

No. 1-11-0665

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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
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09CR507
	)	
THOMAS MAYBERRY,	)	The Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concur in the judgment.

*Held:* Trial court affirmed where the State proved defendant guilty of second degree murder beyond a reasonable doubt; trial court did not abuse its discretion in sentencing defendant to a term of imprisonment within the permissible statutory sentencing range.

¶ 1 **ORDER**

¶ 2 Following a jury trial, defendant Thomas Mayberry was convicted of second degree murder and sentenced to 20 years in prison. On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt where he acted justifiably in self-defense; and (2) the court erred in sentencing him to the maximum term allowed for second degree

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murder. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 At trial, the evidence established that defendant fatally shot the victim, Corey Williams, during an encounter at a gas station located at 603 South Independence Street in Chicago on October 14, 2008. Defendant does not deny that he shot the victim, but argues that he did so in self-defense.

¶ 5 The victim's cousin, Anthony Williams, testified at trial that he drove the victim to the gas station on the morning of October 14, 2008. Anthony did not see a gun in the victim's possession. At the station, he parked next to a gas pump and behind a black Cadillac driven by Ricky Williams. Anthony exited the car to purchase a bottle of water. The victim remained in the passenger seat. Anthony saw Vernon Commings, someone he knew from the neighborhood, near the attendant booth. They shook hands and then Commings approached the passenger side of Anthony's car and shook hands with the victim. The front passenger side window was down and the victim remained inside the vehicle.

¶ 6 As Anthony returned to the car and was standing near the driver's door, he saw a white Cadillac belonging to defendant "driving too fast for the parking lot" and approaching Anthony's car. Anthony had known defendant for many years. Defendant pulled up close to the passenger side of Anthony's vehicle. Anthony could see two other people in the white Cadillac, one of whom was seated in the front passenger seat and the other in the back seat. Anthony identified these individuals as Jameson Butler and Kevin Miller.

¶ 7 Anthony, who knew the victim and defendant had "had words" earlier, told the victim that

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defendant was approaching. The victim leaned back in his seat. Anthony saw defendant pull up next to the car and heard defendant say, "What's up bitch." He then watched defendant shoot the victim in the head:

"[ASSISTANT STATE'S ATTORNEY] Q: As the car [driven by defendant], the white Cadillac pulls up next to [your car], what do you do?

[THE WITNESS ANTHONY WILLIAMS] A: I tell my cousin like there go Tom, there's Tom, you know what I am saying.

Q: As you say that to your cousin, which direction is your cousin looking?

A: He look at me, looking towards me. I am at the driver's door. He look at me.

Q: So you're at the driver's door of the Jimmy at this point?

A: Yes.

Q: [The victim] looks at you and what happens then?

A: He sits back, and Tom pulls up and he says what's up bitch.

Q: You heard who say what's up bitch?

A: Tom, Tom Wood.

Q: Tom said that?

A: Yeah.

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Q: What happened then?

A: He said what up bitch. And after that his arm reached across his body, and out the window and then boom.

Q: Whose arm reached across their body?

A: Thomas Mayberry.

Q: And Thomas Mayberry, what did he have in his hand, if anything, when he reached across his body?

A: A gun.

Q: Did that gun come outside the window of his Cadillac?

A: Yeah.

Q: And once that gun came outside the window of his Cadillac, what did you hear?

A: A shot."

Only a few seconds elapsed between the time Anthony told the victim defendant was approaching and when defendant shot and killed the victim. Anthony did not see the victim reach for a gun or point a gun at defendant, testifying:

"[ASSISTANT STATE'S ATTORNEY] Q: If you never saw a gun in the car, is it fair to say that you never saw your cousin aim a gun at [defendant]?

[THE WITNESS ANTHONY WILLIAMS] A: Yes, ma'am."

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And:

"[ASSISTANT STATE'S ATTORNEY] Q: Anthony, let me ask you this: From the time [the victim] came to your girlfriend's house to the time he was shot at the BP gas station, did you ever see a gun?

[THE WITNESS ANTHONY WILLIAMS] A: No, I did not.

Q: Did you see [the victim] holding a gun?

A: No, I did not.

Q: Did you see [the victim] have a gun anywhere on his body?

A: No, I did not."

Anthony further testified that, if he had seen the victim with a gun, he would have taken the gun and hidden it from the police in order to protect the victim.

¶ 8 After the shooting, Anthony saw somebody get out of the rear of the white Cadillac and run toward him. Anthony recognized this person from the neighborhood but did not know his name. Afraid that the person would also shoot him, Anthony fled the gas station. After a few minutes, Anthony began walking back to the gas station. On the way, he saw Kevin Miller, who instructed Anthony to return to his car and get help for the victim. When he returned to the gas station, the white Cadillac and defendant were gone. Anthony got into his car and checked the victim's pulse, but did not find one. He was still concerned that defendant might return, so he

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drove to his grandmother's house nearby, with the victim's body still in the passenger seat. He went inside and his relatives called the police. Anthony went back outside and the police arrived shortly.

¶ 9 Anthony later identified defendant as the shooter in a photo array and a line-up.

¶ 10 Demond Sykes testified that he was also at the gas station at the time of the shooting. He worked at the gas station pumping gas for customers. Sykes originally saw defendant earlier in the day when defendant came through the gas station briefly and then left. Defendant was driving a white Cadillac. Sykes testified that he thought he saw two other men in the car with defendant, but did not recognize them. Later that morning, he saw defendant return to the gas station, pull in to the south side of the station and up to one of the gas pumps. There were no other cars on that side of the station at that time. Defendant then pulled out of that location, drove to the north side of the gas station, and pulled up beside Anthony's car. Sykes saw one of the men in that vehicle exit the car and go to the station attendant's window.

¶ 11 At the same time, a woman pulled up to the gas station and Sykes asked her if he could pump her gas for her. The woman declined. Sykes remained near that gas pump and heard a gunshot within seconds of when defendant, in the white Cadillac, pulled up next to Anthony's vehicle. Sykes could see the victim's head injuries after the gunshot, but did not see the actual shooting. The woman got into her car and Sykes pumped her gas for her.

¶ 12 Sykes then saw the white Cadillac pull up a short distance and talk briefly to someone in a black Cadillac. Both of the Cadillacs then left the gas station. Sykes approached Anthony's vehicle from the passenger side and saw that the victim had been shot. He noticed that the

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victim's hands were by his side, "[s]ide by side. Like they just fell down on his side." He did not see a gun. Sykes left the gas station before the police arrived. Sykes later identified defendant in a photo array and a line-up as the driver of the white Cadillac.

¶ 13 Chicago police forensic investigator Steven Strzepak and his partner reported to the scene at 3647 West Fifth Avenue, Anthony's grandmother's house, where Anthony's car was parked with the victim inside. They photographed the scene. Officer Strzepak looked through both the driver's and passenger's windows and did not see any type of weapon.

¶ 14 Chicago police sergeant Michael Kelly testified that he and his partner, Sergeant Dan Gallagher, were also at the scene. When he arrived, he saw a red GMC Jimmy parked on the street with a white sheet covering the passenger window. He learned that an ambulance had already arrived at the scene and had left the sheet there so that people in the gathering crowd could not see inside the vehicle. He saw the victim inside the car, still seated in the passenger seat, still buckled in with his seatbelt, and slumped to the right. The victim had a gunshot wound to the right side of his temple with an exit wound at the top of his head.

¶ 15 Chicago Police officer Jeffrey Pawlak testified that he and his partner, Officer Jose Gayton, were driving a police squadrol that day and received an assignment to transport a body. After the forensic investigators completed their work at the scene, Officer Pawlak looked inside the passenger window at the victim and did not see any weapon. The doors to the car were still closed. He and Officer Gayton then opened the passenger door while simultaneously holding the victim up so he would not fall out of the car. As he was holding up the victim, Officer Gayton saw a gun. Officer Gayton testified:

"[ASSISTANT STATE'S ATTORNEY] Q: So you opened the car door and what happened?

[WITNESS OFFICER GAYTON] A: The deceased, of course, leans more towards me, so I am holding him up. I look down in the door seal and the decedent's hand is over a weapon, a gun.

Q: When you say 'over a gun,' what do you mean?

A: It was resting on top of it, not gripping."

¶ 16 Officer Pawlak held the victim up while the forensic investigators took more photographs and recovered the gun. Upon examining the firearm, Officer Strzepek found that it was fully loaded with six rounds of ammunition. Officer Strzepek testified that he did not have to "pry" the gun from the victim's hands, but just "move[d] the hand away and picked up the weapon."

¶ 17 Deputy Cook County medical examiner Dr. James Filkins testified that he performed an autopsy on the victim, and concluded that the victim died of a gunshot wound to the head. He described the entrance wound as a contact range wound, meaning that the muzzle of the gun was in direct contact with the victim's body at the time the gun was fired.

¶ 18 Chicago Police detective Charles Garcia, assigned to the fugitive apprehension unit, testified that he was brought in to help locate defendant, whom police had identified as a suspect. He arrested defendant in DeKalb on November 25, 2008, and transported him to Chicago.

¶ 19 The State rested.

¶ 20 During the defense case, defendant introduced the testimony of Vernon Commings,

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Jameson Butler, Kevin Miller, Leandrew O'Dell, and Cornell Watson. Commings, Butler, and Miller testified regarding the shooting at issue in the case, while O'Dell and Watson testified regarding a previous shooting that took place in 2003, in which the victim was allegedly involved.

¶ 21 Vernon Commings testified that he witnessed the shooting of the victim at the gas station. He testified that he was at the gas station and, when the shooting occurred, had been about to enter Ricky Williams' black Cadillac. He saw Anthony Williams, whom he knew from the neighborhood, at the cash register, and he saw the victim sitting in Anthony's car parked next to a gas pump. According to Commings, the victim called him over to his car to talk to him about something that had happened earlier. When Commings approached Anthony's car, he saw the victim had a gun on his lap. Commings testified that, when he asked the victim why he had a gun, the victim told him it was because "he just got into it with [defendant]" and defendant "got some coming." Commings understood that to mean the victim planned to shoot or fight with defendant. Commings, who had known defendant for twenty years, told the victim to "leave that alone." Commings then walked to the black Cadillac. Then, he saw a white Cadillac pull up to the car in which the victim was sitting. The victim raised a brown and black gun and pointed it toward the white Cadillac. As Commings was trying to get into the black Cadillac, he heard a gunshot. He saw the victim pointing the gun. Commings thought the victim was going to shoot, but defendant shot his gun before the victim did so.

¶ 22 On cross-examination, Commings testified he saw the victim raise the gun that he had seen in the victim's lap, hanging it one-half foot out of the car, and pointing it towards defendant.

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He pointed it at defendant for five to six seconds before defendant, seated in the driver's seat of the white Cadillac, ducked and shot him. Commings estimated that defendant's gun was five to six feet from the victim's head when he fired it.

¶ 23 Commings testified that, after the shooting, defendant pulled up beside him and said he could not believe the victim had tried to kill him. Defendant asked Commings and Ricky if they thought he should stay at the scene and wait for the police, since the shooting was in self-defense. Ricky said he would stay there instead.

¶ 24 Commings testified that he saw Anthony run away after the shooting. Commings did not run because he was not afraid of defendant. He admitted he did not wait for the police and he did not call 911.

¶ 25 Commings admitted he told Sergeant Gallagher on October 17 that he saw defendant drive up, immediately point a handgun at the victim, and shoot him. He also admitted he told Sergeant Gallagher defendant pulled up next to him and said, " I can't believe I just did that. You motherfuckers better not be getting in my business. I need some money to run with.' "

Commings also admitted he identified defendant from a photo array as the person who shot the victim. Commings admitted that he also spoke with Assistant State's Attorney Essig and told her what he had told the police. He also told her he had been treated well by the police. After ASA Essig typed up his statement, he was allowed to read it and make any changes, and he then signed each page of the statement. Commings, who had two prior convictions for possession of a controlled substance and two prior convictions for unlawful use of a weapon by a felon, admitted his handwritten statement differed from his trial testimony.

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¶ 26 Then, on October 21, 2008, Commings telephoned Sergeant Gallagher and told him he wanted to retract his statement. At trial, Commings denied that the reason he wanted to retract it was because he learned that Ricky Williams was not cooperating with the police, but explained it was because the statement was not truthful. Commings testified that Sergeant Gallagher tried to convince him to testify in front of a grand jury.

¶ 27 Commings also admitted that the statement he gave to a defense investigator on April 13, 2009, differed from the handwritten statement he gave to the police. Commings admitted there was nothing in his handwritten statement about the victim having a gun.

¶ 28 Jameson Butler testified that, on the morning of the shooting, he was riding with defendant in the white Cadillac. When he got in the car, Kevin Miller was already in the car. On the way to the gas station, Butler laid heroin out so he could snort it. He and Miller snorted the heroin once they stopped at the gas station. Butler testified that defendant initially pulled into one side of the gas station, but then moved to another spot next to the car with the victim inside. Defendant's car was five to ten feet away from the other car. Butler looked up when the car stopped and saw the victim pointing a gun toward the white Cadillac. Butler immediately "rolled over" and curled up into a ball because he was afraid he was going to get shot. He heard a gunshot. He never saw defendant with a gun. Butler knew defendant did not get shot. Butler then got out of defendant's car and walked away from the shooting. He did not return to the gas station.

¶ 29 On cross-examination, Butler admitted he purchased heroin that morning. He was riding in the passenger side of defendant's car and not paying any attention to where they were going

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because he was focused on preparing the heroin so he could snort it. He did not look up until defendant stopped the car for the second time at the gas station. When he did so, he saw the victim holding a gun with his left hand and pointing it out the passenger window toward the white Cadillac. Butler denied he told Sergeants Kelly and Gallagher that he saw defendant point and shoot a gun at the victim.

¶ 30 Butler testified in front of the grand jury that he saw defendant looking at the car in which the victim was seated and then he heard a loud bang. He testified to the grand jury that he did not see anything in defendant's hands, but saw him leaning out of the car facing the victim. Butler admitted he had a previous conviction for possession of a controlled substance with intent to deliver.

¶ 31 Kevin Miller, defendant's long-time family friend, testified he was walking home on the morning of the shooting when defendant drove by. Defendant gave Miller a ride. When Miller got into the white Cadillac, he saw Butler sitting in the front passenger seat. Miller sat in the back seat behind defendant. As defendant drove to the gas station, Miller snorted heroin in the back seat. He could not see if Butler was also snorting heroin. Defendant pulled into the gas station, then backed up and pulled up next to Anthony's car. Miller recognized the car and the person inside, but he did not know him. He also saw somebody standing near the van pumping gas, but he did not know his name. He saw a black car parked in front of Anthony's car with two men inside that he knew.

¶ 32 Miller testified that, when defendant pulled up next to Anthony's car, defendant said, "what's happening" and then the victim drew a gun and pointed it out the passenger window at

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defendant. Miller got out of the car and then heard a gunshot. He did not see a gun in defendant's hands. Miller ran around the gas station, returned to the car, and asked defendant what had happened. He got back into the car with defendant and they drove away.

¶ 33 On cross-examination, Miller admitted he spoke with an Assistant State's Attorney at the police station and gave a handwritten statement. According to Miller, he told the ASA that he did not see the victim holding a gun or pointing a gun out of the passenger window. He did not recall telling the ASA that he saw defendant holding a gun in his right hand across his body, aiming it at the victim. He claimed he only signed the handwritten statement because he wanted to leave the police station, and he only said the things he said in the statement out of fear because Sergeant Gallagher threatened that he could be an accessory to murder. Miller admitted he used drugs on a daily basis. He could not recall his previous convictions for possession of a controlled substance with intent to deliver or two cases involving possession of a controlled substance.

¶ 34 On rebuttal, Sergeant Gallagher testified that he interviewed Anthony Williams at Williams' grandmother's house on the day of the shooting. After that interview, Sergeant Gallagher was looking for defendant as a suspect and Commings as a witness to the shooting. A few days later, Sergeant Gallagher brought Commings in for questioning. During the interview at the police station, Sergeant Gallagher asked Commings what he saw at the time of the shooting, and Commings responded that he saw defendant shoot the victim. Commings never told him that defendant shot the victim in self-defense or that the victim pointed a gun at defendant.

¶ 35 Two weeks after the shooting, Sergeant Gallagher interviewed Butler and Miller

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separately at the police station. During those interviews, neither Butler nor Miller ever told him the victim had pointed a gun at defendant.

¶ 36 ASA Eric Saucedo testified he was assigned to the Felony Review Unit and went to the police station to interview Butler and Miller on separate occasions. During those interviews, both men made handwritten statements in which they said defendant shot the victim. Neither man reported having seen the victim point a gun at defendant.

¶ 37 ASA Essig testified she interviewed Commings at the police station a few days after the shooting. During that interview, Commings never told her he saw the victim point a gun at defendant.

¶ 38 O'Dell and Watson both testified regarding a shooting that occurred in 2003 in which the victim was allegedly the shooter. O'Dell testified that, on November 14, 2003, he was outside at 521 North Troy with Cornell Watson and another friend when a van approached. He saw that the driver of the van was a man with whom he had recently argued. O'Dell approached the van and saw approximately four or five African-American males in the van. All of them were light-complected with the exception of one dark-complected male. Then, the side door of the van slid open and Leandrew O'Dell could see a man holding a gun. He could not see the man's face, but could see the man's hand that was holding the gun was dark-complected. As O'Dell ran away, he heard two shots fired. On cross-examination, he testified:

"[ASSISTANT STATE'S ATTORNEY] Q: \* \* \* The face of the man who pointed the gun out of the door, were you able to get a good look at that?"

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[WITNESS O'DELL] A: I mean, I didn't get [a] good look.

I mean, I glanced, but I was just mainly looking at that gun.

Q: You said it was a dark-skinned hand?

A: Yes.

Q: That was holding the gun?

A: Yes.

Q: The face of that man, was that dark-skinned or light-skinned?

A: Really, I didn't even glance. I mean I seent [*sic*] it, but I just really seent [*sic*] that gun in the hand.

Q: So that is where your attention was focused, is on the hand and the gun?

A: Yes.

Q: So you don't know if the face of the person that was holding that gun was light or dark-skinned?

A: I mean, I assumed that he was dark because of his hand."

O'Dell testified that he viewed a line-up a few hours after the incident in which he identified the victim as the person holding the gun. He did so only after police told him that all of the line-up participants were occupants of the van. The victim, whom O'Dell identified, was the only person in the line-up who was dark-skinned. O'Dell testified he did not know the victim.

¶ 39 Cornell Watson testified about the same previous incident. He, also, testified he did not

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see the shooter's face, but only saw his dark-complected hand. He, also, identified the victim in the line-up as the person holding the gun, stating on cross-examination:

"[ASSISTANT STATE'S ATTORNEY] Q: This man you pointed out in the lineup, did you point him out because he was the only dark-skinned, or because he's the man whose face you saw in the van?

[WITNESS CORNELL WATSON] A: I pointed him out because they said they had all the guys in the van. He was the only dark-skinned guy in the van, and he was the only dark-skinned guy in the lineup, so I said that might be him there."

¶ 40 The parties stipulated that, if called to testify, Chicago police officers Reyes and Velezquez would testify they were on patrol in the vicinity of 521 North Troy on November 14, 2003, when they heard two loud noises and then saw a van traveling northbound. They saw a person, later identified as the victim, "make movements to the rear of the van". When they stopped the van, the victim fled on foot. The officers apprehended him, placed him under arrest, and recovered a chrome handgun from the van. Later that day, Officer Reyes conducted a line-up in which Watson and O'Dell identified the victim as the person who pointed the gun at them.

¶ 41 The jury found defendant guilty of second degree murder. The trial court denied defendant's motion for a new trial. Defendant was subsequently sentenced to twenty years' incarceration.

¶ 42 Defendant appeals.

¶ 43

ANALYSIS

¶ 44 a. Reasonable Doubt

¶ 45 On appeal, defendant first contends the State failed to prove him guilty beyond a reasonable doubt of second degree murder. Specifically, defendant admits to shooting and killing the victim, but argues he was justified in doing so because the victim aimed a loaded handgun at him. He argues that he had to act quickly and decisively, particularly when considered in the context of the 2003 shooting in which the victim was allegedly the shooter. Moreover, he argues that the jury was improperly persuaded by the victim's "biased and incredible cousin, Anthony Williams," as well by as the station-house statements made by Commings, Butler, and Miller, which were all later recanted. We disagree.

¶ 46 To prove a defendant guilty of first degree murder, the State must prove that the defendant either intended to kill or do great bodily harm to an individual, or that he knows his acts create a strong probability of death or great bodily harm. 720 ILCS 5/9-1(a)(1)(2) (West 2008). If evidence of self-defense is raised, the State has the burden of proving beyond a reasonable doubt that the defendant did not have a reasonable belief in the necessity of using deadly force. 720 ILCS 5/7-1 (West 2008). Specifically, a person is justified in the use of force against another when and to the extent the person reasonably believes that such conduct is necessary to defend himself or others against another's imminent use of unlawful force. 720 ILCS 5/7-1 (West 2008). To raise the affirmative defense of self-defense, a defendant must establish some evidence of each of the following elements: (1) force was threatened against defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the

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threatened force was unlawful; (5) the defendant actually and subjectively believed a danger existed that required the use of the force applied; and (6) the defendant's beliefs were objectively reasonable. *People v. Mayoral*, 299 Ill. App. 3d 899, 912 (1998), citing *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995). Once raised, the State must prove beyond a reasonable doubt that the defendant did not have a reasonable belief in the necessity of using deadly force. 720 ILCS 5/7-1 (West 2008); *People v. Shields*, 298 Ill. App. 3d 943, 947 (1998). A self-defense claim fails when the State negates any one of these elements. *Mayoral*, 299 Ill. App. 3d at 912.

¶ 47 Whether self-defense applies is a factual question to be decided by the trier of fact. *People v. Ornelas*, 295 Ill. App. 3d 1037, 1049 (1998); see also *People v. Greene*, 160 Ill. App. 3d 1089, 1096 (1987) ("The issue of self-defense is determined by the trier of fact."). The trier of fact is not required to accept the defendant's version of the facts, but may consider the surrounding circumstances in determining its probability or improbability. *People v. Ferguson*, 204 Ill. App. 3d 146, 151 (1990).

¶ 48 When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). The trier of fact determines the credibility of witnesses and the weight to be given their testimony, resolves conflicts in the evidence, and draws reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). We will not substitute our judgment for that of the trier of fact. *Ortiz*, 196 Ill. 2d at 259. A reviewing court must construe all reasonable inferences from the evidence in favor of the

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prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259.

¶ 49 Second degree murder may apply where, in relevant part, the offender commits first degree murder while unreasonably believing that the circumstances, if they existed, would justify or exonerate the killing. 720 ILCS 5/9-2 (West 2008). The defendant must prove, by a preponderance of the evidence, the mitigating factor. *People v. Thompson*, 354 Ill. App. 3d 579, 586 (2004). In the case at bar, then, in order to reduce first degree murder to second degree murder, defendant must have shown by a preponderance of the evidence that he believed the circumstances justified using self-defense, but that his belief was unreasonable. 720 ILCS 5/9-2(a)(2),(c) (West 2008). In reviewing the sufficiency of the evidence to prove a mitigating factor, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the mitigating factor was not present. *Thompson*, 354 Ill. App. 3d at 587.

¶ 50 Here, when we consider the evidence in the appropriate standard of review, that is, in the light most favorable to the prosecution, we must determine that the State proved defendant did not act reasonably in self-defense. At trial, the State presented one eye witness to the shooting and one eye witness to the events surrounding the shooting. Anthony Williams, the victim's cousin, testified that as he was returning to his car at the gas station, he saw defendant's white Cadillac quickly pull up next to the passenger side of Anthony's car. Because he knew the victim and defendant were involved in a previous argument, Anthony alerted the victim to defendant's

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presence. Anthony heard defendant say to the victim, "what's up bitch." He then saw defendant, holding a gun in his right hand, reach across his body, hold the gun out the window, and fire a shot into the victim's head. That shot killed the victim. Williams did not see the victim reach for a gun or point a gun at defendant. He, in fact, never saw the victim with a gun that day. He explained at trial that, had he seen the victim with a gun, he would have taken the gun and hidden it from the police in order to protect the victim.

¶ 51 The second eye witness, Sykes, did not see the actual shooting, but did witness what happened immediately before and immediately after the shooting. He testified that he was standing near another gas pump when defendant pulled up next to the victim. Sykes then heard a gunshot. From his vantage point, he could not see who shot the victim. He turned and looked at the victim and defendant only after he heard the gunshot. After the shooting, however, he approached the victim's car and saw that the victim's hands were by his side. He did not see a gun in the victim's hands. He identified defendant from a photo array and a line-up as the person he saw driving the white Cadillac.

¶ 52 Neither Sergeant Kelly nor Officer Strzepek saw a weapon when they looked inside the vehicle at the victim. However, when Officer Pawlak opened the passenger door of Anthony's car, he discovered a gun on the floor of the vehicle next to the door. Officer Pawlak testified at trial that the gun was in the door seal and that the victim's hand was "over" it. He clarified that the victim's hand "was resting on top of it, not gripping." In addition, Officer Strzepek, who recovered the weapon, testified that he did not have to "pry" the gun from the victim's hands, but just "move[d] the hand away and picked up the weapon." None of these witnesses saw a gun in

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the victim's hand. Anthony, in particular, specifically testified that defendant aimed a gun at the victim and shot him. Anthony testified that he did not see the victim aim a gun at defendant.

¶ 53 Commings, Butler, and Miller all testified for the defense that the victim aimed a gun at defendant. However, all three previously were interviewed and provided statements in which they claimed not to have seen the victim aim a gun at defendant. There were many inconsistencies in the testimony from these witnesses, and the jury, as the trier of fact, was entitled to make determinations of credibility. See *Ortiz*, 196 Ill. 2d at 259. For example, Commings and Miller both testified that the victim held the gun in his right hand as he pointed it at defendant, but Butler testified the victim held the gun in his left hand, reaching across his body in order to aim it at defendant. In addition, Commings and Miller both testified that the victim held the gun out of his window, but Butler testified the victim did not hold the gun out the window.

¶ 54 In addition, Commings' testimony regarding the manner in which defendant aimed his gun at the victim is inconsistent with the medical examiner's testimony. While the medical examiner testified to "stippling" around the victim's wound and determined that the gun, when shot, was held flush with the victim's skin, Commings testified that he watched defendant aim his gun at the victim with his hand inside the vehicle. He estimated that defendant's gun was five to six feet away from the victim's head when defendant fired it. Commings' testimony contradicts the medical examiner's testimony that the gun was touching the victim's head at the time it was fired, but Anthony's testimony that he saw defendant holding the gun out of his window when he fired it is consistent with the medical examiner's opinion.

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¶ 55 Moreover, the jury heard testimony that both Miller and Butler were high on heroin at the time of the shooting. Miller testified that he snorted heroin on the way to the gas station that morning. Butler testified that both he and Miller snorted heroin immediately upon arriving at the gas station. The jury is entitled to determine the credibility of witnesses and the weight to be given their testimony, as well as draw reasonable inferences from the evidence presented. See *Ortiz*, 196 Ill 2d at 259.

¶ 56 Defendant urges us to consider that the statements made by Commings, Butler, and Miller to Sergeant Gallagher are not "worthy of belief" because Sergeant Gallagher must have coerced the witnesses into making those statements. Defendant finds it "remarkable" that, after providing statements which all asserted that the victim was not seen with a gun at the time of the shooting and that defendant was the initial aggressor, all three men later recanted those statements. However, Sergeant Gallagher testified at trial regarding all three witnesses. He denied ever having threatened them. In addition, the ASAs who testified at trial, ASA Essig and ASA Saucedo, both testified that the men claimed to have been treated well by the police. In addition, Commings provided a handwritten statement with ASA Essig, Miller provided a handwritten statement with ASA Saucedo, and Butler provided a handwritten statement with ASA Saucedo.

¶ 57 Defendant also urges this court to find Anthony's testimony so unreliable that a reasonable trier of fact could not possibly believe it. Specifically, defendant argues that Anthony's testimony is incredible where he testified he never saw a gun in the victim's possession even though the victim freely showed the firearm to Commings. In addition, defendant finds it incredible that Anthony would not drive the victim to the hospital, but instead went to his

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grandmother's house after the shooting. However, Anthony testified that he checked the victim's pulse and knew he was dead, he was fearful that defendant would shoot him, and he went to his grandmother's house to tell his family about the incident. Again it is the purview of the jury, as the trier of fact, to determine the credibility of witnesses and the weight to be given their testimony, as well as draw reasonable inferences from the evidence presented. See *Ortiz*, 196 Ill 2d at 259.

¶ 58 Defendant's reliance on the testimony presented by O'Dell and Watson regarding a 2003 incident in which the victim allegedly used a gun—although defendant did not know about the incident at the time of the shooting in question—is unpersuasive. Defendant argues that, "[i]f [defendant] knew of [the victim's] prior acts, this knowledge would have affected [defendant's] response when [the victim] pointed a gun at [defendant's] head." Aside from the fact that both witnesses testified at trial that, in the 2003 case, they only identified the victim as the shooter because of the dark-complected skin on his hand and they never actually saw the shooter's face, we are hard-pressed to imagine how any previous incident—no matter how violent—could reasonably affect a person's decision to act in self-defense when the person had no knowledge of the prior event.

¶ 59 We also disagree with defendant's characterization that the evidence was "uncontested" that the victim was holding a loaded gun when he was shot. The evidence, in fact, is contested as to whether the victim was holding a gun at the time he was shot and killed by defendant. Moreover, the evidence is clearly contested as to whether, even if the victim was holding a gun, he actually aimed that gun at or demonstrated the gun in any way to defendant. Defendant

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presented testimony to support his theory that the victim aimed a gun at him before defendant killed the victim, and the State presented eye witness testimony showing that the victim did not have a gun in his hands and did not point a gun at defendant at the time defendant killed him. Again, the jury is entitled to determine the credibility of witnesses and the weight to be given their testimony, as well as draw reasonable inferences from the evidence presented. See *Ortiz*, 196 Ill 2d at 259.

¶ 60 When viewed in the light most favorable to the state, the evidence presented at trial negated defendant's claim of self-defense and firmly established that defendant was guilty of second degree murder beyond a reasonable doubt. We affirm defendant's conviction.

¶ 61 b. Sentencing

¶ 62 Next, defendant contends his sentence is excessive. Specifically, defendant argues that the trial court abused its sentencing discretion by sentencing him to the maximum term for second degree murder, ignoring: his strong rehabilitative potential, demonstrated by 46 years of living a generally non-violent lifestyle; the particular facts of this case; his remorse; his family ties; his education; and his history of employment. We disagree.

¶ 63 A trial court has broad discretion in determining an appropriate sentence. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A reviewing court will reverse the trial court's sentencing determination only where the trial court has abused its discretion. *Patterson*, 217 Ill. 2d at 448. A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense.

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*People v. Henderson*, 354 Ill. App. 3d 8, 19 (2004). The trial court may appropriately consider the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age when sentencing a defendant. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Where mitigating evidence is presented to the trial court, it is presumed, absent some indication other than the sentence itself to the contrary, that the court considered it. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). When determining the propriety of a particular sentence, we cannot substitute our judgment for that of the trial court simply because we would weigh the sentencing factors differently. *Fern*, 189 Ill. 2d at 53.

¶ 64 Defendant was convicted of second degree murder, a Class 1 felony, which is punishable by not less than 4 years' and not more than 20 years' imprisonment. 730 ILCS 5/5-4.5-30 (West 2008). Here, defendant was sentenced to 20 years' imprisonment, which is within the permitted statutory sentencing range.

¶ 65 At sentencing, the victim's mother testified in aggravation regarding the impact the victim's death has had on his family. The State introduced certified copies of defendant's four prior felony convictions: three convictions for possession of a controlled substance and one conviction for possession of a stolen motor vehicle. The State argued for the maximum sentence, calling defendant an "unrepentant forty-six year old felon who has not shown the slightest bit of remorse for his actions. It is abundantly clear that the prospect of rehabilitation is not good."

¶ 66 In mitigation, the defense argued that defendant had earned his GED, has a work history, and could be rehabilitated. The defense asked for "less than" the maximum sentence. Defendant then spoke in allocution, explaining his version of events and telling the victim's family, "I am

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sorry that he died. In all actuality, he was trying to kill me and I was fearing for my life."

¶ 67 In announcing defendant's sentence, the trial court stated:

"THE COURT: The court has considered the victim impact statement, except for the portion that I had stricken that was presented in aggravation and considered the entire presentence investigation that was prepared here and considered the prior convictions of [defendant], as well as the remainder of the presentence investigation.

I have considered the arguments of counsel, both in aggravation and mitigation, afforded [defendant] the opportunity to allocute which he has done and went into the facts, what he believed the facts of the case are or were.

And I have considered the - - each of the pertinent factors that are set forth in the statute with regards to aggravation and mitigation.

When I step back and look at everything, I think it is important to note that this, Mr. Mayberry, is your fifth felony conviction. And things seemed to have escalated because in this felony conviction, another human being has lost his life. And I have considered that and I have considered the entire fact of the case that this court heard on those facts that were facts that were

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sworn and testified today under oath.

I am going to respectfully disagree with the defense and I do believe the appropriate sentence is twenty years in the Illinois Department of Corrections."

¶ 68 Based on this record, which establishes that the trial court considered appropriate mitigating and aggravating factors, and sentenced defendant to a term within the permissible sentencing range, we find the trial court did not abuse its discretion.

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 71 Affirmed.