2019 IL App (2d) 160881-U
No. 2-16-0881
Order filed September 11, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CARLOS T. JONES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 15-CF-155 Honorable Ronald J. White, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justice Spence concurred in the judgment.
Presiding Justice Birkett dissenting.

ORDER

¶ 1 *Held*: (1) There was sufficient evidence to support the defendant's convictions for first degree murder, attempted armed robbery with a firearm, and mob action; (2) the trial court did not err in admitting certain evidence; (3) the defendant was not sentenced under an unconstitutional sentence; and (4) the trial court did not abuse its discretion in sentencing the defendant.

¶ 2 Following a bench trial, the defendant, Carlos Jones, was convicted of first degree murder, attempted armed robbery with a firearm, and mob action and was sentenced to natural life imprisonment. On appeal, the defendant argues that (1) he was not convicted beyond a

reasonable doubt; (2) the trial court erred in admitting certain evidence; (3) he was sentenced under an unconstitutional statute; and (4) his sentence was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 21, 2015, the defendant was charged by indictment with 24 counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(3) (West 2012)), 2 counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)), 2 counts of attempted armed robbery (720 ILCS 5/8-4(a) (West 2014), and mob action (720 ILCS 5/25-1(a)(1) (West 2012)). The charges alleged that the defendant and Kenneth Magee killed a customer during an attempted armed robbery at a Citgo gas station in Rockford on May 23, 2012. The defendant was 20 years' old at the time of the offenses. The defendant waived his right to a jury, and his case proceeded to a bench trial. The following evidence was adduced at trial.

¶ 5 Around 11 pm on May 23, 2012, Marvin McDonald drove to the Citgo station on Auburn Street in Rockford to buy a pack of cigarettes and "half a pint." When McDonald exited his car, he saw two men in black hoodies standing to the right of the store's door.

¶ 6 Osmon Garmon drove to Citgo that same night to purchase gas and lottery tickets. Pulling up to the first gas pump, Garmon saw a man with a brown complexion standing near the pump. Shortly thereafter, he saw a light-skinned man walking across the parking lot. The two men wore dark clothing—one in a black hoodie and the other in a red and white hoodie. The light-skinned male had a scar on his face. The light-skinned, lighter-clothed man asked the other, "Do you want to get him?" The other man said, "No. Don't worry about him." The man in the dark hoodie appeared "antsy." Garmon paid more attention to the man with the scar, afro, and red-and-white hoodie than the man in the black hoodie. Garmon could not identify the

person wearing the black hoodie. However, he identified Magee as the person wearing the red-and-white hoodie.

¶ 7 Later that night, Jimmy Gore walked to the Citgo from Auburn Manor with his brother-in-law Kenny Fletcher. As they approached the store to buy cigarettes and beer, Gore and Fletcher saw two young men standing against the wall on the side of the store. One man wore a light-colored or white hoodie, and the other wore a dark hoodie. Gore and Fletcher saw Michael Studer exit the store. When Studer approached his car, one of the men put his hand in Studer's back pocket. Fletcher believed it was the man in the black hoodie who reached for the pocket. Studer put his hand on his back pocket and turned. The man in the black hoodie stepped back and shot Studer two or three times with a pistol. The other man stood behind the shooter and watched. Both Gore and Fletcher saw the hooded men run across the street to Auburn Manor. Studer managed to get into his car before he collapsed.

¶ 8 Theresa Johnson, who was in a relationship with Studer, recalled arriving at Citgo after leaving a bar. She and Studer spent the evening drinking with friends and decided to purchase beer on the way home. Johnson was a little "buzzed." At 11:30 pm, it was unseasonably warm, and Johnson rolled down the front passenger window. As Studer pulled into the first spot on the east side of the building, Johnson saw two young black men wandering around the east side of the parking lot. Studer entered the store while Johnson waited in the car.

¶ 9 While Johnson waited, the back passenger door opened, and Johnson felt a hard object against her shoulder blade. She assumed it was a gun. A voice asked, "Where's the money?" Johnson did not know who was behind her, but she felt the presence of two people. After twice indicating that she had no money, she heard the door shut. A few moments passed until she saw someone standing next to the front passenger door. She asked, "Are you going to cap me now?,"

and the man replied that he was not. She described the man as wearing a dark gray hoodie with tufts of hair, a gap between his teeth, and a lighter complexion. When she looked at a photograph still from the surveillance camera, she saw that there were two individuals outside the passenger side of the car: one in a dark or black hoodie and the other in a gray hoodie and lighter colored pants. The person she spoke to outside her window was in the lighter-colored clothing.

¶ 10 Studer exited the front door of the gas station and walked to the corner of the building. Johnson heard the men run, and she noted that the man to her right disappeared from her sight when Studer exited the store. She did not see the second man until both men accosted Studer as he neared the driver's door. When the men asked where the money was, Studer responded he had none, and there was a struggle. Johnson heard three gunshots, and the two men ran. Studer entered the car, but he remained unresponsive through the arrival of emergency responders. Studer died shortly after being shot.

¶ 11 When Johnson met with detectives a few weeks after the shooting, she could not identify any individuals involved in it. However, when she saw Magee later in court, she thought he was the man she had asked about being capped.

¶ 12 Detective Brian Shimaitis provided Citgo manager George Wilson with a flash drive on which to transfer the footage from surveillance cameras that captured the shooting. Shimatis also processed Studer's car and developed a partial fingerprint on the exterior of the rear passenger door vent window. Shimaitis determined that the fingerprint was Magee's.

¶ 13 The Citgo surveillance video revealed that two different people approached Johnson before the murder. One was dressed in dark colors and one was dressed in lighter colors. The darkly-dressed person entered the back seat of Studer's car. Simultaneously, the lighter-dressed

person stood at the front passenger window for 20 seconds. The back passenger door remained open until the darkly-dressed person exited the car. A few seconds later, the darkly-dressed person stood near the front passenger window for seven seconds. As Studer walked to his car, the darkly-dressed person approached him and fired a gun at him.

¶ 14 On June 9, 2012, the police recovered a loaded 25-caliber Rigami semiautomatic handgun police from a Dezha Manning. Crime lab expert David Welte tested the gun and analyzed the casings, fragments, and projectiles that were collected from the Citgo shooting. He opined that they were fired from the Rigami handgun.

¶ 15 Kevin Payne testified that, at the time of trial, he was incarcerated for criminal damage to property. He was given no consideration for his testimony. His sisters Kevia and Nila lived in Auburn Manor in May 2012. When Payne was in Nila's apartment mid-day on May 23, 2012, he saw Kevia, Magee, and the defendant. The defendant asked to borrow Payne's black hoodie to go to the store. Payne agreed and then left. The next day, Payne returned to Nila's apartment, only saw Kevia, and collected the black hoodie. Payne subsequently gave the police the black hoodie.

¶ 16 Walter Woodard met the defendant when both of them were in custody at the Winnebago County jail. Woodard had convictions for forgery and retail theft, and he was in custody for an armed robbery charge on June 9, 2012. After reading a newspaper article about a teenager charged with murder at a gas station, the defendant told Woodard that if the "little guy" (which referred to the teenager) "didn't shut his mouth, he (the defendant) would be in trouble." The defendant also stated that his girlfriend tossed a weapon by the river. On June 12, 2012, Woodard spoke to the police. He denied telling the officers any details other than that he heard there was a minor involved in a murder.

¶ 17 Melvin Ford was on parole for unlawful use of a credit card at the time of trial and had previously served probation for a 2007 burglary conviction. From mid-May 2012 to his October 24, 2012, forgery conviction, he was in the Winnebago County jail. Because he was in custody at the time of the Citgo shooting, he was unaware that it occurred. He did not know the defendant prior to June 22, 2012, when the defendant approached his cell. At trial, Ford had no recollection of what occurred on June 22, 2012. However, shortly after his conversation with the defendant, Ford had written notes about it. When Ford refreshed his memory with the notes, he did not remember anything other than the fact that the defendant had a 15-year-old friend in juvenile detention.

¶ 18 Ford acknowledged that a few months after speaking to the defendant, Ford had testified before a grand jury. He believed that his testimony was truthful. Immediately after providing his grand jury testimony, Ford pleaded guilty to forgery and received an agreed sentence. Ford denied receiving promises or consideration for the instant trial or his grand jury testimony.

¶ 19 When the State addressed the October 24, 2012, grand jury testimony, the defendant objected. The trial court overruled his objection. The State then questioned Ford about his grand jury testimony. Ford did not remember responding affirmatively to questions of whether the defendant: (1) stated he murdered a Hell's Angel; (2) was responsible for the murder with the teen; (3) threw the gun in the river after his girlfriend suggested he dump the gun; (4) spoke of an armed robbery "gone bad;" (5) was upset over Studer's lack of money; (6) stated the teen watched but did not pull the trigger; (7) told the teen not to say anything; (8) did not understand how the police found the black hoodie he wore when he shot Studer; (9) stated the police would be unable to retrieve gunshot residue from the hoodie; (10) guessed that his friend from the red van provided police with his name in the murder investigation and that he was going to kill that

friend; and (11) said it had been a month and half since he shot the victim and was confident the police did not know of his involvement.

¶ 20 Ford claimed he did not remember the conversation with the defendant or his grand jury testimony because "it's been that long" and because he had since suffered head injuries affecting his ability to recall. Even so, Ford remembered that the defendant smirked during the conversation. Ford did not recall circling the defendant's photograph on June 27, 2012, as the person he spoke to in jail about committing a murder near Auburn Manor, but he acknowledged his signature was on the lineup. In court, Ford identified the defendant as the person with whom he conversed.

¶ 21 After Ford's testimony at trial, the State moved to admit (1) as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10.1 (West 2012)) Ford's grand jury testimony and (2) Ford's handwritten notes. The trial court admitted the documents over the defendant's objection. The trial court explained that the purpose of section 115-10.1 was to protect parties from turncoat witnesses, who disown a prior statement on the stand by testifying differently or professing an inability to remember. The trial court stated that it considered Ford's testimony, interests, biases, manner, demeanor, and other testimony in the case and found that Ford's testimony that he could not recall was not for a lack of memory. Rather, it was because he was reluctant to testify. The trial court admitted the grand jury testimony as substantive evidence and Ford's notes as meeting the requirements for past recollection recorded. The trial court stated that it would not use Ford's notes as substantive evidence but would rather consider if those notes corroborated any testimony.

¶ 22 The defendant continued to object to the admission of the grand jury testimony and moved that it should not be admissible because Ford's testimony was elicited by leading

questions. The trial court denied the motion. It explained that it considered the grand jury testimony by weighing Ford's failed memory against his determination not to fully cooperate. The trial court also noted that any issue with the grand jury testimony could have been raised earlier in a motion to dismiss the indictment. The trial court further stated that it would determine the weight to give the testimony in light of the leading questions that were asked at the grand jury hearing.

¶ 23 After the State rested, the defendant presented a motion for a directed verdict. The trial court partially granted the motion. Finding that no armed robbery had occurred, the trial court dismissed the charges that were based on that offense.

¶ 24 At the close of trial, the trial court found the defendant guilty of intentional murder, two counts of attempted armed robbery, and mob action. The trial court also found that the defendant had personally discharged a firearm. In so ruling, the trial court stated that it considered all the testimony, arguments, and exhibits. The trial court found Johnson's testimony compelling. She testified that she saw two young, black men walking around; one of those was Magee because he left a fingerprint on the car. She felt something pressed against her shoulder blade, heard a demand for money, and felt the presence of two persons. The trial court drew the inference that the person in the black hoodie opened the passenger door, and the person in the white hoodie—Magee—stood at the passenger side and touched the window. It noted that her testimony that Magee was a person in a gray hoodie was different from all other testimony and the video it observed. The trial court noted Johnson was under stress and "buzzed" from drinking beer that day. The trial court found that she was unable to identify the person in the back seat with the black hoodie.

¶ 25 From Gore's and Fletcher's testimony, the trial court inferred the two people involved in the attempted armed robbery and murder began at Auburn Manor. Fletcher identified the shooter as the man who tried to take Studer's wallet, and he also stated the two men fled toward Auburn Manor. Payne's testimony linked the two men to Auburn Manor and the defendant to Payne's black hoodie. Woodard's testimony showed that the defendant knew the young man the trial court inferred to be Magee.

¶ 26 The trial court found that Ford provided critical testimony. In so finding, the trial court considered that Ford was on parole, that he pleaded guilty following his grand jury testimony, his memory, his manner and demeanor, his interest, bias or prejudice, and his believability. The trial court noted Ford's evasiveness and his reluctance to testify. The trial court considered the grand jury testimony and Ford's notes. Specifically, the trial court stated that it considered the notes "only for corroborating whether or not this conversation took place and what was involved in the conversation" and that it was used to refresh Ford's memory. The trial court inferred that the juvenile the defendant talked about was Magee. The trial court believed that the conversation between the defendant and Ford was about the attempted robbery and murder. The trial court noted that Ford was not from the Rockford area and was not aware of the Citgo shooting. In his grand jury testimony, Ford indicated that the defendant told him that he was involved in a murder of a Hell's Angel, and that a 15-year-old was blamed, but they did it together. The trial court found Ford's grand jury testimony that the defendant told him the 15-year-old did not pull the trigger was corroborated by the video showing the person in the black hoodie pulled the trigger. The trial court believed that a conversation occurred between Ford and the defendant. The trial court further believed Ford's grand jury testimony because Ford knew details that only the person who shot Studer would have known.

¶ 27 On August 10, 2016, following the denial of the defendant's posttrial motion, the trial court conducted a sentencing hearing. The trial court considered the victim impact statements of Studer's sister, his son, and Johnson. The trial court considered the difficulty the defendant had growing up, the possibility of restoring him to useful citizenship, the presentence investigation report (PSI), the financial impact of incarceration, the evidence offered in aggravation and mitigation, the victim impact statements, the parties' arguments, and the defendant's good health and his lack of substance abuse. However, in reviewing his prior delinquency and criminal history, the trial court noted the defendant's participation in crimes involving weapons and violence. Moreover, the defendant was not compliant during probation. The trial court found that the juvenile justice system failed the defendant because it could not make him change his ways. Having had the benefit of probation from a young age, the trial court expected the defendant to know that he needed to change his direction or attitude. With offenses commited shortly before and after Studer's murder, the trial court noted that the defendant's conduct had escalated. The trial court found that the defendant's sentence was necessary to deter others, was necessary to protect the public, and that the defendant's conduct was likely to recur.

¶ 28 As to the offense, the trial court inferred that the defendant planned to rob someone for cash. The defendant borrowed a hoodie on a warm day to conceal his identity, then he went to get money with a handgun. The trial court commented that the defendant was involved in the most serious crime that he could commit and that he had a complete disregard for life.

¶ 29 After considering all the evidence and all of the applicable factors in aggravation and mitigation, the trial court sentenced the defendant to a natural life sentence for murder, to be served concurrently with two 15-year sentences for attempted armed robbery and a 5-year sentence for mob action.

¶ 30 Following the denial of his motion to reconsider sentence, the defendant filed a notice of appeal.

¶ 31 II. ANALYSIS

¶ 32 A. The State's Motion to Dismiss the Defendant's Appeal

¶ 33 The defendant raises four issues on appeal. However, before considering those contentions, we address the State's motion to dismiss the defendant's appeal for lack of jurisdiction. The State argues that this court lacks jurisdiction because the defendant did not file a notice of appeal within 30 days of the final judgment.

¶ 34 On August 10, 2016, after sentencing the defendant to natural life imprisonment, the trial court granted defense counsel's request to stay the mittimus and set a status "for the filing of any post sentencing motions or any other motions you wish to file." The trial court indicated that it would allow the attorneys to set a date, but stated that it would not be available from September 5 through September 9. The trial court suggested that the parties return on September 13, and the parties agreed.

¶ 35 On September 13, 2016, the defendant filed a motion to reconsider and a notice of appeal.

¶ 36 On September 29, 2016, the trial court stated that it had not filed the notice of appeal because it was premature "and will be addressed along with the filing of a new notice of appeal after [it] make[s] a ruling on the motion to reconsider." The trial court further stated that the defendant was "not in any time issue."

¶ 37 On October 19, 2016, after the trial court denied the motion to reconsider, the defendant filed a notice of appeal.

¶ 38 In its motion, the State contends that the defendant had to file its motion to reconsider or its notice of appeal within 30 days of its sentencing order—which would have been September 9,

2016. Because the defendant did neither, the State insists that we lack jurisdiction to consider the defendant's appeal. See IL S. Ct. R. 606(b) (eff. Dec. 11, 2014) (a notice of appeal is timely when it is filed with the trial court within 30 days of a final judgment or 30 days after the entry of an order disposing of a timely motion directed at the judgment).

¶ 39 Our supreme court has recognized that a trial court may extend the deadline for the filing of a motion for reconsideration if that extension is granted prior to the expiration of the 30-day period specified by Rule 606. See *People v. Flowers*, 208 Ill. 2d 291, 300 (2003). Here, that is what the trial court did. Although the trial court extended the deadline, *sua sponte*, the State did not complain and instead acquiesced to the trial court's order. The State cannot now complain of the trial court's actions that it agreed to at trial. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (a party cannot complain of error to which that party consented). Accordingly, as the defendant timely appealed following the denial of his motion to reconsider, we deny the State's motion to dismiss the defendant's appeal.

¶ 40 B. Sufficiency of the Evidence

¶ 41 Turning to the merits of the defendant's appeal, the defendant's first contention is that he was not convicted beyond a reasonable doubt. It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact finder." *People v. Atherton*, 406 Ill. App. 3d 598, 608 (2010). The evaluation of the testimony and the resolution of any conflicts or

inconsistencies that appear are also wholly within the province of the finder of fact. *Collins*, 106 Ill. 2d at 261-62.

¶ 42 The offense of first-degree murder is shown when the State proves, beyond a reasonable doubt, that, in performing the acts that cause the death of an individual, the defendant "either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another." 720 ILCS 5/9-1(a)(1) (West 2012). To prove attempted armed robbery, the State is required to prove that with intent to commit an armed robbery, defendant took a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2012); *People v. Toy*, 407 Ill. App. 3d 272, 289-90 (2011). Mob action is "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." 720 ILCS 5/25-1(a)(1) (West 2012); *People v. Kent*, 2016 IL App (2d) 140340, ¶ 19.

¶ 43 Considering the evidence in the light most favorable to the State, we believe the State provided sufficient evidence that the defendant committed the charged offenses. The video footage of the incident showed two individuals in Citgo's parking lot: one dressed in dark colors, and one dressed in lighter colors. After first approaching the vehicle that Johnson was in, the two individuals approached Studer. The video showed the person in dark colors shooting Studer. Gore and Fletcher testified that they saw the two individuals flee towards Auburn Manor.

¶ 44 Garmon and Johnson both identified Magee as being at the shooting. Magee's fingerprints were found on Studer's vehicle. Garmon identified Magee as wearing a lighter colored hoodie. He was accompanying the man who was wearing a black hoodie. Payne testified that prior to the shooting, he had loaned a black hoodie to the defendant while both were

at Auburn Manor. Magee was with the defendant when the defendant asked to borrow the black hoodie.

¶ 45 The above testimony was corroborated in part by the testimony of Woodward and Ford. Woodward testified that he spoke to the defendant about a minor charged for a murder at the Citgo gas station. The defendant told Woodward he knew the minor and that if the minor "didn't shut his mouth," the defendant would be in trouble. In his grand jury testimony, Ford testified that the defendant told him about his involvement in a murder that a 15 year-old was blamed for. The defendant stated that the teen did not pull the trigger and that the murder was the result of an armed robbery "gone bad." The defendant stated that the police found the black hoodie that he wore when he shot the man.

¶ 46 From this testimony, the logical inferences are that on May 23, 2012, the defendant (1) was wearing a black hoodie that he got from Payne while he was at Auburn Manor; (2) accompanied Magee to the Citgo; (3) with Magee attempted to rob Studer and Johnson; (4) shot Studer to death; and (5) fled to Auburn Manor with Magee following the shooting. Based on all the evidence and the reasonable inferences drawn therefrom, the trial court could determine that the defendant had committed the charged offenses.

¶ 47 In so ruling, we reject the defendant's argument that the trial court could not reasonably conclude that he was the shooter because such a determination was inconsistent with Johnson's identification testimony. The defendant insists that Johnson's testimony established that it was Magee, not him, who shot Studer.

¶ 48 In assessing identification testimony, a court considers the following factors: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's

level of certainty at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). The trier of fact determines the weight to be given identification testimony. *People v. Calderon*, 369 Ill. App. 3d 221, 232 (2006).

¶ 49 Here, the Citgo surveillance video revealed that two different people approached Johnson before the murder. One was dressed in dark colors and one was dressed in lighter colors. The darkly-dressed person entered the back seat of Studer's car. Simultaneously, the lighter-dressed person stood at the front passenger window for 20 seconds. The back passenger door remained open until the darkly-dressed person exited the car. A few seconds later, the darkly-dressed person stood near the front passenger window for seven seconds. As Studer walked to his car, the darkly-dressed person approached him and fired a gun at him.

¶ 50 The video thus reveals that Johnson had opportunities to talk with both individuals involved in the attempted armed robbery and murder as they approached her car door on separate occasions. As the State suggests, however, it appears that she "meld[ed] both men into a single encounter at her window." This is evident because at one point in her testimony she identified Magee as the person who was wearing the lighter colored clothing (and hence was not the shooter). At another point in her testimony, however, she identified Magee as the person at her window after the attempted robbery of her. That person was wearing the darker clothing and was the shooter.

¶ 51 In light of Johnson's inconsistent identification testimony, the trial court was not required to place greater weight on her testimony than the other evidence that pointed to the defendant being the shooter. See *id.* Further, the factors set forth in *Neil* do not compel us to reach a different conclusion. Although Johnson had an excellent opportunity to view the shooter

because he was standing next to her car window for at least several seconds, her degree of attention was compromised due to her admitted intoxication. As the trial court noted, Johnson's degree of attention was also likely affected by the surprise of being the victim of an attempted armed robbery. Further, Johnson was not able to identify anyone involved in the crimes for a couple of weeks after the crimes. After attending court for Magee's case, she believed that he was one of the persons she had seen on the night in question. Based on all of these facts and inferences, the trial court could reasonably conclude that Johnson's testimony established that Magee was at the Citgo at the time of the shooting. Based on these same facts and inferences, however, the trial court could also reasonably conclude that Johnson's testimony did not establish that Magee was the shooter.

¶ 52 Beyond arguing that the trial court should have placed more weight on Johnson's testimony, the defendant also argues that the trial court should have placed less weight on Payne's, Gore's and Fletcher's trial testimony and Ford's grand jury testimony. As to Payne's testimony, the defendant points out that although Payne testified that the defendant asked to borrow Payne's black hooded sweatshirt, Payne never actually saw him take it. Further, the hoodie was not found in the defendant's possession. There was also no gunshot residue found on the hoodie. As such, the defendant complains that the trial court improperly inferred that he wore Payne's hoodie during the shooting.

¶ 53 Gore and Fletcher testified that they saw two individuals flee towards Auburn Manor following the shooting. The defendant contends that the trial court improperly used Gore's and Fletcher's testimony to draw the inference that the two people who committed the crime began at Auburn Manor. The defendant insists that the trial court's inferences are nothing more than speculation because no witness "saw the offenders enter or exit any apartment at Auburn Manor

at any time." The defendant therefore asserts that "[i]t is an insurmountable leap of logic to conclude that [he] was the shooter based on the fact that, earlier in the day, he had been seen at an Auburn Manor apartment with Magee, and asked to borrow a black sweatshirt."

¶ 54 We disagree that the above inferences that the trial court drew were unreasonable and amounted to pure speculation. As to Payne's sweatshirt, the most logical inference is that, after the defendant asked to borrow the black hoodie, he in fact did borrow it. As to the trial court's inference that the people who committed the crimes started at Auburn Manor, that is consistent with the evidence. Payne testified that he saw Magee and the defendant together at Auburn Manor on the day of the crimes. Magee and a person wearing a black hoodie like the one Payne had loaned the defendant were then seen at the Citgo. Following the shooting, Magee and his companion were then seen fleeing towards Auburn Manor. As such, none of the inferences that the trial court drew from Payne's, Gore's, and Fletcher's testimony suggests that it engaged in improper speculation.

¶ 55 The defendant raises several arguments as to why the trial court should have rejected Ford's testimony. Specifically, he contends that Ford's testimony (1) contradicted or was inconsistent with other evidence presented at trial; (2) reflected an ulterior motive; and (3) was weaker than the witness testimony presented in *People v. Reyes,* 265 Ill. App. 3d 985 (1993), which was found to be insufficient to uphold the defendant's conviction. The defendant also contends that the trial court misstated Ford's testimony in rendering its decision.

¶ 56 The defendant is correct that some of Ford's testimony, such as how the police recovered the black hoodie, was contradicted by other evidence presented at trial. Moreover, the State presented nothing to corroborate certain parts of Ford's testimony, such as providing evidence that Studer was a Hell's Angel. Additionally, the fact that Ford entered a negotiated plea in

which he received a sentence of probation for forgery following his grand jury testimony does suggest he may have had an ulterior motive in testifying. Nonetheless, all of these shortcomings in Ford's testimony were brought to the trial court's attention. It was within the purview of the trial court to determine the credibility of Ford's testimony. See *Collins*, 106 Ill. 2d at 261-62.

¶ 57 We also find the defendant's reliance on *Reyes* to be misplaced. In *Reyes*, Andrew Reyes was charged with attempted first degree murder for his alleged participation in a group beating. The State's first two witnesses testified that, although they were present at the scene when the beating occurred, they could not recall whether Reyes had participated in the beating. Both witnesses acknowledged that their trial testimony directly contradicted their grand jury testimony in which they identified Reyes as one of the people who beat the victim. The first witness explained that her grand jury testimony had been a lie, while the second witness assumed that she must have misunderstood the grand jury's questions. Reyes testified that, although he was present when the beating began, he quickly left the scene and did not participate in the beating.

¶ 58 The appellate court held that the State had not proven Reyes guilty beyond a reasonable doubt. The court explained that the only evidence to contradict Reyes' assertion that he had not participated in the beating was the first two witnesses' grand jury statements. *Reyes*, 265 Ill. App. 3d at 989. The credibility of those statements, however, was highly suspect in that (1) both witnesses recanted during Reyes' trial; (2) both statements consisted merely of "yes" and "no" answers to leading questions from the State; and (3) one of the witnesses testified, without contradiction, that the police had coerced her into identifying the defendant. Because the disavowed and highly suspect grand jury statements were the sole evidence of Reyes' guilt, the court held that the State failed to prove Reyes guilty beyond a reasonable doubt. *Id.* at 990.

¶ 59 Here, unlike the witnesses in *Reyes*, Ford never recanted his grand jury testimony. Rather, he stated that he testified truthfully before the grand jury. Similar to the witnesses in *Reyes*, Ford's testimony was in response to the State's leading questions. However, unlike the witnesses in *Reyes*, he wrote notes following his conversation with the defendant that were not one word responses to leading questions. Further, although Ford claimed that he was under "a lot of duress" when he testified before the grand jury, he also testified that the police made no threats or promises to him when he told them about his conversation with the defendant. Most importantly, unlike the witness testimony in *Reyes*, Ford's testimony was not the sole evidence of the defendant's guilt. Considered together, Payne's, Johnson's, Garmon's, Gore's, Fletcher's, and Woodard's testimony all connected the defendant to Studer's murder.

¶ 60 We also find without merit the defendant's argument that the defendant misstated the evidence in considering Ford's testimony. The defendant points to the trial court's following comments:

> "What's important about [Ford's] testimony also is I don't believe he was from town, from the Rockford area, and he was not aware of the shooting at the Citgo. It would have been different if this witness, Mr. Ford, had been in Rockford *** and had seen something on TV, newspaper, but he wasn't from the Rockford area, so he didn't know anything about the shooting at the Citgo."

¶ 61 The defendant asserts that Ford testified that he lived in Rockford between 2011 and 2014. The defendant also claims that the trial court improperly ignored the possibility that Ford learned of the Citgo murder through an alternate source while he was in jail. The defendant notes that Woodard testified that inmates at the Winnebago County Jail had access to the Rockford Register Star newspaper, which reported about the incident as early as June 9, 2012.

¶ 62 Taken in context, the trial court's comments indicate that it believed Ford did not learn about the Citgo murder until the defendant told him about it. As that is a reasonable inference for the trial court to draw, we will not disturb it. See *People v. Wheeler,* 226 Ill. 2d 92, 117 (2007) (reviewing court must allow all reasonable inferences from the record in favor of the prosecution).

¶ 63 C. Improper Admission of Evidence

¶ 64 The defendant's second contention on appeal is that the trial court abused its discretion in admitting Ford's handwritten notes as corroboration of his grand jury testimony. Specifically, the defendant asserts that (1) Ford's handwritten notes constituted hearsay and failed to meet the requirements for admission as a past recollection recorded and (2) the trial court impermissibly used the hearsay notes as a prior consistent statement to bolster the credibility of Ford's grand jury testimony.

¶ 65 Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v. Robinson*, 217 Ill. 2d 43, 62 (2005). This court only finds an abuse of discretion where "the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Wheeler,* 226 Ill. 2d at 133.

¶ 66 Generally, hearsay evidence—an out-of-court statement to prove the truth of the matter asserted—is inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002). One such exception is a past recollection recorded. To fall within the past-recollection-recorded exception, the evidence must meet four requirements: "(1) the witness had firsthand knowledge of the recorded event; (2) the written statement was made at or near the time of the event and while the witness had a clear and

accurate memory of it; (3) the witness lacks present recollection of the event; and (4) the witness can vouch for the accuracy of the written statement." *People v. Beasley*, 307 Ill. App. 3d 200, 207 (1999); Ill. R. Evid. 803(5) (eff. Jan. 1, 2011) (a past recollection recorded is a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.").

¶ 67 Here, the defendant argues that the statement failed to meet the first and fourth requirements of the past-recollection-recorded exception. The defendant argues that Ford did not meet the first requirement because he did not have personal knowledge of the murder. However, Ford did not need to have firsthand knowledge of the murder but rather of the conversation that he had with the defendant on June 22, 2012. See *People v. Andrews*, 101 Ill. App. 3d 808, 811 (1981) (police officers, who suffered memory loss as to which witness told them about the perpetrators' descriptions they recorded in report had firsthand knowledge, not of the offense itself, but of what witnesses told them at the time they made the report). The defendant's reliance on *Barker v. Eagle Food Center, Inc.*, 261 Ill. App. 3d 1068, 1073 (1994) is misplaced because there the witnesses did not have firsthand knowledge of the documents sought to be admitted. See *id.* ("Care Record" prepared by emergency medical technicians was not admissible because it was not based completely on their personal observations). Further, we are unpersuaded by the defendant's reliance on *People v. Speed*, 315 Ill. App. 3d 511, 515 (2000) and *People v. Hastings*, 161 Ill. App. 3d 714, 720 (1987) because those cases did not address whether a conversation a defendant had with someone where he made incriminating statements could constitute an "event."

¶ 68 As to the fourth requirement, the defendant points out that Ford specifically testified that he could not say if his notes were accurate. Thus, the defendant argues that Ford's notes should not have been admitted because Ford could not vouch for their accuracy. See *Beasley*, 307 Ill. App. at 207. The defendant's argument overlooks that the trial court found that Ford's testimony was evasive, suggesting that it did not find Ford was being truthful about his professed lack of memory. As it was within the trial court's purview to assess Ford's credibility (*Atherton*, 406 Ill. App. 3d at 608), we cannot say that the trial court's implicit finding that Ford's notes accurately reflected his conversation with the defendant constituted an abuse of discretion.

¶ 69 We next turn to the defendant's argument that the trial court impermissibly used Ford's hearsay notes as a prior consistent statement to bolster the credibility of Ford's grand jury testimony. Generally, prior consistent statements of a witness are inadmissible to corroborate a witness's trial testimony as they are likely to unfairly enhance a witness's credibility solely because the statement has been repeated. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52. However, there are two exceptions to the rule: (1) where the prior consistent statement rebuts a charge that a witness is motivated to testify falsely; and (2) where the prior consistent statement rebuts an allegation of recent fabrication. *Id.* The statement is admissible if it was made before the motive to testify falsely or before the alleged fabrication. *Id.*

¶ 70 Here, the State presented Ford's notes of his conversation with the defendant on direct examination. The defendant therefore argues that the notes cannot be admitted under the above exceptions because they were introduced before the State had anything to rebut. The defendant further contends that the State never established that the notes were created by Ford at a time when he lacked any motive to fabricate. Rather, the defendant asserts that Ford "created the notes precisely because he was trying to curry favor with the State in his own pending case,

which was resolved through a fully-negotiated plea on the same day he testified before the grand jury."

¶ 71 Although the State introduced Ford's notes on direct examination, the trial court did not admit them until after the defendant had an opportunity to cross-examine Ford. During cross-examination, defense counsel did cross-examine Ford about the difficulty of being in jail, about doing "whatever is necessary to protect *** and help" himself, and about the agreed sentence he received for the guilty plea he entered immediately after he testified before the grand jury. As such, defense counsel's cross-examination of Ford suggested a recent fabrication or a motive to testify falsely before the grand jury.

¶ 72 We do not believe that the trial court abused its discretion in admitting Ford's written notes, especially since the trial court indicated that it would not consider them as substantive evidence but only if they corroborated any testimony. Defense counsel clearly did suggest that Ford had a motive to lie when he gave his grand jury testimony. Thus, the trial court did not improperly consider Ford's notes based on the rule set forth above in *Donegan*. Further, although the defendant suggests that Ford had as much a motive to lie when he wrote his notes as when he gave his grand jury testimony (and thus his notes should not have been considered), that argument ultimately goes to Ford's credibility. Again, this court defers to the trial court's credibility determinations. *Atherton*, 406 Ill. App. 3d at 608.

¶ 73 D. Constitutionality of Sentencing Statute

¶ 74 The defendant's third contention on appeal is that the natural life sentence imposed pursuant to the statutory firearm sentencing enhancement should be vacated because the statute is unconstitutionally vague where it provides no objective criteria upon which the trial court could rely when imposing a sentence and instead encourages an arbitrary and discriminatory

enforcement of the law. The Illinois Appellate Court, First District has reviewed these very same arguments and determined that the 25-years-to-natural-life sentence enhancement is not unconstitutionally vague. See *People v. Brown*, 2017 IL App (1st) 142197, ¶ 80; *People v. Sharp*, 2015 IL App (1st) 130438; *People v. Butler*, 2013 IL App (1st) 120923, 373 Ill.Dec. 604, 994 N.E.2d 89. We agree with *Brown*, *Sharp*, and *Butler* and hold that the statutory firearm sentencing enhancement is not unconstitutionally vague.

¶ 75 E. Excessive Sentence

¶ 76 The defendant's final contention on appeal is that his sentence of natural life imprisonment is excessive. He asserts that the trial court failed to conduct any meaningful consideration of his youth at the time of the offense as well as his rehabilitative potential.

¶ 77 The trial court's sentencing decision is entitled to great deference, and we may not disturb a defendant's sentence unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A sentence that falls within the statutory range is not an abuse of discretion unless it varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Averett*, 381 Ill. App. 3d 1001, 1020-21 (2008). Because the trial court is in a superior position to evaluate the defendant's credibility and demeanor and to balance the various factors in aggravation and mitigation, we may not overturn a sentence merely because we might have weighed the pertinent factors differently. See *Stacey*, 193 Ill. 2d at 209.

¶ 78 In sentencing a defendant, the trial court must consider the character and circumstances of the offense itself (*People v. Bowman*, 357 Ill. App. 3d 290, 304 (2005)) and the defendant's character, criminal history, mentality, social environments, habits, age, future dangerousness, and potential for rehabilitation (*People v. Thompson*, 222 Ill. 2d 1, 35 (2006); *Averett*, 381 Ill.

App. 3d at 1020). Of all these factors, the seriousness of the offense has been called the most important. *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007); *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007).

¶ 79 Based on our review of the record, we do not believe that the trial court abused its discretion in sentencing the defendant. The record reveals that the trial court considered all of the relevant factors in aggravation and mitigation. In particular, the trial court considered the defendant's extensive prior criminal history that consisted of juvenile delinquency adjudications for sexual assault of a child, disorderly conduct while armed, aggravated battery, mob action, battery, residential burglary, resisting arrest, obstruction, aggravated assault, robbery and probation violations as well as criminal convictions for vehicular hijacking with a weapon, possession of a stolen motor vehicle, and residential burglary.

¶ 80 The trial court noted its particular concern with the defendant's escalating conduct as the instant murder occurred during a "crime spree." Two weeks before the murder, a motor vehicle was stolen, and days later, the defendant was found in possession of the vehicle. The defendant drove erratically, crashed the vehicle, and ran from the scene. The trial court found that the murder that the defendant committed was a senseless act that disregarded Studer's life. The trial court further noted that the defendant was not located until after the commission of the instant offenses and a residential burglary on June 5, 2012. The residential burglary was the second time the defendant violated a person's home. The trial court found that the defendant's character and attitude indicated the likelihood of him committing another offense and that his criminal conduct was the result of circumstances likely to recur.

¶ 81 In mitigation, the trial court observed the young age of the defendant, the defendant's difficulties during his youth, and the failure of the juvenile system to provide services to change

his ways. The trial court also considered the possibility of restoring the defendant to useful citizenship, the contents of the PSI, the financial impact of incarceration, the victim impact statements, and the arguments.

¶ 82 Based on its consideration of all these factors, the trial court's decision was not unreasonable. See *People v. Pippen*, 324 Ill. App. 3d 649, 651-52 (2001) ("A court has abused its discretion when the record shows that the sentence is excessive and not justified under any reasonable view of the record.").

¶ 83 In so ruling, we reject the defendant's argument that the trial court's consideration of his youth and rehabilitative potential was not "meaningful." As noted above, the trial court did consider both the defendant's youth and rehabilitative potential. Further, we note that defense counsel made many of these arguments below. As the trial court explicitly mentioned these specific factors and stated that it had considered everything, we will not find an abuse of discretion. See *People v. Kolakowski*, 319 Ill. App. 3d 200, 217 (2001).

¶ 84 We also note that the defendant asserts that the trial court misstated his age at the time of the offenses when imposing sentence. The defendant notes that he had turned 20 shortly before Studer was murdered. The trial court stated, however:

> "I have a young man—I considered his young age, 24 years of age. However, [the defendant] is not a teenager. He is a young adult. He is over 21 years of age and I considered this.
>
> * * *
>
> Had his age during the commission of this first degree murder, he had been a juvenile, 15 or 16 or 17 years of age, would have made some difference to me. But he is 24 years of age and not new to the criminal justice system.

* * *

I have considered the history of prior delinquency and criminal activity. Again, 24 years of age; not a teenager."

¶ 85 We note that the trial court's statement of the defendant's age is not inaccurate. The defendant was 24 years' old at the time of sentencing. However, even if the trial court mistakenly believed that the defendant was 24 at the time of the offenses, the trial court's comments indicate that would not have made a difference. The trial court specifically indicated that, if the defendant was 17 or younger, it would have considered a lesser sentence. As the defendant was 20, there is nothing in the record to suggest that the trial court would have given the defendant a lesser sentence based on his actual age at the time of the offenses.

¶ 86 III. CONCLUSION

¶ 87 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that the defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2018); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 88 Affirmed.

¶ 89 PRESIDING JUSTICE BIRKETT, dissenting:

¶ 90 I respectfully disagree with my colleagues that the evidence in this case was sufficient to convict. I also disagree with my colleagues that Ford's notes were admissible, either as a past recollection recorded or as a prior consistent statement.

¶ 91 A. Evidentiary Issues

¶ 92 With respect to the admissibility of the Ford notes, my colleagues conclude that a proper foundation was laid for the past-recollection-recorded exception. *Supra* ¶ 65. As my colleagues

note, a past-recollection-recorded is admissible only when all four requirements are met. I agree with defendant that Ford did not vouch for the accuracy of the notes. The majority notes that "the trial court found that Ford's testimony was evasive, suggesting that it did not find Ford was being truthful about his professed lack of memory." *Supra* ¶ 67. The majority forgets that one of the requirements for recorded recollection is that "(3) the witness lacks a present recollection of the event." Illinois Rule of Evidence 803(5) (eff. Sept. 18, 2018). The majority cannot use the absence of factor three to fill in the blanks for the fourth factor that "the witness can vouch for the accuracy of the written statement." *Supra ¶65.*

¶ 93 I also agree with the defense that the notes Ford wrote were not admissible as a prior consistent statement. Contrary to the majority's conclusion, the cross-examination of Ford did not suggest "a recent fabrication or a motive to testify falsely before the grand jury." Ford wrote six pages of notes, each page detailing his conversation with defendant. The same material is covered in each page. Ford testified that he was in custody on June 22, 2012, for forgery. It was the forgery case that resulted in Ford's plea agreement with the State immediately after he provided his grand jury testimony. Ford called the police to tell them he had information on the case. In the notes Ford directed the police to "check the video for Max Division and you will see him standing outside cell 23 (my cell)." The only reasonable inference is that Ford was looking for consideration in exchange for providing information. The fact that Ford did not get his plea agreement until October 24, 2012, does not create a new motive to testify falsely. The majority forgets that the notes served as the grand jury script for a series of leading questions to which Ford simply responded "yes."

¶ 94 The majority notes that the "trial court indicated that it would not consider them [the notes] as substantive evidence but only if they corroborated any testimony." *Supra* ¶ 71. The

Illinois Rules of Evidence provide that a prior consistent statement can be used "for rehabilitative purposes only and not as a hearsay exception or exclusion***." Illinois Rule of Evidence 613(c) (eff. October 15, 2015). Our courts have also long held that "a prior consistent statement may be admitted only to rehabilitate the witness; the statement may not be admitted as evidence that the content is true." *People v. Walker*, 335 Ill. App. 3d 102, 114 (2002). However, precisely the opposite is what occurred here. The State argued both in its opening and in rebuttal that the notes were evidence of what defendant told Ford. In opening argument the State argued that "his notes and his grand jury testimony contained the truth." In rebuttal argument the prosecutor repeatedly referred to the notes. The prosecutor argued that the notes went to "the authenticity and the reliability of those statements." Referring to the notes, the prosecutor argued that "[t]here is no way he could ever have made all of these details up without speaking to Carlos Jones. He testified to the truth because of what Carlos Jones told him."

¶ 95 Although a prior consistent statement may only be used to rehabilitate a witness against a claim of recent fabrication or motive to testify falsely, the trial court, like the State, considered the notes for the "truthfulness" of what was said during Ford's conversation with defendant. The trial court commented regarding the notes that:

> "So in considering the testimony of Mr. Melvin Ford as corroborating evidence, I considered only as corroborating evidence as to whether or not this conversation did take place and his *truthfulness* before he testifies before this court, and I find it very interesting that this witness, Melvin Ford, found it so important regarding this conversation that this defendant had with him that he would memorialize it in People's Exhibit No. 53A." (Emphasis added.)

¶ 96 Defense counsel argued in the motion for a new trial that Ford's notes were used substantively to improperly bolster Ford's testimony. I agree. Given the closeness of the evidence, on this basis alone defendant's conviction, at a minimum, should be reversed and remanded for a new trial.

¶ 97 B. Sufficiency of the Evidence

¶ 98 We have a duty to ensure that in cases where the State "cannot meet its burden of proof, the defendant must go free. It is no help to speculate that the defendant may have killed the victim. No citizen would be safe from prosecution under such a standard." *People v. Smith*, 185 Ill. 2d 532, 546 (1999). The fact that the trial court accepted the testimony in this case as establishing defendant's identity as Michael Studer's murderer "does not guarantee that it was reasonable to do so. Reasonable people may on occasion act unreasonably." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). While we must view the evidence "in the light most favorable to the prosecution" we "may not allow unreasonable inferences." *Id*.

¶ 99 The State's key witnesses were Woodard, Ford and Payne. Woodard and Ford were both jailhouse informants whose testimony "must be viewed with caution." *People v. Belknap*, 2014 IL 117094, ¶ 55. Although such testimony "is not to be viewed as inherently unbelievable," (*Id*.) there should be some credible corroboration of the informant's testimony. As our supreme court noted in *Belknap*, there was other evidence that "excluded any reasonable possibility" that anyone else inflicted the victim's injuries. *Id*. ¶ 65.

¶ 100 In this case the State failed to exclude any reasonable possibility that someone else may have killed Michael Studer. I recognize that on paper, it looked like the State had a solid case. Kenneth Magee was arrested and charged. He gave a statement to the police and he testified

before the grand jury.[1] For reasons unknown, the State did not call Magee as a witness, despite stating prior to trial that he would be called. The State also had Kevia Payne listed as a witness and she was under subpoena. Kevia Payne also gave a statement to the police. According to Kenneth Payne, Kevia and Nila were still at their Auburn Manor apartment when Kenneth left there the afternoon of May 23, 2012. Kevia may have been able to put defendant and Magee together closer in time to the murder. Again, for reasons unknown, the State did not call Kevia or Nila Payne.

¶ 101 The weaknesses of the State's case were illustrated when, after the close of the evidence, the State attempted to call police officers in "rebuttal" to perfect the impeachment of several of its witnesses who did not give responses favorable to the State. The prosecutor contended that defendant had made statements to these witnesses and wished to "offer those into evidence as exceptions to hearsay and ask [*sic*] those be argued in closing." The State argued that these witnesses "either willingly or forced to be here are reluctant to testify. I think it does go to a theme, which I think is relevant." The State asked that the rebuttal testimony of the police regarding the statements be admitted as "substantive" evidence. The State intended to call police officers in rebuttal to impeach Woodard and Kenneth Payne regarding "admissions" defendant had allegedly made but that Woodard and Payne denied. The State also sought to call in rebuttal

[1] When defendant was charged in 2015 the public defender was appointed and later withdrew because Magee was represented before the grand jury by a public defender. Private counsel, Mr. Braun, was appointed and later withdrew because Michael Studer was a former client and friend. Mr. Gary Pumilia was then appointed.

a police officer to perfect "impeachment of one Abdul Al-Sadum." The trial court denied all of the State's requests, reminding the State that rebuttal is used to rebut a defendant's evidence.[2]

¶ 102 During its rebuttal argument the State sought to make up for its lack of evidence with an argument that it "would be nice in this case is [*sic*] to have risk-free individuals come before this court without any concern for their own safety to testify truthfully." Mr. Pumilia objected, stating "[t]here is no evidence of threats to any of the witnesses." The trial court overruled the objection and allowed the prosecutor to argue in the same vein by asking the court to consider "what was not testified to by these individuals." I fully recognize that appellate counsel did not raise prosecutorial misconduct as a ground for reversal. However, when evaluating a sufficiency of the evidence claim it is important to examine how the evidence, or lack thereof, was argued by the parties.

¶ 103 As my colleagues discussed, the defense argued that Ford's testimony regarding defendant's statements included several inconsistencies with the known evidence. There was no evidence that Michael Studer was a Hell's Angel. There was no evidence that money was taken from Studer or that he had a knife. Most important, the murder weapon was not fished out of a river, but was recovered from the person of Dezha Manning on June 9, 2012, just 17 days after Studer was murdered. There are other discrepancies, for example, in Ford's notes he states that defendant said "that his brother scraped off the serial number because they had been 'blastin mothafuckas' (said this with a smile)." No such testimony was presented. In the notes Ford said

[2] Although these witnesses failed to establish support for the State's case, none of them affirmatively damaged the State's case. Thus the attempt to impeach would have been improper even if the attempt was made in the State's case. *People v. Cruz*, 162 Ill. 2d 314, 362 (1994).

that defendant told him that the "hoodie" was confiscated from his 'baby momma's cousin's crib." The hoodie was recovered from the trunk of Kenneth Payne's car.

¶ 104 The majority states that the other jailhouse informant, Woodard, testified that defendant told him "that his girlfriend tossed a weapon by the river." *Supra* ¶ 15. Woodard said he had a conversation with defendant on June 9, 2012, the same day the park district police recovered the murder weapon from Dezha Manning. On appeal, the State's statement of facts noted that Woodward said, "[d]efendant also stated that his girlfriend tossed a weapon by the river." Woodard made clear that defendant was talking about "the vehicle hijacking then and how he say his girl tossed the gun by the river and that was that." Woodard stated that defendant's statement "was pertaining to his charge he was in the county jail on, not knowing there's nothing about a murder." Intentional or not, the State's representation leads the reader to believe the weapon referred to was the murder weapon. Such a tactic violates the requirement that a statement of facts be "stated accurately and fairly." Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). Woodard claimed the conversation about the gas station murder began when the two were "looking at a newspaper about a murder case." The State did not bother to introduce a copy of the article to corroborate Woodard. Tellingly, defendant was not in custody on vehicular hijacking when he spoke to Woodard. He was in custody for fleeing and eluding the police and residential burglary. Defendant's presentence report shows one arrest for vehicular hijacking in 2010. He pleaded guilty in January 2011 and was sentenced to four years in the Illinois Department of Corrections.

¶ 105 As our supreme court has stated, the testimony of jailhouse informants must be viewed with caution because "such informants often expect to and do receive consideration on their own charges and sentencing in return for their testimony, thus providing an incentive to testify

falsely." *Belknap*, 2014 IL 117094, ¶ 57. There is no explanation in this record for the failure of law enforcement to take steps to corroborate either Ford or Woodard. The police and prosecution had ample opportunity to obtain an eavesdropping order to overhear and record defendant's jailhouse discussions. Defendant had not been charged and had neither a Sixth nor a Fifth Amendment right to preclude such evidence. See *People v. Hunt*, 2012 IL 111089 and *People v. Manning*, 182 Ill. 2d 193 (1998).

¶ 106 Contrary to the State's improper argument that the trial court should consider what was not presented to establish defendant's guilt, when examining the credibility of a jailhouse informant a fact finder should consider what might have been produced by the State through the use of tools available to it. To their credit, Rockford police submitted the black hoodie for DNA and gun powder residue testing. Both tests failed to connect defendant to the hoodie. Also, at least three cigarette butts were collected from the area around Studer's car. The evidence shows that at least one of the suspects was smoking. No evidence was presented regarding testing on the cigarette butts.

¶ 107 The defense and the State stipulated to the testimony of Rockford Park District police Sergeant Vincent that on June 9, 2012, at 5:14 p.m. he saw a person at Fairgrounds Park that he believed was armed. Park District officers Paulson and Turner stopped the person, identified as Dezha Manning, and recovered a loaded .25 caliber semiautomatic handgun from Manning's right front pants pocket. Forensic testing established that the gun recovered from Manning was used to murder Michael Studer. The trial court asked, "[j]ust so I'm clear, the gun was found on Mr. Manning—matched up to the shell casings found at the scene of this homicide?" Defense counsel added, "and to the bullets and the bullet fragments that were recovered, also."

¶ 108 During closing argument defense counsel argued that the Manning stipulation "was the one that we wanted." Defense counsel argued "[y]ou want to solve the case, judge, one of the ways is [to] follow the murder weapon. I didn't see Dezha Manning in court. He didn't show up at all." Counsel argued that there was no evidence presented connecting defendant to the murder weapon. "There were no prints on the gun and no DNA on clothes or the gun." Counsel argued that there was also no gunshot residue to prove the person wearing it fired a gun. Counsel asked, "[i]s there proof that the person in possession of the gun, Dezha Manning, wasn't involved in this crime? It is interesting because the gun is one really solid piece of direct evidence." Counsel said that a "witness that was bought and paid for" was insufficient in light of the Manning stipulation and the lack of corroboration for the jailhouse informants. Counsel argued that all that was known from "competent evidence" is that "Magee is the shooter. Manning has got the gun."

¶ 109 The Manning stipulation not only severely undermined Ford's credibility, it introduced evidence of a viable alternative suspect who the State did not exclude as a possible suspect. Neither the State in its arguments nor the trial court in its findings addressed the argument that Manning may have been the killer. Instead, the trial court focused only on the evidence that supported the State's theory and in fact, filled gaps in the State's case. For example, Kenneth Payne testified that he left the Auburn Manor apartment in the afternoon, not at night. The State argued that Payne testified that he loaned defendant the hoodie "that night." The trial court found that despite Payne's testimony to the contrary, it was night when he loaned defendant the hoodie. The trial court also accepted the State's argument that Theresa Johnson was mistaken when she identified Magee instead of defendant as the shooter. The trial court also commented that Ford was not from the Rockford area and he would not have learned of the "shooting at the

CITGO" from "tv" or "newspaper." As the defense pointed out in their brief, Ford lived in Rockford between 2011 and 2014, so he would have access to media accounts of the murder at the CITGO station.

¶ 110 Defendant does not argue in his brief that the State's failure to exclude Dezha Manning as a suspect requires reversal. When a defendant challenges the sufficiency of the evidence, we examine all of the evidence in order to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the essential elements of the crime beyond a reasonable doubt." *Smith*, 185 Ill. 2d at 541. Our evaluation must include all of the evidence. "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). With respect to evidence that a viable alternative suspect or a third party committed the offense, the rule in Illinois is that "evidence of an alternative suspect should be excluded on the basis that it is irrelevant if it is too remote or too speculative." *People v. Kirchner*, 194 Ill. 2d 502, 540 (2000). By stipulating to the testimony, the State acknowledged that the evidence was not too remote or speculative. Manning had the murder weapon just seventeen days after the murder and the State presented zero evidence to exclude him as the suspect.

¶ 111 In *People v. Beaman*, 229 Ill. 2d 56 (2008), the defendant argued that the State's failure to disclose material information on a viable alternative suspect violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In that case the defendant argued that there was a reasonable probability that the jury would have acquitted him had it known that there was another suspect with motive and opportunity to commit the murder. *Id.* at 72. Our supreme agreed and reversed defendant's conviction. The court stated, "[t]he impact or strength of the undisclosed evidence can only be

determined by also viewing the strength of the evidence presented against petitioner." *Id*. at 78; see also *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). Like in *Beaman*, the Manning stipulation countered the State's evidence which, in my view, was weak.

¶ 112 Prosecutors in our justice system have an obligation to insure that criminal trials serve as a search for the truth. *Strickles v. Grune*, 527 U.S. 263, 281 (1991). If the State believed that Manning's possession of the murder weapon was not relevant, it could have filed a motion *in limine* to establish that there was no connection between Manning's possession of the gun on June 9, 2012, and the murder of Michael Studer on May 23, 2012. See *People v. Kirchner*, 194 Ill. 2d 502, 540 (2000) (although a defendant in a criminal case may offer evidence that tends to show that someone else committed the offense with which he is charged, such evidence should be excluded on the basis that it is irrelevant if it is too remote or too speculative.)

¶ 113 Whether the fact finder is a jury or a judge, probative value must be assigned to the evidence. Physical evidence of identification, like fingerprints, DNA, firearm identification, etc, which links a suspect to a crime should be given high probative value. In this case highly probative evidence links Kenneth Magee and Dezha Manning to the murder. The State's failure to call Manning as a witness or to make any effort to exclude him blew a hole in the State's case that cannot be repaired. Unlike in *Beaman*, a post-conviction case, jeopardy has attached here and the trial court was presented with evidence of an alternative suspect(s) that it simply ignored.

¶ 114 At the end of the spectrum, we have testimony of two jailhouse informants whose testimony must be viewed with caution. Even without the Manning stipulation, the credibility of both Ford and Woodward was undermined by inconsistencies and by the lack of any explanation as to why defendant would open up to these men whom he did not know. As I've noted, the State failed to seek an eavesdropping order to corroborate their claims.

¶ 115 When one compares the weak evidence from jailhouse informants to the evidence that the murder weapon, that was supposedly thrown in the river, is actually in the possession of Manning on June 9, 2012, there is no question that there is a reasonable doubt as to who shot and killed Michael Studer. Again, contrary to the Ford's grand jury testimony, Studer did not have a knife; there was no evidence that $172 was taken; the gun was not thrown into the river; and there was no evidence presented to show that Studer was a Hell's Angel.

¶ 116 I am not suggesting that defendant is innocent. I am saying that due to the State's failure to exclude Manning as the killer, it has failed to meet its burden of proof. As or supreme court said in *Smith*,

> "[w]hile there are those who may criticize courts for turning criminals loose, courts have a duty to ensure that all citizens receive those rights which are applicable equally to every citizen who may find himself charged with a crime, whatever the crime and whatever the circumstances. When the State cannot meet its burden of proof, the defendant must go free." *Smith*, 185 Ill. 2d at 546.

¶ 117 Like in *Smith*, this case happens to be a murder case. It is no help to speculate that defendant may have killed the victim. Again, no citizen would be safe from prosecution under such a standard. *Id*. As a matter of law, defendant's conviction must be reversed.