offense. As the committee note to IPI Criminal 4th No. 26.01J indicates, the language for greater and lesser offenses must be used, instead of the language contained in the instruction, when the jury is to be instructed on a lesser included offense, such as the reckless discharge offense in the present case. See IPI Criminal 4th No. 26.01J, Committee Note. The jury was never informed in this case by either the jury instructions or the parties' closing arguments that reckless discharge was a lesser included offense of aggravated battery and that it could only find defendant guilty of one of those charges but not both. See People v. Washington, 2019 IL App (1st) 161742, ¶ 29 (describing a similar error that had taken place in that case). Although the State presents a scenario on appeal where, because of the multiple victims involved and the multiple shots fired at the victims and at Roberson's home, the jury might have been able to find defendant guilty of both offenses without returning legally

[10]Although defendant has grouped the felony murder charge with the aggravated battery with a firearm charge in his argument on this issue, the felony murder charge did not pertain to defendant's shooting of Gulley, as the aggravated battery with a firearm charge and reckless discharge of a firearm charge did, and was not advanced by defendant as a lesser included offense of the felony murder charge. We, therefore, will only address whether the verdicts of guilty of aggravated battery with a firearm and reckless discharge of a firearm were legally inconsistent.

inconsistent verdicts (see People v. Spears, 112 Ill. 2d 396, 405 (1986) (recognizing that where a claim of inconsistent guilty verdicts involves multiple shots or multiple victims, the question for the reviewing court is whether the trier of fact could rationally find separable acts accompanied by mental states to support all of the verdicts as legally consistent)), that was not the manner in which the parties had intended for the jury to consider the reckless discharge offense. We, therefore, conclude that the jury's finding of guilty of reckless discharge of a firearm was legally inconsistent with the jury's finding of guilty of aggravated battery with a fireman. See Price, 221 Ill. 2d at 188-89. Accordingly, we reverse defendant's conviction of aggravated battery with a firearm, vacate the jury's finding of guilty of reckless discharge of a firearm, and remand this case for a new trial on defendant's aggravated battery with a firearm charge. See Mitchell, 238 Ill. App. 3d at 1060; Fornear, 176 Ill. 2d at 535. At the new trial, defendant will be free to again ask for a lesser included offense instruction of reckless discharge of a firearm if the circumstances warrant, and the trial court will have to make a ruling on that request based upon the evidence presented. We have thoroughly reviewed the evidence in this case and find that the evidence presented at defendant's trial was sufficient to prove both charges (aggravated battery with a firearm and reckless discharge of a firearm) beyond a reasonable doubt and that a retrial on those charges (a possible retrial as to reckless discharge) will not raise double jeopardy concerns. See People v. Drake, 2019 IL 123734, ¶¶ 20-21 (indicating that double jeopardy does not bar a retrial when a conviction has been overturned because of an error in the trial proceedings, unless the evidence introduced at the initial trial was insufficient to sustain the conviction).

¶ 106 As for defendant's remaining claim on this issue that the jury's verdicts finding him guilty of second degree murder and felony murder were also legally inconsistent this court

previously resolved that exact issue in the Lesley case cited above and found that guilty verdicts of both second degree and felony murder were not legally inconsistent verdicts because the factors that apply to mitigate first degree murder down to second degree murder were not applicable to a felony murder charge. See Lesley, 2016 IL App (3d) 140293, ¶¶ 20, 26. We, therefore, reject that portion of defendant's argument on this issue.

¶ 107 D. Cumulative Error

¶ 108 As his fourth point of contention on appeal, defendant argues that he was deprived of a fair trial due to the cumulative effect of the following trial errors: (1) the trial court received inconsistent verdicts that it failed to clarify and sentenced defendant on the more culpable offenses (previous issue); (2) the trial court refused to allow defendant to present Gabe's rap video as a prior inconsistent statement; (3) the trial court and defense counsel allowed a juror to remain on the jury after learning that the juror was related to one of the victims, even though an alternate juror was available; and (4) defense counsel provided ineffective assistance when, contrary to defense counsel's theory of the case, defense counsel told the jury in closing argument that self-defense was not a defense to mob action and implied to the jury that defendant was a member of one of the mobs. According to defendant, the above-listed errors created a pervasive pattern of unfair prejudice at defendant's trial such that it cannot be said that defendant's trial was fundamentally fair. For that reason, defendant asks that we reverse his convictions and remand this case for a new trial.

¶ 109 The State argues that defendant was not deprived of a fair trial and that defendant's convictions should be upheld. In support of that argument, the State asserts that none of the matters referred to by defendant constituted error in this case. More specifically, the State contends that (1) the jury's verdicts were not legally inconsistent; (2) the trial court did not abuse

its discretion in denying defendant's request to admit Gabe's rap video; (3) the juror that defendant challenges did not suffer from a disqualifying bias and any error that otherwise occurred was invited by defendant; and (4) the actions of defense counsel of which defendant complains were generally matters of trial strategy and did not constitute ineffective assistance of counsel. For that reason, the State asks that we reject defendant's claim of cumulative error and affirm defendant's convictions.

¶ 110 The determination of whether the cumulative effect of various trial errors warrants a reversal in a criminal case depends upon the reviewing court's evaluation of the individual errors. See People v. Doyle, 328 Ill. App. 3d 1, 15 (2002). A defendant in a criminal case, whether guilty or innocent, is entitled to a fair, orderly, and impartial trial conducted according to the law. See U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; People v. Bull, 185 Ill. 2d 179, 214 (1998). It must be remembered, however, that no trial is perfect, and that a defendant in a criminal case is entitled to a fair trial, not a perfect one. Bull, 185 Ill. 2d at 214. That being said, it has been recognized that a situation may arise where a criminal defendant has been deprived of a fair trial, not by any individual error alone, but by the cumulative effect of the trial errors that occurred. See, e.g., People v. Blue, 189 Ill. 2d 99, 138-40 (2000); People v. Speight, 153 Ill. 2d 365, 376 (1992); People v. Jones, 2019 IL App (3d) 160268, ¶ 50. When such cumulative trial error occurs, due process and fundamental fairness may require that the defendant's conviction be reversed and the case be remanded for a new trial, even when defendant's guilt is overwhelming. See Jones, 2019 IL App (3d) 160268, ¶ 50; People v. Fultz, 2012 IL App (2d) 101101, ¶ 54.

¶ 111 In the present case, after reviewing defendant's individual claims of error and the effect of any error that occurred on defendant's trial as a whole, we find that defendant was not

deprived of a fair trial. As for defendant's first claim of error under this issue inconsistent verdicts we have already determined, as indicated above, that two of the guilty verdicts returned by the jury were legally inconsistent. We have reversed and vacated those verdicts and have remanded the greater of the two offenses for a new trial. We do not believe, however, that defendant's claim of inconsistent verdicts would otherwise contribute to his claim of cumulative error and defendant does not provide any additional explanation in that regard. We, therefore, will not address defendant's claim of inconsistent verdicts any further under this particular issue.

¶ 112 With regard to defendant's second claim of error under this issue the denial of defendant's request to admit Gabe's rap video we note that the trial court's ruling on the admissibility of evidence will generally not be reversed on appeal absent an abuse of discretion. See People v. Pikes, 2013 IL 115171, ¶ 12; People v. Illgen, 145 Ill. 2d 353, 364 (1991). The threshold for finding an abuse of discretion is high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable or that no reasonable person would have taken the view adopted by the trial court. See In re Leona W., 228 Ill. 2d 439, 460 (2008); People v. Donoho, 204 Ill. 2d 159, 182 (2003). Considering that standard of review and the evidence before the court on this matter, we cannot find that the trial court erred in denying defendant's request to admit the rap video. As the State correctly notes, the rap video was made solely for entertainment purposes and was not akin to a prior statement by the witness.

¶ 113 As for defendant's third claim of error under this issue juror bias we are not persuaded by defendant's argument. Contrary to defendant's assertion on appeal, the juror in this case did not suffer from an implied bias. See People v. Cole, 54 Ill. 2d 401, 413 (1973) (recognizing that implied bias generally arises when a certain relationship exists between a juror and a party to the litigation which is so direct that it is presumed that the juror will be biased and,

therefore, disqualified); People v. Tondini, 2019 IL App (3d) 170370, ¶¶ 17-19 (same). Indeed, there is no claim here that the juror was related to any of the parties. See Tondini, 2019 IL App (3d) 170370, ¶ 19 (stating that Illinois courts have defined a party as one who has a right to control the proceedings, to pursue a defense, to call and cross-examine witnesses, and to appeal from the decision). Nor is there any indication in this case that the juror was suffering from a disqualifying state of mind that would give rise to a claim of actual bias. See Cole, 54 Ill. 2d at 413 (recognizing that claims of actual bias are based upon a juror's state of mind where a juror or potential juror's state of mind is such that a party will not receive a fair and impartial trial with that person on the jury); Tondini, 2019 IL App (3d) 170370, ¶¶ 17-18 (same). Although the juror in this case was related by marriage to Gulley (one of the victims/witnesses), she did not know Gulley and had never spoken to him. Defendant's mere speculation on appeal is not sufficient to establish a claim of juror bias, especially in light of the juror's unequivocal statement upon inquiry by the trial court that her relationship to Gulley and Gabe's mother would not affect her ability to be fair and impartial. See Cole, 54 Ill. 2d at 415. In addition, because the juror did not have a disqualifying bias, defense counsel in this case cannot be considered ineffective for failing to seek to have the juror removed from the jury. See People v. Edwards, 195 Ill. 2d 142, 165 (2001) (stating that defense counsel cannot be considered ineffective for failing to make or pursue meritless objections).

¶ 114 Finally, with regard to defendant's fourth claim under this issue defendant's other assertions of ineffective assistance of trial counsel we do not agree with defendant's assertions. Defense counsel spent the majority of his closing argument trying to convince the jury that the real mob at the scene of the shooting that day was Roberson's group and not Price's group or defendant. That defense counsel may have referred to Price's group at one point as "Mob B,"

either because he wanted to emphasize to the jury that there were two groups at the scene of the shooting (not just Price's group) or because he misspoke, does not give rise to a claim of ineffective assistance of counsel. See People v. Patterson, 217 Ill. 2d 407, 441 (2005) (recognizing that matters of trial strategy will generally not support a claim of ineffective assistance of counsel); People v. Perry, 224 Ill. 2d 312, 355-56 (2007) (indicating that matters of trial strategy will generally not support a claim of ineffective assistance of counsel, even if defense counsel made a mistake in trial strategy or tactics or made an error in judgment); People v. Cloyd, 152 Ill. App. 3d 50, 57 (1987) (stating that in reviewing a claim of ineffective assistance of counsel, a court must consider defense counsel's performance as a whole and not merely focus upon isolated incidents of conduct). Nor do we find that defense counsel was ineffective for telling the jury that self-defense was not a defense to the mob action charges in this case. Defense counsel was merely repeating a portion of the jury instructions that the jury was going to be given, and his statement in that regard was consistent with Illinois law and the facts of the instant case. See 720 ILCS 5/7-4(a) (West 2016) (indicating that self-defense is not available to a person who is attempting to commit, committing, or escaping after the commission of, a forcible felony); People v. Gates, 47 Ill. App. 3d 109, 115 (1977) (pointing out that a claim of self-defense is not available to a person who is participating in a forcible felony); IPI Criminal 4th No. 24-25.10 (providing that a person is not justified in the use of force if he is committing a forcible felony). Because we have found that none of the matters cited by defendant under this issue constituted error, except for defendant's claim of inconsistent verdicts, which was addressed in the previous section, we reject defendant's claim of cumulative error. See Jones, 2019 IL App (3d) 160268, ¶ 50; Fultz, 2012 IL App (2d) 101101, ¶ 54.

¶ 115 E. Excessive Sentence

¶ 116 As his fifth and final contention on appeal, defendant argues that his sentences for felony murder and aggravated battery with a firearm were excessive. We have already determined that defendant's conviction of aggravated battery with a firearm must be reversed and remanded for a new trial as indicated above (inconsistent verdicts). We, therefore, consider only whether defendant's sentence for felony murder was excessive. As to the sentence for that offense, defendant asserts that the trial court committed an abuse of discretion when it discounted or failed to consider at sentencing certain mitigating evidence, most notably, the fact that the jury found defendant's conduct was mitigated by defendant's sincere but unreasonable belief that he needed to fire the weapon to protect himself and/or Mayfield. Defendant asserts further that in determining the appropriate sentence, the trial court failed to properly balance the retributive and rehabilitative purposes of its punishment. For those reasons, defendant asks that we either reduce his sentence for felony murder or that we remand this case for resentencing on defendant's felony murder conviction.

¶ 117 The State argues that the trial court's sentencing decision was proper and should be upheld. The State asserts that (1) the trial court correctly found that there were no factors in mitigation that applied to defendant and (2) the trial court's sentencing decision was justified based upon the circumstances of the shooting, defendant's prior criminal history, and defendant's history of failing to successfully complete his prior terms of probation or conditional discharge. The State asks, therefore, that we affirm defendant's sentence for felony murder.

¶ 118 The trial court is charged with the difficult task of fashioning a sentence that strikes an appropriate balance between the protection of society and the rehabilitation of the defendant. People v. Cox, 82 Ill. 2d 268, 280 (1980). On appeal, the trial court's sentencing decision will not be reversed, absent an abuse of discretion. People v. Streit, 142 Ill. 2d 13, 19 (1991). The

trial court's sentencing decision is entitled to great deference and weight on appeal because the trial court is in a far better position than the reviewing court to fashion an appropriate sentence since the trial court can make a reasoned judgment based upon firsthand consideration of such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age; whereas the reviewing court has to rely entirely on the record. Id. Although the reviewing court may reduce a sentence where an abuse of discretion has occurred (Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967)), in reviewing the propriety of the sentence, the reviewing court should proceed with great caution and care and must not substitute its judgment for that of the trial court merely because the reviewing court would have weighed the factors differently (Streit, 142 Ill. 2d at 19). It is presumed that the trial court considered any mitigating evidence, absent some indication in the record to the contrary. People v. Franks, 292 Ill. App. 3d 776, 779 (1997).

¶ 119 In the instant case, after reviewing the record before us, including the record for the sentencing hearing, we find that the trial court's sentencing decision was proper. In determining the appropriate sentence to impose upon defendant for the offense of felony murder, the trial court considered, among other things, the circumstances of the offense, the PSI, and the potential factors in aggravation and mitigation. As the trial court's comments indicated, defendant in this case committed a senseless act of violence and, in doing so, killed one person and injured another. Defendant had a prior criminal history, including prior crimes of violence, and was subject to a mandatory sentencing add-on of 25 years because of the personal discharge of a firearm that resulted in death. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2016). In the past, defendant had repeatedly failed to successfully complete his prior terms of probation and conditional discharge, and the trial court specifically found, based upon that fact and some of the

facts of the shooting, that defendant's likelihood of rehabilitation was low. Although defendant asserts that the trial court should have considered as a mitigating factor the jury's determination that defendant had acted with an unreasonable belief in the need for self-defense or defense-of-others, we do not agree with that assertion and note that this court specifically rejected a similar argument in Lester. See Lester, 2016 IL App (3d) 140293, ¶ 31 (indicating that the appellate court was aware of no authority that would suggest that a sentencing judge was bound to apply a statutory mitigating factor that was implicated by the jury's verdict). We, therefore, find that the trial court did not commit an abuse of discretion in sentencing defendant. Accordingly, we affirm defendant's sentence for felony murder.

¶ 120 III. CONCLUSION

¶ 121 For the foregoing reasons, we affirm defendant's convictions and sentences for felony murder and unlawful possession of a weapon by a felon, we reverse defendant's conviction of aggravated battery with a firearm, we vacate the jury's finding of guilty of reckless discharge of a firearm, and we remand this case for a new trial on defendant's aggravated battery with a firearm charge.

¶ 122 Affirmed in part, reversed in part, and vacated in part; cause remanded.

No. 3-19-0283

Cite as:	People v. Bush, 2022 IL App (3d) 190283
Decision Under Review:	Appeal from the Circuit Court of Peoria County, No. 16-CF-373; the Hon. John P. Vespa, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Thomas A. Karalis, and Amber Hopkins-Reed, of State Appellate Defender's Office, of Ottawa, for appellant.
Attorneys for Appellee:	Jodi Hoos, State's Attorney, of Peoria (Patrick Delfino, Thomas D. Arado, and Nicholas A. Atwood, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

MITCHELL DEANDRE BUSH,

Defendant.

Case No. 16 CF 1979

MOTION IN LIMINE TO USE PRIOR RECORDED VIDEO FOR PURPOSES OF IMPEACHMENT OF STATE WITNESSES

The Defendant, Mitchell Bush, by and through his Attorney, Mark Zalcman, moves this Honorable Court to allow the Defendant to impeach the following witnesses should they testify differently to that of a rap video reciting the events at issue in this case:

A. Lathaniel Gulley; "This is true"

B. Gabriel Gulley. " "

Such video has been tendered to the State and was authored and performed by Gabriel Gulley and was confirmed as a "true story" by Lathaniel Gulley within the video as well.

Respectfully submitted,

Mark Zalcman, Attorney for the Defendant

The undersigned certifies that a copy of the foregoing Motion in Limine was served upon the Plaintiff to the above cause (State of Illinois/ASA Kim Nuss) by email to her office on November 27, 2018.

Mark Zalcman

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Email: mzalcmanlaw@sbcglobal.net
Attorney No. 3668

Denied

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

FILED
ROBERT M. SPEARS
NOV 28 2018
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, ILLINOIS

People

Plaintiff

vs.

Mitchell Bush

Defendant

CASE NO. 16 CF 373

J: Vespa
P: Nuss, Fitzsimmons
D Zalcman
clk: ochs
rpr: Bichett

ORDER

ON MOTIONS IN LIMINE

1.) Motion to allow Defense witness to wear civilian clothes - GRANTED without objection.

2.) MOTION to USE Prior convictions for Impeachment is GRANTED as to Lathaniel Gulley and Damelon Tillman. Motion Denied as to GABriel Gulley.

3) Motion to Preclude State from referring to "Victims" is DENIED

4) Motion to use Prior Recorded video for Impeachment is Denied

5) Motion to Admit 911 Recording is DENIED

11-28-18

JUDGE OF THE TENTH JUDICIAL CIRCUIT

JUDGE VESPA

CLERK'S COPY—WHITE
PLAINTIFF'S COPY—YELLOW
DEFENDANT'S COPY—PINK
ADDITIONAL COPY—GOLDENROD

11/28/18

ORDER

FORM #60
R-10-92

C 721

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16 CF 373
	)	
MITCHELL DEANDRE BUSH,	)	
	)	
Defendant.	)	

MOTION FOR NEW TRIAL OR JUDGMENT N.O.V.

Now comes the Defendant, Mitchell Bush, in his own and proper person and by and through his Attorney, Mark Zalcman, and hereby requests that this Honorable Court grant him a new trial or enter judgments of not guilty notwithstanding the verdicts of guilty and in support thereof states:

1. On March 4, 2019, this Honorable Court began a bifurcated jury trial in the above case.

2. On March 8, 2019, this Honorable Court concluded the jury trial when the jury returned verdicts of guilty of Second Degree Murder, First Degree Felony Murder, Mob Action (two counts), Aggravated Battery, and Unlawful Possession of a Weapon by a Felon (only charge that was bifurcated).

3. Other than the offense of Unlawful Possession of a Weapon by a Felon, it was error of the Court to find the Defendant guilty of the remaining counts since the State failed to prove the Defendant guilty beyond a reasonable doubt on the remaining offenses.

4. It was further error of the Court to deny Defendant's motion for a directed verdict on all counts at the conclusion of the State's evidence, with the exception of the Unlawful Possession of Weapon by a Felon, not at issue in the first portion of the jury trial.

5. It was further error for the Court to deny defense counsel the opportunity to cross examine Detective Stevie Hughes using defense counsel's laptop computer that magnified video footage showing threatening actions by the alleged victims, including possession of knives, other blunt instruments, and a surreptitious movement akin to placing a weapon in a waste band. Although the Court allowed defense counsel to use such imagery from his laptop computer in closing argument, no viable reason exists to not have allowed defense counsel to cross examine detectives using the same technology. Such error by the Court was highly prejudicial to the defendant.

6. It was further error for the Court to limit the Defendant's testimony as to the underlying reasons explaining why he was in fear for the safety of another individual at the alleged crime scene who was especially vulnerable to injury and profuse bleeding. The Court should not have denied the Defendant the opportunity to fully explain the subjective fear he experienced at the time he engaged in gun fire, which was based in and upon on the Defendant's own personal knowledge and understanding of the medical condition of Henry Mayfield, his cousin. Had the Court allowed such opportunity, Defendant would have testified that he believed Henry could bleed to death or suffer great bodily harm if the catheter implanted and connected to the heart of his cousin became dislodged for any reason, especially if he were to become involved in a fist fight or other physical confrontation. Defendant would have testified that he on prior occasions saw the catheter leak blood and that Henry told him of the dangers he faced,

including death and profuse bleeding, if the catheter became dislodged for any reason. The Court refused to allow Defendant to fully explain his personal subjective beliefs about the dangerous and vulnerable mental condition of Henry Mayfield, which required no medical expertise. The Court also would not allow the Defendant to use a drawing of the catheter to confirm and demonstrate that the drawing reflected the Defendant's knowledge of the catheter and how it operated on Henry. See Exhibit 1, attached. Such errors were highly prejudicial to the Defendant and could have swayed the jury that his defense of Henry was reasonable and that he did not intentionally act in concert with Henry to commit mob action.

7. It was further error for the Court to deny the Defendant the opportunity to testify that at the time of the shooting he observed a tattoo of tear drops on the face of Lathaniel Gulley, the person the Defendant personally felt threatened by and the person the Defendant shot in the arm. A tattoo of teardrops placed on a person's face is known to the Defendant and commonly known to mean that the person who wears such a tattoo had on a prior occasion killed someone. Such error of not allowing the Defendant to testify to his personal observations and subjective interpretations was highly prejudicial to the Defendant and could have swayed the jury that his self-defense claim was reasonable and that he did not intentionally act in concert with Henry to commit mob action.

8. It was further error for the Court to deny the Defendant the opportunity to introduce an autopsy photograph of the decedent, which showed a bold tattoo of the decedent placed across the front of his neck of the word "MOB" and another tattoo of the decedent on his chest and just under his neck of the phrase "Born to Live, Live to Die." See Exhibit 2, attached. On information and belief, neither tattoo is related to a specific

gang affiliation, but rather both are signs of an aggressive personality of the person wearing them. Such error was highly prejudicial to the Defendant and could have swayed the jury that his claims of self-defense and defense of Henry Mayfield were reasonable, that he did not intentionally act in concert with Henry to commit mob action, and that it was the other group of individuals who were the aggressors.

9. Defendant's inability to completely testify as to what was going through his mind because of the Court's not allowing him to do so shows a bias and predisposition of the Court to hoping the Defendant would be found guilty prior to a verdict being rendered by the jury. Moreover, this bias against the Defendant was demonstrated by the Court in regards to the Court's statement of commentary on the evidence, albeit outside the presence of the jury, as to one of the witnesses, Kim Williams, when the Court stated that Kim Williams "was in the process of gathering people up," when in fact no such evidence had been presented in the case. See Exhibit 3 (page 3), attached. Such bias bolsters Defendant's request for a new trial.

10. It was further error for the Court to not allow the Defendant to testify as a rebuttal witness after the State introduced rebuttal evidence through Detective Rezac as to the detective's observations as to what video evidence taken at the alleged crime scene showed. Defendant had a right to show the jury what he believed the video showed and a right to testify as to what the video did not show that only he could perceive from his vantage point during the incident.

11a. Lastly, on more than one occasion, the Court stated that "99 out of 100 times" the people who drive up to another's property when an altercation breaks out or ensues are the aggressors. In other words, 1 out of 100 times they are not the aggressors. Based on the Court's logic, 1% of the people in the Defendant's position, may be

wrongly convicted of violence that ensues. The Court should consider that even a 1% error rate is unacceptable in our criminal justice system, which operates under the presumption of innocence.

11b. Reasonable doubt is a concept that does not consist of a percentage likelihood, but rather is a subjective interpretation of the evidence designed to prevent wrongful convictions, albeit at the expense of allowing some guilty people to escape a rightful conviction. The above "1%" is enough to create reasonable doubt in this case, where no direct evidence of knowledge of the situation that led to the circumstances of gunfire was introduced against the Defendant. That is, no texts, facebook messages, or phone or personal conversations were introduced into evidence to show that the Defendant knew about the situation he was drawn into.

11c. Rather, all that was shown was that he was in a car that drove to the shooting scene and that he was in possession of a hand gun. While such evidence suggests circumstantially of Defendant's "likely" knowledge of preceding events, it does not prove directly that Defendant had any knowledge of what was transpiring before or during the event as to why there was an altercation in the first place and the identities of the people in the house or in the street other than the people he drove with. Because of the absence of proof of direct knowledge of the situation and the people involved and the reasonable doubt generated from the "1% chance" that the people stationed on the property were the aggressors, the Court should overturn the guilty verdicts of the jury, especially as to the mob action counts and the felony murder count predicated upon mob action.

WHEREFORE, based upon the foregoing, the Defendant, Mitchell Bush, hereby requests that this Honorable Court grant his motion for a new trial or in the alternative

enter a judgments of not guilty notwithstanding the verdicts of guilty since the state has failed to prove the Defendant guilty beyond a reasonable doubt of the aforementioned offenses and for such other and further relief as this Honorable Court deems just and equitable.

By _____
Mark Zalcman, Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion for New Trial oe Judgment N.OV. was served upon the Plaintiff to the above cause (State of Illinois) by hand delivery on April 5, 2019, addressed as follows: Kim Nuss, ASA, 324 Main St., Room 111, Peoria, IL 61602.

_____
Mark Zalcman

Mark Zalcman
Attorney for Defendant
315 East Front Street
Bloomington, IL 61701
Phone: 309-808-3362
Fax: 309-213-1155
Email: mzalcmanlaw@sbcglobal.net
Attorney No. 3668

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16 CF 373
	)	
MITCHELL DEANDRE BUSH,	)	
	)	
Defendant.	)	

SUPPLEMENT TO MOTION FOR NEW TRIAL OR JUDGMENT N.O.V.

Now comes the Defendant, Mitchell Bush, in his own and proper person and by and through his Attorney, Mark Zalcman, and hereby submits to this Honorable Court this supplement to Defendant's previously filed Motion for New Trial or Judgment N.O.V.. Defendant submits the following as additional grounds for a new trial:

1. On March 4, 2019, this Honorable Court began a bifurcated jury trial in the above case.

2. On March 8, 2019, this Honorable Court concluded the jury trial when the jury returned verdicts of guilty of Second Degree Murder, First Degree Felony Murder, Mob Action (two counts), Aggravated Battery, and Unlawful Possession of a Weapon by a Felon (only charge that was bifurcated).

3. On April 5, 2019, Defendant filed the aforementioned Motion for New Trial or Judgment N.O.V.

4. As additional grounds for a new trial, Defendant submits it was error for the Court not to dismiss Juror Jeanette Proctor when, in the middle of trial, she revealed that she was the mother-in-law of one of the alleged victims, Nathaniel Gulley.

5. Defense counsel did not request her removal because he did not actually hear the juror state that the juror's daughter was married to Nathaniel Gulley's mother, but only thought that the juror's daughter was a friend or acquaintance of Nathaniel Gulley's mother. (Relevant transcripts of day three, pp. 3-10, attached).

6. Such a familial relationship between one of the victims and a juror is justifiable cause for removal and she should have been removed from the jury. Furthermore, it was error for defense counsel not to request her removal.

WHEREFORE, based upon the additional foregoing, the Defendant, Mitchell Bush, hereby requests that this Honorable Court grant his motion for a new trial or in the alternative enter judgments of not guilty notwithstanding the verdicts of guilty since the state has failed to prove the Defendant guilty beyond a reasonable doubt of the aforementioned offenses and for such other and further relief as this Honorable Court deems just and equitable.

By_____
Mark Zaloman, Attorney for Defendant

STATE OF ILLINOIS, PEORIA COUNTY

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff,

VS.

MITCHELL DEANDRE BUSH,
Defendant.

Case No: 16-CF-00373-1,

Judge: **John Vespa**
ASA: Fitz/Nuss
Def Atty: Zalcman
Ct. Clerk: Stephanie Ct. Rep.: C. Smith
321

INTERIM ORDER

The Defendant having been called into Open Court on this date and:

☒ 1. Defendant **is present in custody**;
☐ 2. Defendant is informed of the charge in the and furnished with a copy thereof;
☐ 3. The Defendant desires Court appointed counsel and the Court determines the Defendant is indigent;
☐ 4. The Defendant requests additional time for private counsel to appear;
☒ 5. Counsel identified above appears for the Defendant;
☐ 6. The Defendant waives the reading or explanation of the charge and explanation of penalties;
☐ 7. The Defendant moves that the People furnish Discovery pursuant to Illinois Supreme Court Rules;
☐ 8. The People move that the Defendant furnish Discovery pursuant to Illinois Supreme Court Rules;
☐ 9. The Defendant enters a plea of Not Guilty to each count of the charge;
☐ 10. The Defendant is advised pursuant to 725 ILCS 5/115-4.1 of the consequences of the failure to appear for trial and sentencing;
☐ 11. The Defendant waives a Jury Trial and requests a Bench Trial after admonition;
☐ 12. The **Defendant** move(s) for a continuance.
☐ 13. The Defendant moves for reduction of bail;
☒ 14. Hearing held on **Defendant's** Motion for **New Trial**;
☐ 15. Defendant advised that Bond Money is presumed to be the property of the Defendant and Bond Money may be used for Costs, Fine, Restitution, Attorney Fees, or other purposes authorized by the Court;
☐ 16. Other: _____.

IT IS HEREBY ORDERED THAT:

☐ A. The Public Defender **is** appointed for the Defendant.
☐ B. This matter is continued on **Defendant's** Motion to _____ **at** _____ __ **for** _____.
☐ C. The Parties are to furnish Discovery pursuant to Supreme Court Rules.
☒ D. The **Defendant's** Motion for **New Trial is respectfully denied**.
☐ E. The Scheduling Conference is set for _____ **at** _____ **a.m.**
☐ F. The **Jury** Trial is set for _____ **at** _____ **a.m.**

IN THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT

CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	3-19-0283
-vs-	)	No. 16 CF 373
MITCHELL D. BUSH, Defendant.	)	E-FILED Transaction ID: 3-19-0283 File Date: 7/7/2020 11:20 AM Matthew G. Butler, Clerk of the Court APPELLATE COURT 3RD DISTRICT

AMENDED NOTICE OF APPEAL

(1) Court to which appeal is taken:

Appellate Court of Illinois, Third Judicial District

(2) Name of appellant and address to which notices shall be sent:

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

(3) Name and address of appellant's attorney on appeal:

Name: Thomas A. Karalis
Address: Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531

(4) Date of judgment or order: May 15, 2019

(5) Offense of which convicted: first degree murder, aggravated battery, and unlawful possession of a weapon by a felon

(6) Sentence: 65 years for first degree murder, 15 years for aggravated battery, and seven years for unlawful possession of a weapon by a felon in the Illinois Department of Corrections

/s/ Thomas A. Karalis
THOMAS A. KARALIS
Deputy Defender

No. 128747

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MITCHELL DEANDRE BUSH, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-19-0283. There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 16 CF 373. 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 January 10, 2023, the Brief and Argument 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 Brief and Argument 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