

No. 1-08-0654

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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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, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04 CR 20163
	)	
LAMONT GRIFFIN,	)	
	)	Honorable William G. Lacy,
Defendant-Appellant.	)	Judge Presiding

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Justice Murphy delivered the judgment of the court.

Justice Quinn and Justice Steele concurred in the judgment.

**ORDER**

- ¶ 1 *HELD:* Where evidence was overwhelming in bench trial, trial court's error in reserving ruling on defendant's motion *in limine* to bar introduction of his prior convictions was harmless beyond a reasonable doubt.
- ¶ 2 *HELD:* Where defendant failed to properly raise the theory of self-defense, trial court did not error in precluding him from presenting evidence of the victim's violent character pursuant to *People v. Lynch*, m 104 Ill. 2d 194 (1984).
- ¶ 3 *HELD:* Where defendant was convicted of two counts of unlawful use of a weapon by a felon: one for possessing a gun and one for possessing a bullet, one conviction was vacated for the simultaneous possession of a firearm and ammunition constitute a single offense.

¶ 4 After a bench trial, defendant, Lamont Griffin, was convicted of first-degree murder and unlawful use of a weapon by a felon and sentenced to life imprisonment. On appeal, defendant argues that: (1) the trial court interfered with his right to testify when it deferred ruling on his motion *in limine* to bar the State from the introduction of his prior convictions until he testified, (2) the trial court erred when it precluded evidence of the victim's violent character, and (3) one of his convictions for unlawful use of a weapon by a felon should be vacated.

¶ 5 An order pursuant to Supreme Court Rule 23 was filed on March 31, 2010, affirming defendant's conviction for first-degree murder and vacating defendant's conviction for unlawful use of a weapon by a felon. Our supreme court entered a supervisory order directing this court to vacate our prior holding and reconsider the judgment in light of *People v. Mullins*, 242 Ill. 2d 1 (2011). That judgment was vacated. For the following reasons, we affirm defendant's conviction for first-degree murder and vacate defendant's conviction for unlawful use of a weapon by a felon.

¶ 6 I. BACKGROUND

¶ 7 Defendant was charged with first-degree murder and unlawful use of a weapon by a felon for the shooting death of his girlfriend's father, Cedric Nailing.

¶ 8 A. State's Evidence

¶ 9 The State presented evidence that established the following. On April 5, 2004, Cedric Nailing, the victim; Phyllis Alcorn, his girlfriend; Tiffany Ryan, Nailing's daughter and defendant's girlfriend; defendant; and Ryan's two children lived together in an apartment at 2730 South State Street in Chicago.

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¶ 10 Tiffany Ryan was on a pay phone in a building across the street from her apartment building. She was talking to the father of her children when defendant passed by and asked whom she was talking to. She did not want to tell him, and they argued as they walked to their apartment. Ryan testified that when they were in the apartment, defendant lifted his shirt, exposing what appeared to be a gun, and said, "This is going to your head."

¶ 11 Because there was "something in Lamont's voice," Alcorn urged Nailing to check on his daughter. Nailing came from his bedroom and stood between Ryan and defendant, telling them to calm down. Defendant reached around Nailing and hit Ryan in the head.

¶ 12 Nailing grabbed defendant by the collar and the two started "tussling." Alcorn and Ryan went to their respective bedrooms. Alcorn kept going back and forth from the bedroom to the kitchen to check on defendant and Nailing. She stated that the "tussling" went on for about 10 minutes. Alcorn heard Nailing say, "It doesn't have to go this far," and then heard a muffled gunshot. Tiffany Ryan heard her father say, "Come on man. Don't do it. Ain't worth it." Then she heard a gunshot.

¶ 13 Defendant ran to Ryan's bedroom, said, "Bitch, I was in love with you," and walked down the hallway. Alcorn left the bedroom and walked down the hall behind defendant. As Alcorn went to the front of the apartment, she saw defendant walking down the hall with a gun in his hand. When she reached the end of the hallway, she saw Nailing lying on the kitchen floor. As defendant left the apartment, she said, "You could at least call somebody to get some help." She looked through the peephole and saw defendant on a pay phone in the hallway of the building.

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¶ 14 Nailing had been shot in the neck and was having trouble breathing. Alcorn called Ryan to sit with him, and then she went into the hallway and called the police. Defendant was gone. According to the medical examiner, the bullet "coursed from front to back, left to right and slightly downwards." The gunshot fractured Nailing's neck. He was a quadriplegic and died from sepsis on July 22, 2004.

¶ 15 B. Defendant's Case

¶ 16 Defendant testified that on April 5, 2004, he was leaving a relative's house at 2701 South Dearborn when he saw Ryan talking on a pay phone in the lobby. When she saw him, she quickly hung up and started walking away. Defendant walked behind her and asked whom she was talking to. She refused to tell him, and the two walked back to their apartment together.

¶ 17 When they arrived at the apartment, they argued about the phone call. Defendant then lifted his shirt, indicating that he had a gun. He testified that he was going to take it to a friend's house, where he stored it, because Nailing was on electronic home monitoring and the police were frequently in the apartment checking on it. Nailing then walked into the room where defendant and Ryan were arguing and stood between the chairs that they were sitting in. Nailing asked what was going on, so defendant explained the argument. Nailing told Ryan to just tell defendant whom she was talking to, but Ryan refused and told her father to mind his own business.

¶ 18 Defendant stood up and slammed the chair into the table and then slapped Ryan in the face. Ryan ran from the room, and Nailing "attacked" defendant from behind as he attempted to leave. Cedric was 6' 1" and 160 pounds and defendant was 5' 5" and 140 pounds. Defendant stated that Nailing "wrestled me from behind with his arms around my neck and threw me on the

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couch face down." They struggled for a minute or two, with Nailing holding defendant in a head lock. Defendant tried to push up off the couch when he felt the scrape of his gun going across his stomach. Nailing pulled defendant to his feet and started hitting him in the head and face while still holding defendant by his neck. Defendant continued to struggle, and when Nailing "swung his right arm around," defendant saw his gun in Nailing's hand. Defendant continued struggling "very hard" in an attempt to get away from Nailing. He tried to get Nailing's arm from around his neck. Nailing then "swung the other arm and that's when I heard a pop sound and I felt the wind hitting me in my face and I had like grit in my mouth and my ear was ringing." They both fell to the floor.

¶ 19 Defendant was not sure what happened. Nailing was lying on the floor, but defendant did not see any blood. He picked up the gun off the ground to get it away from Nailing. He walked to the back of the apartment, calling Ryan's name, to see if she would come and help. She did not, so he told her that he loved her and left. As he passed through the apartment, he saw that Nailing was not responsive, so he called 911 from the phone in the hallway of the apartment building. He returned to 2701 South Dearborn and gave the gun to a friend.

¶ 20 Patricia Arnold testified that on April 5, 2004, she picked defendant up at 30th and State. She stated that it looked like someone "beat him up" because "his lip was busted," his nose was bleeding, his eye was swollen, and he had marks on his neck that looked like hand prints. He also had blood on his shirt.

¶ 21 Chris Stadnicki, a physician's assistant at Cermak Health Services, testified that when he treated defendant on April 8, 2004, defendant had a small contusion on the right side of his

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forehead, a superficial laceration on his inner lower lip, and abrasions on his abdomen and left knee. He stated that lip injuries usually heal within 24 to 48 hours.

¶ 22 Defense counsel, arguing that defendant acted in self-defense, sought to admit evidence "pertaining to defendant's state of mind and material that might be relevant to who the aggressor was" under *People v. Lynch*, 104 Ill. 2d 194 (1984). Defendant made an offer of proof that Gayle Nailing, Cedric Nailing's sister, would testify that Nailing struck her on July 21, 1985, and that she contacted the police, signed a complaint, and indicated that she would appear in court to prosecute the case. Furthermore, Officer Robert Robinson would testify that he interviewed Gayle Nailing about the assault and that he took Nailing into custody. The assistant State's Attorney responded that he spoke to Gayle Nailing the day before and she did not remember the arrest, and she did not show up to court to prosecute him. Defendant also presented evidence that Cedric Nailing was convicted of aggravated battery in October 1992 and that a protective order was issued in January 1992 but was later dismissed. Finally, defendant would have testified that Nailing threatened him with a butcher knife and, as a result, he was fearful of Nailing, especially when Nailing was unable to get high for a period of time.

¶ 23 The court denied defendant's request, finding that his testimony was that Nailing shot himself during the struggle, not that defendant shot him in self-defense. The court further concluded that even if the evidence were proper, it would have been excluded evidence of the assault against Nailing's sister as too remote in time. It also noted that, while protective orders "are routinely issued in domestic violence, they are issued for other things as well," so it probably would not have admitted it, anyway.

¶ 24

#### C. Trial Court's Findings

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¶ 25 The trial court found defendant guilty of first-degree murder and unlawful use of a weapon by a felon. It found Alcorn's and Ryan's testimony to be credible and defendant's version of events to be "incredible to the point of being ridiculous." The court sentenced defendant to life imprisonment.

¶ 26

## II. ANALYSIS

¶ 27

### A. Defendant's Motion *in Limine*

¶ 28 Defendant first argues that the trial court erred when it deferred ruling on his motion *in limine* seeking to bar the State from introducing his prior murder conviction for purposes of impeachment. When the State's case was almost complete, the assistant State's Attorney explained that it was seeking to present a certified copy of defendant's prior conviction for murder because it was an element of the charge for unlawful use of a weapon by a felon. Although it appears that a motion was not filed, before defendant testified, defense counsel stated that "we made a motion *in limine* previously regarding the defendant's prior background. We had asked about that the other day and we probably need to address that before his testimony." The trial court found that it could not conduct the balancing test pursuant to *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), until it heard defendant testify and stated that it would make a ruling after defendant's testimony. Pursuant to counsel's request, the trial court made its ruling on the motion between the State's cross-examination and defense counsel's redirect of defendant. The court found that the probative value of defendant's prior murder conviction outweighed its prejudicial effect.

¶ 29 In *People v. Patrick*, 233 Ill. 2d 62 (2009), our supreme court concluded that "a trial court's failure to rule on a motion *in limine* on the admissibility of prior convictions when it has

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sufficient information to make a ruling constitutes an abuse of discretion.” *Patrick*, 233 Ill. 2d at 73. The supreme court further held that the trial court abused its discretion by refusing to exercise any specific discretion. *Patrick*, 233 Ill. 2d at 74-75. “There is no justification for a trial judge’s blanket policy to withhold ruling on all motions *in limine* on the admissibility of prior convictions until after a defendant’s testimony.” *Patrick*, 233 Ill. 2d at 74. Therefore, the court concluded that the trial court’s application of a blanket policy amounted to an abuse of discretion. *Patrick*, 233 Ill. 2d at 75. *Patrick* was followed by *People v. Averett*, 237 Ill. 2d 1 (2010), in which our supreme court concluded that deferring ruling was an abuse of discretion, but that did not warrant reversal as a violation of defendants’ constitutional rights to testify because the error was harmless beyond a reasonable doubt. *Averett*, 237 Ill. 2d at 17.

¶ 30 In *People v. Mullins*, 242 Ill. 2d 1 (2011), our supreme court considered *Patrick* and *Averett*. The *Mullins* court stated that those cases both recognized that reserving ruling on a motion *in limine* to exclude prior convictions for impeachment constitutes an abuse of discretion - absent “rare cases.” *Id.* at 21. The court highlighted that *Averett* clarified *Patrick*, noting that the reserved-ruling error was serious, but not structural. As such, automatic reversal is unwarranted and a court of review must determine whether the error in delaying ruling was harmless beyond a reasonable doubt. *Id.* at 22-23. Under this standard, the State has the burden to prove beyond a reasonable doubt that the error did not affect the outcome of the proceeding. *Id.* at 23. In doing so, the reviewing court will consider: the defendant’s need to testify in order to present a defense; whether the parties mentioned the defendant’s prior conviction during argument; and the strength of the evidence against the defendant. *Id.* at 23-24.

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¶ 31 We find that the trial court's error in deferring its ruling on defendant's motion *in limine* did not contribute to the outcome and the evidence against defendant was overwhelming. First, we note that defendant was tried before the bench, not a jury. In *People v. McGee*, 398 Ill. App. 3d 789 (2010), we found that the "prejudicial effect of the error is of less concern when the evidence of earlier convictions is presented in a bench trial because it is presumed the trial court will consider only properly admitted evidence." *Id.* at 797, citing *People v. Eubanks*, 279 Ill. App. 3d 949, 958 (1996). *Patrick* is distinguishable because it was a jury trial "where the trial court's deferred decision prevented defense counsel from either telling the jury that defendant would testify or anticipatorily disclosing the earlier convictions to lessen the prejudicial impact." *Id.*, citing *Patrick*, 223 Ill. 2d at 75.

¶ 32 While defendant's testimony was necessary to establish his theory of defense, whether or not the parties mentioned or argued his prior convictions does not carry much importance in the instant matter. Indeed, the trial judge knew of defendant's prior murder conviction from the inception of the proceedings, as the charges for unlawful use of a weapon by a felon specifically alleged the "felony offense of first degree murder under case number 90 CR 17126." The judge also knew that the State was seeking the death penalty based on a prior murder conviction.

¶ 33 Second, the evidence against defendant was overwhelming. Ryan testified that defendant showed her a gun in his waistband and threatened her with it. Alcorn heard Nailing say, "It doesn't have to go this far," while Ryan heard her father say, "Come on man. Don't do it. Ain't worth it." This was just before they heard a gunshot. Alcorn saw defendant with a gun in his hand as he was leaving the apartment. The evidence was overwhelming.

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¶ 34 Furthermore, the trial court in the instant case found defendant's version of events to be unsupported by the evidence: "I sat here and I watched Mr. Griffin testify and actually demonstrate how he says Mr. Nailing shot himself. His testimony and demonstration are not supported by a downward bullet path into Mr. Nailing's neck and body." The court found defendant's version of "the ultimate act is incredible to the point of being ridiculous." It further noted that defendant's actions after the shooting "do not support a man who did not know what happened. His actions support culpability." Accordingly, we find that the trial court's error in reserving ruling was harmless beyond a reasonable doubt.

¶ 35 B. Evidence of the Victim's Violent Character

¶ 36 Defendant next argues that the trial court erred in precluding him from presenting evidence of the victim's violent character, including Nailing's murder conviction, his arrest for aggravated battery, the protective order against him, and defendant's fear of Nailing. Relying on *People v. Lynch*, 104 Ill. 2d 194 (1984), defendant contends that the preclusion of this evidence violated his rights to due process and a fair trial. He also argues that the trial court erroneously refused to consider alternative findings such as self-defense or second-degree murder.

¶ 37 "The determination of the admissibility of evidence lies within the province of the trial court, and it may reject evidence, even relevant evidence, if it is remote, uncertain or speculative." *People v. Figueroa*, 381 Ill. App. 3d 828, 840-41 (2008). A trial court's ruling regarding relevance and admissibility of evidence will not be reversed absent a clear abuse of discretion and manifest prejudice. *Figueroa*, 381 Ill. App. 3d at 841.

¶ 38 "*Lynch* provides the seminal law regarding the admissibility of character evidence in cases where self-defense has been raised." *Figueroa*, 381 Ill. App. 3d at 841. In *Lynch*, our

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supreme court noted that a victim's aggressive and violent character may be used to support a theory of self-defense in two ways: (1) to show the defendant's knowledge of the victim's violent tendencies affected defendant's perception of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened. *Lynch*, 104 Ill. 2d at 199-200. Under the first approach, evidence is relevant only if the defendant knew of the victim's violent acts. *Lynch*, 104 Ill. 2d at 200. Under the second approach, the defendant's knowledge is irrelevant, but there must be conflicting accounts of what occurred in order for the evidence to be admissible. *Lynch*, 104 Ill. 2d at 200; *Figueroa*, 381 Ill. App. 3d at 841-42. Defendant contends that he should have been permitted to present *Lynch* evidence to establish Nailing's violent character and to show who the aggressor was.

¶ 39 We find that defendant was not entitled to introduce *Lynch* evidence because the theory of self-defense was not "properly raised." See *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005) *Lynch*, 104 Ill. 2d at 204 ("a defendant may not introduce evidence of the victim's character until some evidence has been presented that the victim was, or appeared to be, the assailant, and that the defendant therefore acted in self-defense"). A person is justified in using deadly force against another "only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1 (West 2006); *People v. Huddleston*, 243 Ill. App. 3d 1012, 1018 (1993). In the instant case, defendant did not present evidence that he acted in self-defense.

¶ 40 Specifically, the State's evidence demonstrated that defendant threatened Ryan with a gun and that Nailing begged for his life before defendant shot him. Further, defendant unequivocally testified that Nailing removed the gun from defendant's waistband and shot

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himself in the neck. While the defenses of accident and self-defense are not mutually exclusive (*People v. Bedoya*, 288 Ill. App. 3d 226, 237 (1997); *People v. Robinson*, 163 Ill. App. 3d 754, 768 (1987)), there was no evidence in the record that would support his argument that he acted in self-defense. See *People v. Everette*, 141 Ill. 2d 147, 154 (1990). Therefore, the trial court did not err in rejecting defendant's argument of self-defense or in precluding the presentation of *Lynch* evidence.

¶ 41 Defendant contends that he was denied a fair and impartial trial when the trial court prejudged the evidence regarding his assertion of self-defense. Defendant cites several comments by the trial court that he did not act in self-defense and that "this is obviously not a self-defense case," even though defendant's defense was not complete. Defendant contends that the "judge could not have been more unambiguous--alternative findings such as self-defense and second-degree murder would not be considered."

¶ 42 A person commits second-degree murder when he commits the offense of first-degree murder and at the time of the killing (1) he is acting under a sudden and intense passion resulting from serious provocation by the individual killed, or (2) he believes the circumstances to be such that, if they existed, would justify the use of deadly force under the principles of self-defense, but his belief is unreasonable. 720 ILCS 5/9-2(a)(1), (a)(2) (West 2006). We find no evidence in the record that the trial court "failed to consider" the possibility of a finding of second-degree murder. In closing argument, defense counsel argued for self-defense, involuntary manslaughter, and second-degree murder. The trial court heard these arguments and the witnesses' testimony and concluded that defendant was guilty of first-degree murder. See *People v. Tenney*, 205 Ill. 2d 411, 428 (2002) (it is the function of the trier of fact to assess the

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credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence, as well as to resolve conflicts or inconsistencies in the evidence). However, the trial court's rejection of defendant's arguments does not lead to the conclusion that it refused to consider them.<sup>1</sup>

¶ 43 Nor does the record support defendant's assertion that the trial court "prejudged the defense." After defense counsel's redirect examination of defendant, counsel sought to introduce evidence of his "state of mind" because he was acting in self-defense. The trial court commented that defendant "did not testify to self defense for the charge of first degree murder." The trial court commented to this effect several times because the court and the parties were discussing whether defendant's proposed *Lynch* evidence was proper, and the question precedent to that issue was whether defendant was acting in self-defense.

¶ 44 *People v. McDaniels*, 144 Ill. App. 3d 459 (1986), which defendant cites in support of his argument, is distinguishable. In *McDaniels*, the defendant was convicted of aggravated battery after pouring hot grease on the victim while he slept. The defendant's theory of the case was that she was defending herself because he would not leave her apartment, nor could she leave, without getting beaten or raped. When the defendant's attorney began cross-examining the State's first witness, the court stated in response to an objection, "Seems to be pretty ridiculous to

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<sup>1</sup>We also note that a theory of second-degree murder was inconsistent with a defense of accident. *People v. Tate*, 25 Ill. App. 3d 411, 419 (1974); *People v. Sawczenko-Dub*, 345 Ill. App. 3d 522 (2003).

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claim self-defense. You might do that before a jury, but this is a bench trial." This remark was made before any evidence, other than a prior altercation between the parties, had been presented.

¶ 45 On appeal, the court found that the trial court, as trier of fact, "prejudged the validity of the defendant's defense prior to hearing the totality of the evidence" and concluded that the defendant was denied a fair and impartial trial. *McDaniels*, 144 Ill. App. 3d at 462. In the instant case, the court's comments did not come "very near the beginning of trial" (*McDaniels*, 144 Ill. App. 3d at 463); rather, they came after defense counsel's redirect of defendant. Therefore, we conclude that the trial court did not err when it precluded defendant's proposed *Lynch* evidence.

¶ 46 C. Unlawful Use of a Weapon

¶ 47 The State charged defendant with two counts of unlawful use of a weapon by a felon: one for possessing a gun and one for possessing a bullet. The trial court found him guilty of both counts. Defendant argues, and the State concedes, that one of these convictions should be vacated because section 24-1.1(e) of the Criminal Code of 1961 (720 ILCS 5/24-1.1(e) (West 2006)) does not allow for multiple convictions for a single act of possession a gun and its ammunition. Further, our supreme court held in *People v. Carter*, 213 Ill. 2d 295, 304 (2004), that "the simultaneous possession of two firearms and firearm ammunition constituted a single offense, and that only one conviction for unlawful possession of weapons by a felon could be entered." Consequently, pursuant to our authority under Supreme Court Rule 615(b)(1) (134 Ill. 2d R. 615(b)(1)), we vacate defendant's conviction for unlawful use of a weapon by a felon under count VIII and direct the circuit court clerk to amend defendant's mittimus accordingly. See *People v. McCray*, 273 Ill. App.3d 396, 403 (1995).

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¶ 48

### III. CONCLUSION

¶ 49 For the foregoing reasons, we affirm defendant's conviction for first-degree murder and vacate defendant's conviction for unlawful use of a weapon by a felon under count VIII.

¶ 50 Affirmed as modified; mittimus corrected.