

No. 1-11-1494

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PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 10 CR 607
)	
TERRELL COBBS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant's conviction for second degree murder and sentence of 28 years' imprisonment were affirmed where the State disproved defendant's affirmative defense to the murder beyond a reasonable doubt and where the trial court considered all of the relevant factors before imposing sentence. Mittimus corrected.

¶ 2 Following a bench trial, defendant Terrell Cobbs was found guilty of second degree murder and sentenced to 28 years' imprisonment. On appeal, defendant contends that: 1) the State failed to prove his guilt beyond a reasonable doubt; 2) his sentence was excessive given the presence of mitigating factors and his rehabilitative potential; and that 3) his mittimus should be

corrected to reflect only one conviction and sentence for second degree murder.

¶ 3 Defendant was arrested and charged by information with six counts of first degree murder in connection with the shooting death of the victim, Gregory Hampton. Prior to trial, defendant raised defense of dwelling as an affirmative defense. Defendant claimed that killing Hampton was justified due to Hampton's violent entry into defendant's apartment and defendant's subjectively reasonable belief that Hampton would assault defendant and others in his dwelling. The following evidence was presented at trial.

¶ 4 Jeanace Evans testified that she had been in a relationship with the victim for 10 years at the time of his death and that the victim was the father of her three children who were ages five, seven, and nine. Evans and the victim lived together in the third-floor apartment of a three-flat building located at 3428 West Douglas in Chicago, Illinois. Each floor of that building had one apartment and there was one staircase leading to each floor. Lichelle Hassell and defendant lived in an apartment on the second floor of the building.

¶ 5 On November 24, 2009, Evans was taking the garbage out when she saw a fire on the back porch of Hassell's apartment. She knocked on Hassell's back door and informed her of the fire. Hassell and defendant put out the fire and then defendant argued with Evans as to whether she started the fire. Later that night, Evans had another argument with defendant at the front door of Hassell's apartment. Evans testified that defendant hit her in the face multiple times during the argument. Evans gathered her children, went to the first floor of the building and called the police, her mother and the victim. The police arrived and spoke with Evans. While they were doing so, the victim arrived at the apartment building. The victim looked at Evans'

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face and said that he was going to Evans' mother's house. Evans was sitting in a police car filling out a police report when she heard Hassell yelling out of her window "[c]an y'all come and get him because he's trying to kick my door down." Evans testified that the police did not do anything after Hassell yelled out of the window. After finishing the report, Evans returned to her apartment. A short time later her doorbell rang and Evans saw from her window that it was her mother. She sent her son downstairs to open the door. Evans then heard gunshots and saw her son and mother run through the door of her apartment. Evans heard more gunshots and then the victim walked into the apartment toward Evans, grabbed his chest and said, "he shot me." The police and paramedics arrived shortly thereafter. Evans herself then went to the hospital, where she remained for two days due to head trauma.

¶ 6 Ashley Smith and Lacy Moore also testified for the State. They were together during the incident and testified to substantially the same sequence of events. Smith testified that she was a friend to Evans and the victim and that she had a son with Moore. Moore testified that Evans was his sister and that Smith was his girlfriend. On the evening of November 24, 2009, Smith and Moore were together when Moore received a call from the victim, who said that defendant had beaten Evans. Smith and Moore met the victim at Moore's mother's house. Smith, Moore, Moore's mother and the victim drove to defendant's apartment. The victim drove in his own vehicle while the other three drove together in a separate vehicle. The group rang the building's doorbell and Evans' son came downstairs and opened the door. The victim then ran back to turn off his car while Moore's mother and Evans' son walked up the stairs. The victim returned from his car and along with Smith and Moore entered the building and walked up the stairs. The

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victim stopped at the second-floor apartment and knocked on the door. Hassell opened the door "slightly" and the victim "opened it a little bit more with his shoulder." The victim asked Hassell if defendant was in the apartment and she replied that he was not. The victim did not yell at Hassell, threaten to harm her or her children and did not force himself in the apartment. Instead, he turned around to walk up the stairs to the third-floor apartment and Hassell closed the front door. That door then swung open and defendant came out of the apartment firing a handgun. The victim's back was turned to defendant as he ran up the stairs to get away and defendant chased after the victim while continuing to fire his handgun until it ran out of ammunition. After the firing stopped, Smith heard two clicking sounds from defendant's gun and Moore heard three to four clicks. Defendant turned around, walked down the stairs and entered his apartment. Smith and Moore ran down the stairs and Moore called the police. Smith and Moore both testified that they did not see the victim carrying a weapon during the evening of the shooting.

¶ 7 On cross-examination, Smith acknowledged giving a handwritten statement to a detective and an Assistant State's Attorney (ASA) indicating that the after the victim knocked on the door, he pushed the door open with his shoulder and stood inside the entry to the apartment and continued to ask the woman who answered the door "where that n**** at?" Under cross-examination, Moore testified that the victim was in the process of turning around and away from the door to the second-floor apartment when that door opened and defendant fired the first shots.

¶ 8 The parties stipulated that if called as a witness, Rashida Green would testify that she was alone with Herman Cobbs, defendant's brother, in their apartment at 2950 West Harrison when defendant barged into their bedroom. Defendant was carrying a handgun with a washcloth

wrapped around it, which he hid inside a light fixture in the bathroom. Green relayed this information to the police.

¶ 9 Peter Larcher, a forensic investigator, testified that he arrived at the defendant's building after the shooting and that he took pictures of the exterior and interior of the building, including the second and third-floor apartments. Larcher photographed and recovered evidence from the building, including a fired bullet that was found on the second floor landing. Larcher also photographed and identified damage to the door frame of the defendant's apartment. He then proceeded to 2950 West Harrison, where he recovered and photographed the handgun that defendant had placed in the light fixture. Larcher testified that there were no bullets in the gun.

¶ 10 Chicago police officer Keith Fuelling and his partner were working on the evening of November 24, 2009, when they heard a flash message on their radio that a man had been shot and that defendant was the suspect. The officers responded to 2950 West Harrison Street and knocked on the door of an apartment in that building. Someone identifying himself as defendant's father answered the door and said that defendant was not there. Officer Fuelling's partner could see someone inside the apartment who matched defendant's description. Officer Fuelling again knocked on the door and was let in by the man identifying himself as defendant's father. The officer eventually found defendant in a bedroom and he initially identified himself as "Ernie Banks" before admitting his real name. Defendant was taken into custody.

¶ 11 The Medical Examiner's report documenting the victim's injuries was admitted into evidence. The victim's injuries were all caused by six gunshot wounds. The first bullet entered the victim's body on the right side of the back, coursing from back to front and damaging the

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right atrium and right ventricle of the heart before lodging itself in the lower chest. The second bullet entered on the lateral right side of the chest and coursed, from right to left and back to front, through the body before lodging itself in the upper abdomen. The third bullet entered on the lateral right upper abdomen, coursing through the body from right to left, back to front, and upward until it exited the body on the medial right side of the lower chest. The fourth bullet entered on the anterolateral right forearm, coursing from right to left through the tissue and musculature of the right forearm before exiting the body on the anterior right forearm. The fifth bullet entered on the anterolateral right thigh, coursing from right to left and upward through the tissue and musculature of the right thigh before exiting the body on the anterior right thigh. The sixth bullet entered on the lateral right thigh, coursing through the musculature of the right thigh and exiting on the medial right thigh. The sixth bullet then reentered the body on the medial left thigh and coursed from right to left through the tissue and musculature of the left thigh before lodging itself in the musculature of the left thigh. Examination of the skin around the entrance wounds of all six bullets revealed no evidence of close-range firing.

¶ 12 The State then rested its case and Defendant called Hassell as a witness. Hassell testified that on November 24, 2009, she was living with her three children and defendant in a second-floor apartment located at 3428 West Douglas. The apartment had a back door and three bedrooms. One of the bedrooms was near the front entrance of the apartment and the other two bedrooms were in the back of the apartment. Hassell testified that in the evening of November 24, 2009, Evans knocked on the back door of her apartment and said that there was a small fire near the back door. Several minutes later Evans knocked on the front door of Hassell's apartment

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and, when Hassell opened the door, Evans began yelling at her and defendant. Evans and defendant then argued in the second-floor hallway and eventually got into a physical fight.

Hassell testified that Evans initiated the fight by striking defendant. After the fight, defendant went back into the apartment and Hassell called the police.

¶ 13 Approximately five minutes later, Hassell looked out of her living room window and saw police arrive at her building and speak with the Evans. The victim then arrived and yelled up at the window to Hassell and said, "b****, come open up the door because I am fixin[g] to get Terrell and you and your kids." Hassell yelled down at the police officer, "did you hear what he just said?" but the officer did not say or do anything in response. Hassell then called family members to let them know about the situation. She was on the telephone when she heard the victim kick her front door. Hassell called the police again and as she was speaking with a 911 operator she heard another kick to her front door. The 911 recording was played and the trial court stated that it heard "what sounded like kicking in the background consistent with her saying a door was being kicked." Hassell testified that the victim then kicked open her front door and entered her apartment. The victim told Hassell that he was going to "kill [defendant] and beat [Hassell] and [her] kids' a**." Defendant was in the bedroom at this time and Hassell's children were next to her. Hassell yelled to the police officers who were still outside and those officers came up to her apartment. She showed them the damage to her door, which had been kicked off the hinges and would not close or lock. At some point the officers left and Hassell observed two vehicles pulling up to the building. The victim and several other men and a woman exited the vehicles. Hassell and defendant put a table up behind the front door in an attempt to keep it

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closed. Shortly thereafter, Hassell was standing by the rear bedroom door when the victim kicked open Hassell's front door and entered her apartment. Hassell testified that the victim did not knock on her door and that she did not give him permission to enter the apartment.

Defendant and Hassell's three children were in the apartment at this time. The victim was standing in Hassell's apartment so Hassell went into her son's rear bedroom, closed the door and called police.

¶ 14 Hassell acknowledged that she did not see a gun or any other weapon in the victim's hands when he reentered the apartment. Hassell testified that after the victim reentered her apartment, she did not see him turn around and leave or defendant running from the rear of the apartment with a gun because she was in the rear bedroom with the door closed speaking on the phone with the police. Hassell acknowledged speaking to a detective and telling him that after the victim kicked open her door the second time and entered the apartment, the victim was exiting her apartment when defendant ran towards the front door holding a gun. Hassell further acknowledged that when she called 911, she did not tell them that the victim threatened her and her children when he yelled up to her from outside of her building. Hassell also acknowledged that on the 911 tape played in court she said the victim was "trying" to kick open her door but she reiterated that the victim did in fact enter her apartment. Hassell testified that she spoke with an ASA and another detective the day after the shooting. She acknowledged telling them that defendant was not in the apartment when the victim kicked open her door and entered her apartment and that when the victim asked where defendant was, she told him that he was not in the apartment. Hassell testified that she was referring to the first time the victim entered the

apartment when she made those statements but acknowledged telling the ASA and detective that the victim started to leave the apartment and that she then saw defendant running towards the front door with a gun in his hand. On redirect examination, Hassell testified that what she told the ASA and the detective about defendant running toward the front door was not the truth and that she made those statements because she was scared and afraid that she would be arrested for possessing the gun.

¶ 15 Chicago police officer John Boutris and his partner, Officer Wolfort, testified that he responded to a battery call at 3428 West Douglas on November 24, 2009. The officers met with Evans, who told them about an altercation she had with defendant. The victim approached the apartment building as the officers were speaking with Evans and they spoke briefly with him. The victim then left and the officers escorted Evans to the police vehicle to prepare a case report. The victim reappeared and went inside the apartment building. Officer Boutris heard Hassell yelling out of her window that the victim was "kicking down [her] door." The victim then walked out of the apartment building and Officer Boutris and his partner entered the building and walked up to the second floor to check on Hassell. The officer observed that Hassell's apartment door was broken in and could not be closed or locked. The officers spoke with Hassell and asked about defendant's current location. Hassell let the officers into the apartment and they briefly searched for defendant but did locate him. Boutris offered to file a report for Hassell's door and Hassell stated that she was going to have her landlord repair it.

¶ 16 Defendant testified on his own behalf. He acknowledged that he was convicted of six offenses from 2001 to 2006 and that those convictions were for possession of a controlled

substance, possession of a controlled substance with intent to deliver and delivery of a controlled substance. Defendant testified that he was home with Hassell and her three children on the evening of the incident. Defendant was sitting at the kitchen table when Evans knocked on the front door. They spoke briefly and defendant returned to the kitchen table. Soon Evans knocked on the rear door, which Hassell answered. Evans told Hassell that somebody had set a fire at their back door but that she did not know who had done so. Hassell called defendant over to the door and he put out the fire. Defendant told Evans that he did not know why she would start the fire and then he shut the door. Evans then started beating on the front door of the apartment and when defendant opened the door he and Evans got into an argument. Evans hit defendant on the left side of the face and then defendant "hit her back." Defendant and Evans exchanged blows for about 20 seconds. Evans said something about calling the victim and defendant went back into the apartment and locked the door.

¶ 17 Defendant began to look out of the living room window to see if the victim was coming while Hassell called family members who could drive them to a safe location. Defendant eventually saw a police car pull up to the building and Evans approach the car and speak with the police. Defendant then saw the victim arrive at the building. Defendant went into the back bedroom and hid in the closet because he was scared of the victim. While in the closet, defendant heard the front door being kicked open then heard Hassell scream and the victim say, "where that b**** a** n**** at, I'm fint [*sic*] to kill him." At some point after the arguing stopped, defendant heard Hassell speaking to the police and explaining that the victim had kicked open the door. Defendant did not leave the bedroom and tell the police what happened because

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he did think they could protect him from the victim. After the police left, defendant came out of the bedroom and saw that the front door had been kicked off the hinges. Hassell was still in the apartment with the children and she told defendant that her father was on his way over.

Defendant and Hassell used a table and a case of water to prop up the front door. As defendant was waiting for Hassell's father to arrive, he looked out the window and saw two vehicles pull up to the apartment building. Approximately five people exited the vehicles and approached the building, including the victim and Moore. Defendant told Hassell to take the children and hide while he returned to the bedroom and hid in the closet. At some point he heard "the front door being opened, like I heard my table *** being moved." Defendant heard the victim say "that b**** a** n**** ain't in here" and "as a matter of fact, b****, I'm fint [*sic*] to beat you and your kids' a**." He next heard Hassell scream and run towards the rear of the apartment.

¶ 18 Defendant testified that Hassell had a gun in her purse that was hanging in the same closet in which he was hiding. He grabbed the gun, came out of the closet and stood by the front door. Defendant explained that he had grabbed the gun because of the threats the victim made to Hassell and the children. Defendant then heard Hassell walking toward the back of the apartment so he opened the door, came into the inner hallway of the apartment and saw the victim standing in the hallway near his one of Hassell's son's bedroom. The victim was standing approximately five feet from defendant and had his hands in the front pocket of his hooded sweatshirt. Defendant asked the victim "what's going on," and the victim turned around and said, "I am fint [*sic*] to kill your b**** a**." The victim's hands were still in the pocket and it seemed to defendant that "[the victim] was fint [*sic*] to pull it out." The victim came towards defendant

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and then defendant "just started pulling the trigger" because he feared for his life. Defendant's eyes were open as he initially fired and he wondered if the gun was real because the victim kept approaching. Defendant closed his eyes and heard a click. He reopened his eyes and saw the victim running in the hallway and then up the stairs toward the third-floor apartment. Defendant ran out the back door of the apartment to his mother's house at 2950 Harrison Street, where he was eventually arrested by police. He explained that he ran because he was scared and that he did not go to the police because he did not see them around. Defendant did not know why he initially told the police that his name was "Ernie Banks." The defense then rested its case.

¶ 19 The trial court found defendant guilty of second degree murder. The court began its ruling by stating that the victim's murder was not justifiable and that it was a violent criminal act. Nevertheless, the court stated that it considered the killing in context of the physical fight between defendant and Evans and the kicking of Hassell's door by victim. The court stated that defendant's version of events "was not exactly consistent with the evidence in this case, particularly from other witnesses and from the coroner about where the gunshots were fired, and I didn't believe everything [defendant] was saying." The court further stated that it was a "close case" between first and second-degree murder but that the killing "was not in any way justifiable." The court said it could not ignore the evidence about the door being kicked in and the victim having a motivation to confront defendant because he "started all the violence in the first place by acting as he did." After finding defendant guilty, the court noted that defendant was "Class-X mandatory" for purposes of sentencing.

¶ 20 At the subsequent sentencing hearing, the court reiterated that there was no question

defendant was guilty of murder but that it was a close case as to whether it was first or second degree murder. The court observed that there "was only one gun that was there" and stated that it rejected defendant's suggestion that he thought the victim had a gun and that the court found the killing to be "completely unnecessary." The court stated that it had looked carefully at defendant's life through the pre-sentence investigation and found that he produced "virtually nothing positive to anybody, albeit he has some people that do care about him." The court noted that defendant had been convicted of five felonies, had been imprisoned on three occasions, had a history of delinquency and had never finished high school. The court also stated that it did find some mitigating factors and that it expressed them "as dramatically" as it could by finding defendant guilty of second degree murder instead of first degree murder. Again noting defendant's mandatory Class X status, the court sentenced defendant to 28 years' imprisonment on Counts 1, 2, and 3 and stated that the sentences would run concurrently and would merge. Defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 21 Defendant first challenges the sufficiency of the evidence to sustain his conviction for second degree murder. When a defendant raises such a challenge, the reviewing court must determine whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable

doubt as to the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶ 22 Defendant was charged with first degree murder but found guilty of second degree murder. Section 9–2 of the Criminal Code of 1961 provides that a person commits second degree murder when he commits first degree murder and a mitigating factor is present. 720 ILCS 5/9–2(a)(2) (West 2008). The elements of first and second degree murder are identical. *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995). Second degree murder differs from first degree murder only in the presence of a mitigating factor, such as an alleged provocation or an unreasonable belief in justification. *People v. Porter*, 168 Ill.2d 201, 213 (1995).

¶ 23 Where a defendant raises an affirmative defense, the State bears the burden of disproving the defense beyond a reasonable doubt. *People v. Rogers*, 263 Ill. App. 3d 120, 126-127 (1994). In this case, defendant raised an affirmative defense that he justifiably used deadly force in defense of his dwelling and the people inside of it. The statute defining this affirmative defense states:

"(a) A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if:

(1) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling,

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or

(2) He reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling." 720 ILCS 5/7-2 (West 2008).

Our supreme court has held that the use of deadly force in defense of a dwelling is justified only when two elements are present: first, the victim's entry must be made in a violent, riotous, or tumultuous manner and second, the defendant's subjective belief that deadly force is necessary to prevent an assault upon, or an offer of personal violence to, him or another in the dwelling must be reasonable. *People v. Sawyer*, 115 Ill.2d 184, 192 (1986).

¶ 24 Defendant first claims that the victim's reentry into the apartment was violent, riotous and tumultuous. The trial court was presented with two competing versions of events on this issue. In defendant's version, the victim kicked down defendant's apartment door, entered the apartment and threatened to beat defendant's girlfriend and her children. In the State's version, the victim knocked on the apartment door, which Hassell opened "slightly." According to Smith, the victim did not force the door open but instead "pushed the door open a little more" with his shoulder. Smith further testified that the victim did not walk inside the apartment but was only partway inside the door. Moore similarly testified that the victim had his shoulder at the door, that he did not push the door and that the victim's shoulder was inside the apartment door. Both Smith and Moore testified that the victim did not yell at Hassell when she opened the door but instead had a conversation with her and asked if the victim was in the apartment. When she replied that he was not, the victim turned away from the door to walk up the stairs and Hassell closed the door. Defendant then opened the door and came out of the apartment firing a weapon.

¶ 25 When presented with conflicting versions of events from witnesses, it is the trial court's responsibility to determine the credibility of those witnesses and to determine which version to believe. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001). In this case, the trial court chose to believe the version presented by the State through the testimony of Smith and Moore, who were eyewitnesses to the shooting, and did not believe defendant's version of events. That testimony established that the victim did not enter defendant's apartment in a violent, riotous and tumultuous manner, as he knocked on the apartment door first, only nudged the door with his shoulder after Hassell opened the door and was not completely inside the apartment before he turned to walk up the stairs and Hassell shut the door. See *Sawyer*, 115 Ill.2d at 193 (finding that the victim's entry into the defendant's house by opening the door and walking inside, while unlawful, was not violent, riotous, or tumultuous). Other evidence corroborated the State's version of events and contradicted defendant's version. A fired bullet was recovered from the hallway outside of defendant's apartment and the medical examiner's report stated that three of the six bullets coursed through Hampton's body from back to front and that the other three bullets coursed from side to side, which suggested that the victim was not facing defendant or inside his apartment when he was shot. Viewed in the light most favorable to the State, we find that the evidence presented at trial was sufficient to prove beyond a reasonable doubt that the victim did not enter defendant's apartment in a violent, riotous or tumultuous manner.

¶ 26 Defendant next claims that he reasonably believed that deadly force was necessary to prevent an assault by the victim upon himself, Hassell and her children. Our supreme court has explained the relevant considerations on this issue:

"In the context of self-defense, it is the defendant's perception of the danger, and not the actual danger, which is dispositive. [Citation.] Defense of dwelling differs from self-defense in that, unlike self-defense, defense of a dwelling 'does not require danger to life or great bodily harm in order to invoke the right to kill.' (*People v. Eatman*, 405 Ill. 491, 497 (1950)). Nevertheless, as in cases of self-defense, the issue in defense of a dwelling is whether the facts and circumstances induced a reasonable belief that the threatened danger, whether real or apparent, existed. The reasonableness of a defendant's subjective belief that he was justified in using deadly force is a question of fact for the jury to determine. [Citation.]" *Sawyer*, 115 Ill. 2d at 184.

¶ 27 Defendant initially argues that the trial court misapprehended the law when it stated that defendant could have reasonably expected to be battered by the victim but that the killing was not justified because the court did not believe defendant's suggestion that the victim had a gun. Defendant asserts that he did not need to fear for his life in order to "invoke the right to kill" and therefore his fear of being battered by the victim was sufficient to find the killing justified. We disagree.

¶ 28 The trial court did not misapprehend the law in finding defendant guilty. The court is presumed to know the law and apply it properly unless the record shows strong affirmative evidence to the contrary. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). We find no such evidence in the record. It is true that defense of dwelling does not require danger to life or great bodily harm in order to use deadly force. See *Sawyer*, 115 Ill. 2d at 184. However, defendant still must

have reasonably believed that deadly force was necessary to prevent the assault. See 720 ILCS 5/7-2 (West 2008); *Sawyer*, 115 Ill. 2d at 184. The trial court's comments merely reflected the court's finding that even if defendant believed deadly force was necessary, his belief was not subjectively reasonable under the circumstances.

¶ 29 Moreover, a rational trier of fact could have found that defendant's belief that deadly force was necessary was not subjectively reasonable. Again, there were two competing versions of events on this issue. According to defendant's version, the victim initially kicked open defendant's apartment door, entered the apartment and threatened to kill defendant, his girlfriend and her children. The victim left but returned with Smith and Moore. He reentered defendant's apartment and again made threats to kill defendant and batter his girlfriend and her children. At this point defendant exited the bedroom closet in which he was hiding and walked out to the hallway of the apartment carrying a gun that he took from Hassell's purse. The victim appeared to be concealing a gun in his pocket and was standing five to six feet away from defendant and near one of the children's bedrooms. The victim made further verbal threats and then approached defendant. It was only then that defendant fired his weapon and he did so multiple times only because the victim continued to approach him and defendant fired the gun. At some point defendant closed his eyes and continued to fire his weapon until it ran out of bullets. He opened his eyes and saw the victim running out of the apartment and up the stairs to the third floor.

¶ 30 According to the State's witnesses' version of events, the victim returned to defendant's apartment and knocked on the front door. The victim did not force the apartment door open or enter the apartment, but instead simply asked if defendant in the apartment. When Hassell said

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that defendant was not there, the victim turned away from the door to walk up the stairs to the third floor apartment and Hassell shut the door. Defendant's apartment door then opened and defendant ran out the apartment and chased the victim up the stairs while firing at him repeatedly.

¶ 31 Again, as it was entitled to do, the trial court chose to believe the State's witnesses' version of events and did not believe defendant's version. The medical examiner's report further supported the testimony presented by the State. Half of the fired bullets coursed through the victim's body from back to front and the other half coursed from side to side. None of the bullets were found to have entered the body from the front and coursed from front to back and none of the shots were fired from close range. Considering that defendant testified that the victim was approximately five feet away and approaching him when defendant began firing, his version of the events is contradicted by the medical examiner's findings.

¶ 32 The evidence put forth by the State established that the victim did not enter defendant's apartment or approach him with a gun but instead had turned away from the apartment door and was walking up the stairs when defendant came out of the apartment and shot the victim in the back. This evidence was sufficient to prove beyond a reasonable doubt that defendant's belief that deadly force was necessary was not subjectively reasonable. In its role as the trier of fact, the trial court made this determination and we have no basis to disturb it. Again, when viewed in the light most favorable to the State, we find that the evidence was sufficient to prove defendant guilty of second degree murder beyond a reasonable doubt.

¶ 33 Defendant next contends that this sentence was excessive in light of his rehabilitative

potential and several mitigating factors that were brought to the court's attention. These factors include defendant's prior convictions being nonviolent drug-related offenses, the events occurring before the murder, the court stating that it was a close case between first and second-degree murder and defendant apologizing to the victim's family at trial.

¶ 34 When mitigating evidence is before the court, it is presumed that the trial court considered such evidence, absent some indication to the contrary other than the sentence imposed. *People v. Redmond*, 265 Ill. App. 3d 292, 307 (1994). Here, defendant offers no evidence, other than the sentence imposed, to indicate that the trial court did not adequately consider the mitigating evidence. Furthermore, the trial court explicitly stated that it "did find some mitigating factors for [defendant] and expressed them as dramatically as [it] could by making this finding second degree murder instead of first degree murder." The court also heard and considered the evidence in aggravation, including the nature of the offense and defendant's criminal history. Regarding defendant's rehabilitative potential, the court stated that it looked carefully at defendant's life through the pre-sentence investigation and found that he had "been in trouble most of the time" that he had "produced virtually nothing positive to anybody" and that he did have people that "care[d] about him." The court also stated that it had considered all of the factors in "totality" before imposing sentence, including that defendant was a five-time convicted felon and that he had never finished high school. Our review of the record shows adequate consideration of all of the relevant factors and, as a reviewing court, we will not reweigh those factors or substitute our judgment for that of the trial court. *People v. Streit*, 142 Ill. 2d 13, 19 (1991) (a reviewing court will not substitute its judgment for that of the sentencing

court merely because it might have weighed the factors involved in the trial court's sentencing determination differently).

¶ 35 Defendant next argues that his 28-year sentence is inconsistent with the trial court's statement that it was a close case between first and second degree murder. Defendant claims that his sentence is significantly greater than the minimum 20-year sentence for first degree murder and the maximum 20-year sentence for second degree murder. Therefore, defendant asserts, the court essentially punished defendant for committing intentional, unmitigated murder. We find no merit in this argument. Defendant was sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Code of Criminal Procedure (the Code), which provides that "[w]hen a defendant *** is convicted of a Class 1 or Class 2 felony, after having twice been convicted of any Class 2 or greater Class felonies in Illinois, *** such defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 2008). There is no dispute that as a result of defendant's criminal history, the court was required to sentence him as a Class X offender. The sentencing range for a Class X felony is 6 to 30 years' imprisonment. See 730 ILCS 5/5-8-1(a)(3) (West 2008). Therefore, defendant's comparison of his sentence to the sentencing range for first and second degree murder is inapposite. Moreover, the sentencing range for first degree murder is 20 to 60 years' imprisonment. See 730 ILCS 5/5-4.5-20 (West 2008). Therefore, defendant is incorrect when he states that his 28-year sentence is significantly greater than the minimum for first degree murder. Finally, section 5-5-3(c) of the Code was designed by the legislature to enhance regular sentences due to prior criminal behavior (*People v. Thomas*, 171 Ill.2d 207, 221 (1996)), it was not an abuse of discretion for the trial court to extend the sentence beyond the

maximum for second degree murder and within the Class X sentencing range.

¶ 36 Defendant's final contention is that his mittimus should be corrected to reflect only one conviction and sentence for second degree murder. Defendant was charged with six counts of first degree murder. At the conclusion of trial, the court found that the State had met its burden of proof on "all counts" as to the offense of second degree murder. At sentencing, the court imposed three concurrent, 28-year sentences and stated, "[t]he sentence will be 28 years in the penitentiary on Counts 1, 2 and 3 *** they all merge." Nevertheless, defendant's mittimus reflects three convictions for second degree murder and three corresponding concurrent sentences of 28 years' imprisonment.

¶ 37 Defendant asks that the case be remanded to the circuit court with instructions to correct his mittimus so that it is consistent with the court's oral pronouncement. The State agrees that the court indicated that counts 1, 2 and 3 should merge but requests that the case be remanded so that the trial court can enter a sentence on counts 4, 5 and 6 and correct the mittimus to merge all counts into count 1.

¶ 38 In criminal cases, the one-act, one-crime doctrine prohibits the imposition of multiple convictions based upon a single act and provides that only a conviction for the most serious offense may be sustained. See *People v. King*, 66 Ill. 2d 551, 566 (1977); *People v. Pearson*, 331 Ill. App. 3d 312, 321–22 (2002). When a defendant is convicted of murder and there is only one decedent, there can only be one murder conviction. See *People v. Walton*, 378 Ill. App. 3d 580, 590 (stating that under one-act, one-crime principles, "[b]ecause there was only one person murdered, [the defendant's] dual convictions cannot stand"); *People v. Pitsonbarger*, 142 Ill. 2d

353, 377 (1990) ("[a] defendant cannot be convicted of more than one murder arising out of the same physical act"). As defendant points, the trial court also stated that all three of defendant's convictions were to merge. Where the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007).

¶ 39 In this case, there was only one murder victim and therefore defendant's convictions on counts 2 and 3 cannot stand. For this same reason, we decline the State's request to remand the case so that convictions and sentences can be entered on count 4-6. This court has the authority to correct the mittimus at any time without remanding the matter to the trial court. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008). Accordingly, we direct the clerk of the circuit court of Cook County to correct defendant's mittimus to reflect only one conviction and sentence for second degree murder on Count 1 and that the remaining Counts 2-6 are merged. See *Walton*, 378 Ill. App. 3d at 590 (vacating defendant's conviction for the less serious murder offense of which he was convicted).

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and direct that the mittimus be corrected.

¶ 41 Affirmed; mittimus corrected.