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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County, Criminal Division
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 9811
	)	
ELEMO MOHAMED,	)	Honorable Michael B. McHale,
	)	Judge Presiding
Defendant-Appellant.	)	

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by conditioning defendant's cross-examination of the victim's purported gang membership upon his argument of self-defense, by precluding defendant's impeachment of the victim as collateral and by denying defendant's proffered jury instructions.

¶ 2 A jury convicted defendant Elemo Mohammed of attempt first degree murder and aggravated battery with a firearm. The jury also found that defendant shot his victim causing permanent disfigurement. Defendant was sentenced to 38 years' imprisonment. Plaintiff challenges the trial court's decision to condition his cross-examination of the victim and refusal to give his proffered instructions to the jury. We affirm.

¶ 3

### BACKGROUND

¶ 4 On April 16, 2013, victim Tony Hemphill drove to his girlfriend's house and looked for a place to park. As he drove through an alley around 6:00 p.m., Hemphill approached a blue BMW that slowed to a stop. The driver of the BMW exited his car and pointed a revolver at Hemphill, firing three to four shots into his car. Hemphill testified that he jumped into his backseat for cover as the gunman fired an additional three to four shots into his driver's side door. Hemphill was hit.

¶ 5 When the shots ended, Hemphill saw the gunman running to the BMW. Hemphill testified that he jumped into his driver's seat and crashed his car into the BMW, disabling it. The gunman fled on foot and Hemphill gave chase, wielding a bat he retrieved from his trunk. Stopping short of catching the gunman, Hemphill testified that he flagged down a person riding a bicycle who called 911. An ambulance transported Hemphill to Saint Francis Hospital where he received 16-17 stitches for a bullet wound to his right upper chest area.

¶ 6 On April 18, 2013, detectives from the Chicago Police Department showed Hemphill a photo spread that included a picture of defendant. Hemphill identified defendant as the gunman. An investigative alert issued for defendant's arrest.

¶ 7 On May 4, 2013, defendant was apprehended. Detectives placed defendant in a physical line-up the same day. Hemphill was called into view the line-up and again identified defendant as the gunman. Another witness, Blas Ramirez, separately identified defendant as the individual who was holding a gun and running from Hemphill on the night of the shooting.

¶ 8 On May 20, 2013, a grand jury returned an indictment of defendant, charging him with attempt first degree murder (720 ILCS 5/8-4 (West 2012)), personally discharging a firearm that proximately caused permanent disfigurement (730 ILCS 5/5-8-1(a)(1)(d)(iii)(West

2012))(Firearm Enhancement) and aggravated battery with a firearm. 720 ILCS 5/12-3.05(e)(1) (West 2012).

¶ 9 Before defendant proceeded to trial, he expressed an intention to elicit testimony of Hemphill's prior gang membership through a statement Hemphill allegedly made to a detective. The trial court inquired as to the relevance of such testimony and defendant argued that because he was asserting a claim of self-defense, the testimony would establish bias and motive on the part of Hemphill as the initial aggressor. The trial court ruled that defendant was not to elicit testimony from the victim about prior gang membership, but that if defendant took the stand or separately raised the issue, such testimony would be allowed.

¶ 10 During trial, defendant sought to impeach Hemphill's statement that he did not know defendant's sister with a signed statement indicating that he knew her "from the neighborhood." The State objected, arguing that the line of questioning was not impeaching. The trial court agreed and sustained the objection.

¶ 11 At the close of the State's case, defendant moved the trial court for a directed verdict. The motion was denied. Defendant rested without presenting evidence. The trial court then instructed the jury.

¶ 12 Defendant's proffered jury instructions were not given. Defendant had offered an instruction to the trial court that combined the Firearm Enhancement and attempt first degree murder instructions. The State objected and the trial court sustained the objection. The trial court gave separate instructions for attempt first degree murder and the Firearm Enhancement.

¶ 13 Defendant offered another instruction regarding the victim's alleged prior inconsistent statements. The State objected, arguing that the victim's inconsistencies were minor and the trial court sustained the objection. The instruction was not given.

¶ 14 At the close of deliberation, the jury found defendant guilty of attempt first degree murder and aggravated battery with a firearm. Separately, the jury found that during the commission of attempt first degree murder, defendant discharged a firearm that proximately caused the victim to suffer permanent disfigurement. Defendant filed a posttrial motion which was denied. The trial court sentenced defendant to serve 38 years' imprisonment in the Illinois Department of Corrections. Defendant appeals, seeking a new trial or the vacation of his conviction altogether.

¶ 15

#### ARGUMENT

¶ 16 The issues on appeal are whether the trial court abused its discretion by: (1) conditioning defendant's cross-examination of the victim's prior gang membership upon his argument of self-defense; (2) precluding, as a collateral matter, defendant from impeaching the victim with a signed statement that he knew defendant's sister; and (3) denying defendant's proffered jury instructions. The parties agree that we review the decisions of the trial court for an abuse of discretion. *People v. Roman*, 2013 IL App (1st) 110882, ¶ 23; *People v. Moore*, 343 Ill. App. 3d 331, 338 (2003). We review whether or not the jury instructions accurately stated the law *de novo*. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34.

¶ 17 A criminal defendant's constitutional right to confrontation includes the right to cross-examine. *People v. Blue*, 205 Ill. 2d 1, 12 (2001). The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Because the partiality of a witness is always relevant, a witness' gang activity may be relevant to show bias against the defendant. *People v. Harris*, 262 Ill. App. 3d 35, 47 (1994). However, evidence of gang membership may only be admitted if there is sufficient proof that it is related to the crime charged and is relevant

to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 21.

¶ 18 Defendant argues that the trial court deprived him of his constitutional right to cross-examine the victim as to his prior gang membership. The State argues that the victim's gang membership, long ago, was not relevant to the crime. The following exchange, at a hearing on motions *in limine*, informs the issue:

“THE COURT: Very Good. Then there was some mention of gang evidence. Counsel, did you want to make a specific offer of proof as to why the victim's prior gang involvement I guess, for lack of a better word, would be relevant? Other than to dirty him up?”

MR. GOLDMAN [(DEFENSE ATTORNEY)]: As I indicated I believe on the last court date, there is an issue – I tried to file an affirmative defense of self-defense. My client made an outburst in court last time that he is not allowing me to file an affirmative defense. He has since changed his mind and is allowing me to argue self-defense if need be.

In my opinion, though, the self-defense argument would show that there was gang activity involved and that would show motive and bias on the witness, who as an offer of proof, was a self-admitted gang member to the investigating officers of this crime. So he did acknowledge to the police officers that he had prior gang affiliation.

Again, if we do use the self-defense, then that would be one of my arguments, that it was –

THE COURT: It sounds like it goes to – if you are using self-defense, it would go to the victim's motive in your view of things for attacking your client?

MR GOLDMAN: As the initial aggressor, yes.

THE COURT: Wouldn't it necessitate, if this is gang motive, that your client is also a gang member. Yes or no?

MR. GOLDMAN: Judge, I can see that perspective, yes.

\* \* \*

THE COURT: Here's how I am going to rule: you are not to ask the victim about his gang involvement in the past in any way whatsoever. If you do, I'm going to stop everything and excuse the jury and it's not going to be pleasant. Don't go there.

However, if your client should take the stand or through other testimony from the defense it becomes a relevant issue, I will allow it. Until then, don't go there."

¶ 19 Defendant claims that the trial court imposed a "complete and total bar of any evidence or impeachment" of the victim's gang membership similar to the prohibition in *People v. Gonzalez*, 104 Ill. 2d 332, 335 (1984). In *Gonzalez*, the trial court's ruling, that "there is to be no gang affiliation in this case," was held to have improperly restricted the defendant's right to cross-examination because "gang affiliation and the concerted activity of the gang in threatening the defendant and harassing his family formed the very basis of the defense theory" that he was "being framed." 104 Ill. 2d at 338.

¶ 20 We hold that the trial court did not abuse its discretion by conditioning cross-examination of the victim's purported gang membership. When the trial court asked if the victim's gang membership was relevant, the defendant answered that "if we do use self-defense," the "argument would show that there was gang activity involved and that would show motive and bias on the witness." Defendant supported his answer with an offer of proof: the victim was "a self-admitted gang member to the investigating officers of this crime." The two primary functions of an offer of proof are to disclose to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action and to provide the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful. *People v. Thompkins*, 181 Ill. 2d 1, 10 (1998). The trial court ruled on defendant's offer of proof accordingly: "if your client should take the stand or through other testimony from the defense it becomes a relevant issue, I will allow it." Defendant did not testify and chose not to argue self-defense at trial.

¶ 21 Defendant invited the error he now challenges on appeal. Having conceded the relevance

of gang membership as conditioned upon his argument of self-defense to the jury, defendant procured the ruling which he now charges as error. Under the doctrine of invited error, a defendant may not request to proceed in one manner and later contend on appeal that the course of action was in error. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17. To allow a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play and encourage defendants to become duplicitous. *Id.*

¶ 22 However, in absence of defendant's invited error, we hold that his offer of proof fell short of showing that the victim's gang activity was related to the offenses charged. Evidence of gang affiliation is only admissible where there is sufficient proof that such membership or activity is related to the crime charged. *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Defendant's offer of proof concerned a single statement made by the victim to law enforcement that he was a gang member. Defendant's case thereby bears no relation to *Gonzalez*, where the defendant argued *in camera* that evidence of gang membership was central to his theory of the case: defendant had "recently become a father and withdrawn from gang membership" and the State's witnesses were former gang members that "had threatened to 'get' the defendant if he did not renew his gang activities." 104 Ill. 2d at 335. Here, defendant has shown no relation between the victim's gang membership and the crimes charged.

¶ 23 Defendant also claims that the trial court erred in conditioning his questioning as to the victim's gang membership upon the relinquishment of his right to "remain silent and force the State to prove him guilty." Defendant's claim is misguided because nothing, other than his decision to argue self-defense, required him to testify. A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. 720 ILCS 5/7-

1(a) (West 2012). Defendant conceded that a showing of the victim's bias and motive required him to present evidence of self-defense. Defendant was not required, but rather chose, to remain silent.

¶ 24 Next, defendant argues that the trial court abused its discretion by preventing him from impeaching the victim as to a prior inconsistent statement. Defendant takes issue with the trial court's ruling that a signed statement, purporting to show that the victim knew the defendant's sister "from the neighborhood," was not impeaching because the statement indicated that the victim did not know defendant's sister by name. Generally, any permissible kind of impeaching matter may be developed on cross-examination, since one of the purposes of cross-examination is to test the credibility of the witnesses. *People v. Collins*, 106 Ill. 2d 237, 269 (1985). "A matter is collateral," for the purposes of impeachment, "if it is not relevant to a material issue of the case." *People v. Santos*, 211 Ill. 2d 395, 405 (2004). "The test to be applied in determining if a matter is collateral is whether the matter could be introduced for any purpose other than to contradict." *Id.*

¶ 25 We recognize, as the State points out, that defendant raised the argument that the victim's signed statement was noncollateral for the first time in his reply brief. A point raised, but not argued or supported by citation to relevant authority on appeal, is deemed waived. *People v. Newbern*, 276 Ill. App. 3d 623, 629 (1995). Defendant's argument is waived. However, waiver aside, we hold that the trial court did not abuse its discretion by precluding defendant's introduction of the signed statement because its purpose was to contradict the victim's testimony.

¶ 26 The victim testified that he did not know the victim's sister. His signed statement indicated that he knew defendant's sister "from the neighborhood," but could not identify her by name. The two statements are contradictory, not impeaching. Moreover, defendant did not



sufficiently tie the victim's knowledge of the identity of his sister to any material issue of his identification as the gunman and drew no such connection to raise doubt as to any of the elements the charged offenses. Whether the victim knew defendant's sister "from the neighborhood" was a collateral matter.

¶ 27 Finally, defendant contends that the trial court abused its discretion by not giving his proffered instructions to the jury. First, defendant charges the trial court as having committed error by not instructing the jury as to Illinois Pattern Jury Instruction 3.11 (Illinois Pattern Jury Instructions, Criminal, No. 3.11 (approved July 18, 2014)) (IPI 3.11), which states, that "[e]vidence that on some former occasion a witness made a statement inconsistent with his testimony in this case, may be considered by you in deciding the weight to be given to the testimony of that witness." The State argues that the trial court properly denied the instruction because any inconsistencies were minor at best and that Illinois Pattern Jury Instruction 1.02 (Illinois Pattern Jury Instructions, Criminal, No. 1.02 (approved July 18, 2014)) (IPI 1.02) fairly and accurately stated the law: "[i]n considering the testimony of any witness, you may take into account his ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

¶ 28 The purpose of jury instructions is to provide the jury with correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict. *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). An instruction regarding the credibility of a witness' testimony in the light of inconsistencies is a cautionary one. *People v. Lockett*, 273 Ill. App. 3d 1023, 1035 (1995). As such, the trial court is vested with discretion in determining whether to give the proffered instruction. *Id.* IPI 3.11 is appropriately given when two statements are inconsistent on a material

matter. *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001).

¶ 29 We hold that the trial court did not abuse its discretion by refusing to give IPI 3.11 to the jury because the victim's statements were inconsistent on nonmaterial matters. Accordingly, IPI 1.02, correctly and sufficiently covered the applicable legal principles related to the believability of, and weight to be given to, the victim's testimony.

¶ 30 Minor discrepancies and inconsistencies in testimony do not render the testimony unworthy of belief, but go only to its weight. *People v. Larry*, 218 Ill. App. 3d 658, 666 (1991). The victim's testimony was inconsistent as to when he determined there were 3 to 4 people in the BMW, not as to whether the victim saw 3 to 4 people in the BMW, as defendant contends. As to the victim's omission that he placed his car into reverse when being fired upon by the gunman, detective Gomez first testified that the victim did not tell him he shifted his car into reverse, but then upon further questioning, testified that he could not recall if the victim told him what gear the car was in after shots were fired. The victim's testimony that he chased defendant with a bat and then sought help, does not call into question the victim's testimony that a chase ensued, as defendant asserts. Finally, the victim's testimony that defendant had a revolver, but had previously told detective Gomez that the weapon was "like a handgun or something," reflects a discrepancy. The foregoing statements, insofar as they are inconsistent, are nonmaterial.

¶ 31 We note that defendant, when arguing that IPI 3.11 should be given, directed the trial court's attention to section 2(a) of IPI 3.11 that instructs the jury to consider the witness' earlier inconsistent statement as evidence "when the statement explains a condition that the witnesses had personal knowledge of and the statement was written or signed by the witness." Here, the statements with which defendant takes issue were testimonial and did not qualify for evidentiary treatment by the jury. The trial court properly denied defendant's instruction of section 2(a) of

IPI 3.11 as inapplicable.

¶ 32 Defendant also takes issue with the trial court's decision not to give his "modified instruction" to the jury, which combined the Firearm Enhancement and attempt first degree murder instructions. When an "IPI criminal instruction does not accurately state the law with respect to a particular subject, the trial court can, in its discretion, give a non-IPI instruction on the subject." *People v. Bush*, 157 Ill. 2d 248, 253 (1993). Defendant argues that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," required the State to prove the Firearm Enhancement beyond a reasonable doubt in order to secure defendant's conviction for attempt first degree murder. Therefore, defendant claims, that the Firearm Enhancement and attempt first degree murder instructions required combination to be accurate.

¶ 33 We hold that the attempt first degree murder instruction given to the jury accurately stated the law and that instructing the jury separately as to the Firearm Enhancement was in compliance with *Apprendi*. Defendant's argument is similar to that seen in *People v. Alexander*, 2017 IL App (1st) 142170, where the defendant argued that his conviction for first degree murder should be vacated because the jury found, in a special interrogatory, that the State had failed to prove a firearm enhancement beyond a reasonable doubt. The Court explained that "personal discharge of a firearm is not an element needed to convict defendant of first degree murder," but is instead, a fact that must be "submitted to the jury in order for the State to seek the firearm enhancement sentence." *Alexander*, 2017 IL 142170, ¶ 47. Defendant's proffered instruction functioned to transform the Firearm Enhancement into an element of attempt first degree murder. The Firearm Enhancement is not an element of attempt first degree murder and

did not become an element of the offense once the State charged defendant with the sentence enhancement. Accordingly, the trial court gave the Firearm Enhancement instruction separate and apart from the attempt first degree murder instruction and the jurors signed a separate verdict form finding that the State had proven the sentence enhancement beyond a reasonable doubt. The instructions given accurately stated the law and the trial court's decision not to give defendant's proffered instruction was not an abuse of discretion.

¶ 34

CONCLUSION

¶ 35 Accordingly, we affirm.

¶ 36 Affirmed.