2015 IL App (1st) 130185-U
No. 1-13-0185

THIRD DIVISION
August 5, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10CR8310
	)	
STEPHEN RIGGS,	)	
	)	The Honorable
Defendant-Appellant.	)	Mary Margaret Brosnahan,
	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's involuntary manslaughter conviction reversed and the cause remanded for a new trial where the issues instruction for that offense that the circuit court provided to the jury failed to contain a proposition that informed the jury that the State was required to prove that the force defendant employed against the victim was not justified in order to convict him of that offense.

¶ 2 Following a jury trial, defendant Stephen Riggs was convicted of involuntary manslaughter and was sentenced to 5 years' imprisonment. Defendant appeals his conviction and the sentence imposed thereon, arguing: (1) he was not proven guilty of the offense of involuntary

manslaughter beyond a reasonable doubt; (2) the jury did not receive an appropriate set of jury instructions; and (3) the circuit court erred in precluding defense counsel from cross-examining a witness about the victim's reputation for violence and mental illness. For the reasons set forth herein, we reverse defendant's conviction and remand the cause for a new trial.

¶ 3 BACKGROUND

¶ 4 On March 31, 2010, Joshua Spencer was stabbed in the neck outside of his apartment building located at 4626 North Magnolia Avenue. He subsequently succumbed to his injuries and died on April 8, 2010. Defendant, another resident of the same apartment building, was charged with various offenses in connection with Spencer's death including first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)). Defendant ultimately elected to proceed by way of a jury trial.

¶ 5 At trial, eyewitness Clarence Miller, also a resident of the 4626 North Magnolia Avenue apartment building, testified that on March 31, 2010, at approximately 7 p.m. he was standing in front of a Starbucks coffee shop located near the intersection of Wilson Avenue and Magnolia Avenue when he observed defendant and Spencer arguing. Although the two men were "up on each other" arguing, Miller testified that they were not pushing or shoving each other. He specifically recalled that Spencer's hands were down at his side when defendant reached into his pocket, pulled out a knife and stabbed Spencer in his throat. Afterwards, Miller testified that Spencer "just stood there" and said, "Man, why did you—you know, you stabbed me." Defendant responded by telling Spencer that he was going to call the police and began walking toward the apartment building. Although Spencer had been stabbed, Miller recalled that he remained upright, held his throat, and then followed defendant "slowly" into the apartment

complex. Shortly thereafter, Spencer exited the building and fell to the ground. Miller testified that he never saw Spencer with a weapon or saw him raise his hands prior to being stabbed.

¶ 6 On cross-examination, Miller denied testifying during earlier proceedings that defendant stepped away from Spencer during their argument and that defendant only stabbed him after Spencer "kept coming" after him. He also denied testifying that Spencer looked like he was "getting ready to hit [defendant]" prior to being stabbed. Miller confirmed, however, that although he heard the two men arguing, he did not hear the content of their argument. He further confirmed that the argument was not lengthy, that the stabbing happened within seconds, and that Spencer had never actually raised his arms or tried to hit defendant prior to being stabbed.

¶ 7 Adam Kuhn, another eyewitness to the incident, testified that on March 31, 2010, at approximately 7 p.m., he and his family were eating dinner on the front porch of their residence, which was located at 4609 North Magnolia Avenue, when he heard two men arguing. The argument was taking place "directly across the street" and Kuhn observed "one man attack[] the other." He identified defendant as the aggressor. Kuhn testified that prior to that attack, neither man had exhibited any physical aggression during the argument and that there had been "absolutely no physical contact between the two [men]." Kuhn confirmed that he did not observe a weapon in Spencer's hands or see him raise his hands in an aggressive manner prior to the attack; rather, he testified that Spencer's hands were by his sides with his palms out when defendant used an item to "hit[] him in the side of the neck." After being struck, Kuhn saw Spencer put a hand up to his neck. Both defendant and Spencer then walked into the same apartment building, but Spencer exited the building shortly thereafter. When he did so, Kuhn noticed that the front of Spencer's shirt and pants were bloodstained and that he appeared to be

"very woozy." He recalled that Spencer remained upright for approximately one minute before falling to the ground.

¶ 8 Kuhn confirmed that there was nothing that obstructed his view of the attack and that he immediately called 911 after he saw defendant strike Spencer. He further confirmed that defendant did not run into the apartment building after striking Spencer; rather, he appeared to walk at a normal pace. Kuhn testified that he spoke to police once they arrived on scene and relayed what he had observed. The following day, Kuhn was asked to view a physical lineup at the Area North Police Station. Upon doing so, he identified defendant as "the attacker" who had struck Spencer.

¶ 9 On cross-examination, Kuhn acknowledged that he was not familiar with either man and had never seen defendant or Spencer in the neighborhood until the evening of March 31, 2010. Moreover, he did not know what the two men were arguing about that night. Based on what he observed, however, it appeared that the two men had been walking together as they were arguing. He recalled observing the two men stop several times while they argued before they continued walking together toward the entrance of the apartment building. Kuhn was able to confirm that defendant never backtracked or changed direction during the argument; rather he continued to head toward the building. Kuhn also confirmed that he spoke with Detective Campbell prior to viewing the physical lineup on April 1, 2010, and that he told the detective that he "wasn’t sure" that he would be able to make an identification.

¶ 10 Sabrina Holmquist, Adam Kuhn's wife, confirmed her husband's account of the events that transpired on the evening of March 31, 2010. Specifically, Holmquist recalled that their dinner was interrupted by a loud argument that was taking place between two men in front of an apartment building located across the street from their residence. She did not observe any

pushing or punching; rather, the two men appeared to be walking together and arguing with each other. Holmquist recalled seeing defendant walk away from the other man several times during the argument but indicated that he kept "walk[ing] back toward [Spencer] and resum[ing] the argument." At one point, Holmquist observed defendant move closer to the other man before reaching up near the victim's ear and making a "slashing motion" while holding something in his hand. Like her husband, Holmquist confirmed that Spencer's hands were down at his side with his palms up at the time that he was struck. Afterwards, Holmquist recalled that Spencer "put his hand to his neck *** and then looked at his hand and he put it back on his neck." He then turned and walked into the same building that defendant entered. Holmquist subsequently observed Spencer exit the building five or ten minutes later and testified that he "basically looked as if someone had spilled something dark down his entire front, all the way to his feet." He was still holding his neck and "walked in a little bit of a circle" before he collapsed on the ground shortly before police arrived. Holmquist confirmed that she was also asked to view a physical lineup on April 1, 2010. After doing so, she also identified defendant as the assailant.

¶ 11 On cross-examination, Holmquist conceded that she did not know what the men had been arguing about or why the argument had started. In addition, she had not seen either of the men before that evening and was unaware if the two men had a "history." Holmquist also acknowledged that although she was an OBGYN, she did not leave her porch to render medical assistance to Spencer after he fell to the ground.

¶ 12 Shandy Porter testified that in 2010, she worked as a desk clerk at the 4626 North Magnolia Avenue apartment building. She explained that her shift was from 4 p.m. to 12 a.m. and that she was responsible for buzzing tenants, visitors, and staff into the building. Porter testified that she also made regular rounds throughout the building. Because she worked in the

building, Porter indicated that she was familiar with many of the residents including defendant and Spencer. Defendant had resided there for several years whereas Spencer was a more recent tenant. At approximately 7 p.m. on March 31, 2010, Porter recalled buzzing defendant into the building and saw him walk toward the building's lounge, which contained a payphone. Seconds later, she buzzed Spencer into the building. After doing so, Porter noticed that Spencer had a cut on "[t]he baseline of his neck" and that his shirt was "drenched in blood." She immediately called 911. While she was on the phone, Porter saw Spencer also walk toward the lounge, but notice that when he approached the doorway of the lounge, he "immediately backed up" and began pacing in the hallway. As Porter began looking for a towel she could use to apply pressure to Spencer's cut, he exited the building. She recalled that defendant left the lounge sometime while she was talking to the 911 dispatcher, but indicated that she did not know where he went.

¶ 13 Anthony Weston, another resident of the 4626 North Magnolia Avenue apartment building, testified that he knew both Spencer and defendant. He indicated that he had known defendant since 2007 and that he considered him a friend. In contrast, Spencer was a more recent resident in the building and Weston did not know him well. Weston recalled that sometime around 7 p.m. on March 31, 2010, there was a knock on his door. When Weston opened his door, he saw defendant standing in the hallway holding a large beer. Defendant asked if Weston wanted to drink beer with him. In response, Weston told defendant that he "didn't mind" doing so but that he was going downstairs to get some air first. Defendant elected not to accompany Weston downstairs, so he entered the elevator alone. When Weston arrived at the first floor, however, he "saw a lot of blood" and noticed that part of the first floor had been roped off. After making these observations, Weston elected to return directly to his apartment.

Shortly after entering his apartment, defendant reappeared at his door and Weston invited him inside to continue drinking. As they did so, Weston told defendant that he had just seen "a lot of blood downstairs." Defendant responded by saying that "[h]e and [Spencer] got into it" and that he "just had to cut him." After defendant's statement, Weston asked him to leave. Defendant, however, asked Weston for a "favor." Specifically, defendant asked Weston to "go up to [his] unit and get what [he] used" to cut Spencer. Weston responded that he was not going to do that and again requested defendant to leave, but defendant then asked if he could make a phone call. Before defendant could do so, however, detectives began knocking on Weston's door. After opening his door, Weston told detectives, "Oh, ya'll looking for [defendant]." The detectives then apprehended defendant and led him out of Weston's apartment.

¶ 14 On cross-examination, Weston confirmed that during the time that he had known Spencer, he had observed him act "strangely," but acknowledged that Spencer had never acted violently or aggressively. Weston also confirmed that defendant did not resist when police officers arrived to apprehend him. Although Weston recalled testifying during earlier grand jury proceedings, he did not recall testifying that defendant stated that he had to cut Spencer because he had to "get [Spencer] off [of] [him]."

¶ 15 Chicago Police Officer Timothy Covelli testified that on the evening of March 31, 2010, he and his partner were directed to an apartment building located at 4626 North Magnolia Avenue. When they arrived at that location, they observed paramedics attending to "a man laying on the ground in front of the building bleeding." Once the victim was taken away in an ambulance, Officer Covelli spoke to other officers who had arrived on the scene and was informed that the "offender who stabbed the man was named Stephen Riggs." After unsuccessfully attempting to locate defendant in his own apartment, they ultimately found him in

Anthony Weston's apartment and placed him under arrest. Officer Covelli confirmed that defendant was cooperative and that he immediately acknowledged that he was the individual they were looking for and put his hands in the air.

¶ 16 Chicago Police Department Detective John Campbell testified that on March 31, 2010, he was assigned to investigate the stabbing at the 4626 North Magnolia Avenue apartment building. When he arrived at the scene, he noticed that "[t]here was yellow crime scene tape up and [that] the situation was in hand and secure, but [that] it was obvious[ly] a little chaotic." At that point, defendant had already been taken into custody and Detective Campbell began interviewing a number of witnesses at the scene. Based on the information he was provided, Detective Campbell prepared a search warrant for defendant's apartment. The following day, after a judge signed off on the search warrant, he and "a couple of other police officers" and evidence technicians entered defendant's residence and recovered multiple knives including a "folding knife." He confirmed that all of the knives were in plain view in the apartment.

¶ 17 Retired Chicago Police Officer Edward Grabarek testified that in 2010, he was a trained evidence technician and as such, he was responsible for photographing crime scenes, collecting evidence and properly securing that evidence. He confirmed that on April 1, 2010, he received an assignment to retrieve evidence from defendant's 4626 North Magnolia Avenue apartment. After arriving at the building, Officer Grabarek conversed with Detective Campbell before entering defendant's apartment. Once inside, Officer Grabarek took photographs of the apartment and collected several items, including a "pocket type knife" with a three-inch blade and a "small working tool." Both items were recovered from a table in defendant's living room and were inventoried in accordance with police protocol.

¶ 18 Doctor Lauren Moser-Woertz, assistant medical examiner at the Cook County Medical Examiner's office, testified that she was assigned to perform Spencer's autopsy and that she did so on April 10, 2010. After reviewing the medical records, she learned that Spencer had been alive but unconscious when found by paramedics, and that he never regained consciousness before succumbing to his injuries several days later. During her external examination of Spencer's body, Doctor Moser-Woertz testified that she observed "an incised wound on the front of the neck." She explained that an incised wound is one that is "longer in length on the skin than the depth within the body versus a stab wound which is shorter on the skin and deeper in the body." In addition, there were two recent bruises on Spencer's left upper arm. During Doctor Moser-Woertz's internal examination, she observed injury to the muscles and soft tissue on the left side of Spencer's neck. Upon completing her examination, Doctor Moser-Woertz concluded that Spencer's "cause of death [wa]s anoxic encephalopathy [lack of oxygenation to the brain] due to an incised wound to the neck." She classified the manner of death as homicide.

¶ 19 After the State concluded its case-in-chief, defendant moved for a directed finding on the first degree murder charge. The court, however, denied the motion.

¶ 20 Defendant elected to testify on his own behalf and began by providing details about his relationship with Spencer prior to the March 31, 2010, incident. He explained that he and Spencer were both residents at the 4626 North Magnolia apartment complex. Defendant had lived there for several years whereas Spencer was a more recent tenant. Although they had not known each other well, defendant stated that their relationship was "not good." He explained that one of his first encounters with Spencer took place in the building's lounge when Spencer walked up to him and kicked and stepped on his feet. Spencer then said, "if you don't like it, do something about it. I'm Chief Malik. I will kick your ass, man. I'm Chief Malik. Come on, I

will whip your ass. Step into the ring. If you don't like it, do something about it." Defendant testified that he did not understand Spencer's reference to Chief Malik but guessed that it was gang-related. Ultimately, the situation did not escalate at that time because defendant did not want to engage in a physical confrontation. On another occasion, defendant testified that Spencer approached him as he was waiting by the elevator and shoved him. Spencer again referred to himself as Chief Malik and threatened to "fuck [defendant] up." Defendant explained that on that occasion he elected to take the stairs and told Spencer that he was "[not] looking for no problems." Defendant testified that Spencer accosted him in a similar manner several weeks later and that he again went out of his way to avoid a physical confrontation. In addition to his own interactions with Spencer, defendant testified that other tenants in the building told him about an incident in which Spencer "slamm[ed]" another man against a wall, made references to gang membership, and issued threats. As a result of these incidents, defendant testified that he began talking to several case managers in an effort to try to move to another housing complex. When he was unable to do so, defendant stated that he elected to stay at a shelter for several weeks in January 2010 in order to avoid Spencer because he "was scared" of him. Defendant explained that the source of his fear was that Spencer was about "13 years younger than [him and] at least 50 pounds heavier than [him]." Given their age and size disparities, defendant was "scared to fight" Spencer.

¶ 21 Turning to the events that took place on March 31, 2010, defendant testified that he left his job at a local soup kitchen at approximately 6 p.m. and walked to a neighborhood store where he purchased a beer before continuing on his way home. Once he reached the intersection of Wilson and Magnolia Avenues, defendant observed Spencer leaning against a gate. Because he "want[ed] to avoid any kind of trouble," defendant attempted to simply walk past Spencer and

make his way into the building. However, as soon as defendant passed the gate, he "hear[d] footsteps running up from behind." He immediately knew Spencer was coming up behind him to hit him. Although he jumped onto the grass and attempted to get out of the way, defendant was not able to get out of Spencer's reach. When Spencer caught up to him, he shoved defendant, knocked the beer out of his hand, and began threatening to "kick [his] ass." In response, defendant told Spencer, "I ain't trying to fight. I ain't trying to fight, man. Please don't walk up on me." Defendant also told other people who were standing nearby to call the police and attempted to retreat into the apartment building. Spencer, however, "kept coming" at him. At that point, defendant reached into his pants pocket where he had a utility knife. Defendant explained that he always brought a utility knife with him on the days he worked at the soup kitchen because he frequently had to cut open and unpack boxes. He explained that he pulled out the knife to "show [Spencer] that [he was] armed" and hoped that the sight of the knife "w[ould] definitely stop him." Spencer, however, seemed unfazed by the sight of the knife and continued to threaten and walk toward defendant. As he did so, a bicyclist "rolled straight through" the two men. As soon as the bicyclist passed them, Spencer appeared to reach into the waistband of his pants and then lunged at him while raising his elbows. Defendant testified that he was "terrified" at that point and that he "immediately closed [his] eyes out of fear, ducked [his] chin and threw [his] hands up" in an effort to "block" Spencer.

¶ 22 After the two men collided, defendant recalled that he was able to push Spencer away. Once he did so, Spencer immediately looked down and grabbed his shirt. When Spencer took his eyes off defendant, he used that opportunity to run past him and into the apartment building. After he was buzzed into the building, defendant walked to the lounge which contained a payphone. He explained that intended to call the police to make a complaint against Spencer and

"tell the police that [Spencer] had attacked [him] on the streets. [And] that he done attacked [him] and that he had been picking on [him] and trying to bully [him] a good three months." As defendant picked up the phone to place the call, however, he observed Spencer enter the building and could see that "he was bleeding, and he was bleeding bad." It was only at this point that defendant realized that he had cut Spencer. After seeing that Spencer needed help, defendant testified that he called 911 and explained that he had cut Spencer after Spencer had attacked him on the street and that Spencer needed an ambulance. Once he placed the phone call, defendant observed Spencer walking in the hallway. He was staggering and sweating and his eyes were red and glassy. Despite being in that condition, defendant testified that Spencer continued to threaten him. He speculated that Spencer was either on drugs or was mentally ill. As a result, defendant elected not to remain on the lower level and used the stairs to walk upstairs to his friend Tony's apartment. After speaking to Tony briefly, defendant went to his own apartment to place the utility knife on his dining room table. He did not attempt to wipe it down or clean it off in any manner. Defendant then returned to Tony's apartment where he used Tony's phone to make several calls, including another call to 911 to make a complaint against Spencer since he had not done so in his initial call. Shortly thereafter, police officers arrived at Tony's apartment and defendant immediately put his hands up and was taken into custody. Defendant denied that he ever intended to hurt Spencer that evening; rather, his intention was simply to push Spencer off of him and he "got cut in the process."

¶ 23 On cross-examination, defendant admitted that he picked up the beer that Spencer had knocked to the ground before he entered the apartment building and called 911. Moreover, he told the 911 dispatcher that he did not know Spencer's name. Defendant testified that he never knew or tried to find out Spencer's name prior to that day even though he continued to have

altercations with him and made complaints about him. He simply knew him as the guy "with the skull cap" and always referred to him in that manner. He also acknowledged prior convictions for retail theft and felony possession of a controlled substance.

¶ 24 Constance Nelson, another resident of the 4626 North Magnolia Avenue apartment building who was acquainted with defendant, was called to testify as a defense witness. She recalled that at approximately 7 p.m. on March 31, 2010, she was leaving the building to go to a nearby store. Spencer, another acquaintance was walking behind her. After she exited the building, Nelson observed defendant standing "down by the tree" talking to June, another man who lived in the building. June was holding a bike as he was conversing with defendant. As she continued walking on her way to the store, Spencer got in front of her and began "shouting profanities at defendant." She recalled Spencer calling defendant a "punk bitch" and telling him that he was "going to whip [his] stanking ass." Defendant, in turn, "looked as if he was afraid" and stood with his back against the tree. Spencer then began walking toward defendant and continued to curse and threaten him. Defendant responded by raising his voice and saying, "don’t come up on me." Spencer was also "moving his hands like he was getting ready to fight or something;" however, he did not appear to actually have anything in his hands. Once Spencer got within a foot of defendant, Nelson observed defendant bring his hands up to push him away. At that point, Spencer turned around and said, "you didn't have to cut me." Once Spencer turned around, Nelson observed a little "dot" of blood on the front of his shirt. Defendant, in turn, responded that he was "going in and calling the police" and he then began walking "quickly" toward the apartment building. Nelson continued onto the store where she purchased a soda. When she came back to the building a short time later, she saw Spencer "lying on the ground in a pool of blood" surrounded by paramedics who were attempting to help him.

¶ 25 Nelson confirmed that she did not see Spencer with anything in his hands prior to defendant making a "movement" toward him. Although she had informed Detective Zacharias back in 2010 that the two men had been punching each other, Nelson testified at trial that she never observed the two men hitting each other that evening. She also acknowledged that the whole incident "happen[ed] within a matter of minutes or a minute or so."

¶ 26 After the defense presented the aforementioned testimony, the State called Lieutenant Robert Stasch to testify as a rebuttal witness. Lieutenant Stasch testified that he had conducted gang investigations for approximately 32 years and was familiar with local gangs and their members. He testified that the Black P Stones gang was known to dominate the area of Wilson and Magnolia Avenues. Although he was familiar with the members of that gang and other local gangs, Lieutenant Stasch indicated that he was not familiar with Spencer. Moreover, when he looked up Spencer's name in the police database, he did not find any reports indicating that Spencer was affiliated with any gang. On cross-examination, however, Lieutenant Stasch testified that Chief Malik is the pseudonym used by Jeff Fort, the founder of the National Black P Stones gang. He also confirmed that his lack of personal knowledge of Spencer's involvement in gang activity did not mean that Spencer was not, in fact, a gang member.

¶ 27 In addition to presenting the aforementioned witness testimony, the parties also stipulated to the contents of Spencer's toxicological report, which was completed on April 1, 2010. The report indicated that benzodiazepine, cannabinoids, and opiates were found in Spencer's body. The parties, however, further stipulated that the report contained no indication as to when those substances entered Spencer's body or whether those substances were administered pursuant to medical treatment.

¶ 28 During the jury instruction conference that ensued, defense counsel requested that the jury receive an involuntary manslaughter instruction. The court granted defense counsel's request over the objection of the State. Defense counsel also requested that the jury receive instructions on two different theories of second degree murder: provocation and imperfect self-defense. The State objected to the instruction pertaining to second degree murder premised on provocation, but the court again elected to provide the jury with that instruction over the State's objection. Accordingly, the jury was provided with instructions on first degree murder, second degree murder based on provocation, second degree murder based on imperfect self-defense, involuntary manslaughter, and self-defense.

¶ 29 After hearing closing arguments and receiving the aforementioned instructions, the jury commenced deliberations and returned with a verdict finding defendant solely guilty of the offense of involuntary manslaughter. At the sentencing hearing that followed, the court heard evidence offered by the parties in aggravation and mitigation. After considering that evidence, the court ultimately sentenced defendant to 5 years' imprisonment. Defendant's post-trial and post-sentencing motions were denied. This appeal followed.

¶ 30 ANALYSIS

¶ 31 Sufficiency of the Evidence

¶ 32 On appeal, defendant first challenges the sufficiency of the evidence. He argues that his conviction for the offense of involuntary manslaughter should be "reversed outright" because the State failed to prove beyond a reasonable doubt that he was not justified in his use of force against Spencer, and thus failed to rebut his assertion that he acted in self-defense.

¶ 33 The State, in turn, responds that defendant's challenge to the sufficiency of the evidence is without merit. Specifically, the State argues that the jury correctly rejected defendant's self-

defense claim and properly convicted him of the offense of involuntary manslaughter where the evidence demonstrated that defendant "had no reasonable belief that he was in danger of imminent death or great bodily harm, and where the amount of force used was excessive."

¶ 34 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)). A reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)) and will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt (*People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007)). A person is guilty of involuntary manslaughter where he recklessly performs an act that is likely to cause death or great bodily harm to another person. 720 ILCS 5/9-3(a) (West 2010); *People v. DiVencenzo*, 183 Ill. 2d 239, 250 (1998); *People v. Hulitt*, 361 Ill. App. 3d 634, 639 (2005). An individual is deemed to have acted recklessly when he consciously disregards a substantial and unjustifiable risk that his acts are likely to result in death or great bodily harm to another person. 720 ILCS 5/4-6 (West 2010); *Castillo*, 188 Ill. 2d at 540-41; *Hulitt*, 361 Ill. App. 3d at 639; see also *DiVencenzo*, 183 Ill. 2d at 250 ("In general, a defendant acts recklessly when he is aware

that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur").

¶ 35 "Self-defense is a right an individual is entitled to exercise in those situations where he reasonably believes that force is necessary to prevent death or great bodily harm to himself." *People v. Everette*, 141 Ill. 2d 147, 162 (1990). Codified in section 7-1 of the Illinois Criminal Code of 1961 (Criminal Code), the affirmative defense of self-defense may be raised by a defendant to excuse conduct that would otherwise constitute a crime. 720 ILCS 5/7-1 (West 2010); *People v. McLennon*, 2011 IL App (2d) 091299, ¶ 14; see also *People v. Podhrasky*, 197 Ill. App. 3d 349, 352 (1990) (explaining that when a defendant raises an affirmative defense, he admits to conduct that caused harm to another person but denies legal responsibility for that conduct). That provision, in pertinent part, provides as follows: "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm 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(a) (West 2010).

¶ 36 The elements of the affirmative defense of a self-defense are: (1) unlawful force was threatened against a person; (2) the person who was threatened was not the aggressor; (3) the person threatened was in danger of imminent harm; (4) the threatened person's use of force was necessary; (5) the threatened person actually believed that a real danger existed that necessitated the use of force; and (6) the threatened person's belief was objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004); *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). Once a defendant

asserts self-defense as an affirmative defense and offers some evidence to support that defense, it is the burden of the State to prove beyond a reasonable doubt not only the elements of the charged offense, but that the defendant did not act in self-defense. *Jeffries*, 164 Ill at 127; *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 17. The State satisfies that burden if it negates any one of the aforementioned elements. *Lee*, 213 Ill. 2d at 225; *Jeffries*, 164 Ill. at 127-28. Ultimately, the question of whether a defendant acted in self-defense is a question for the trier of fact. *People v. Garcia*, 407 Ill. App. 3d 195; 203 (2011); *People v. Goliday*, 222 Ill. App. 3d 815, 821-22 (1991). In making this determination, the trier of fact is not obligated to accept a defendant's claim of self-defense; rather, the trier of fact must consider the circumstances around the killing, the probability or improbability of the defendant's testimony, as well as the testimony of other witnesses. *In re Jessica M.*, 399 Ill. App. 3d 730, 737 (2010); *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002).

¶ 37 Here, the central issue in dispute between the parties is the reasonableness of defendant's subjective belief that circumstances existed that necessitated his use of deadly force against Spencer. The reasonableness of a defendant's belief that deadly force was necessary is a question of fact and depends upon the unique facts and circumstances of each case. *People v. Sawyer*, 115 Ill. 2d 184, 193 (1986); *Rodriguez*, 336 Ill. App. 3d at 15. At trial, the jury heard various accounts of the altercation that took place between defendant and Spencer. Defendant testified that Spencer approached him from behind, shoved him and verbally threatened to "kick [his] ass." Defendant further testified that although he told Spencer he "[wasn't] trying to fight," and attempted to retreat into his apartment building, Spencer "kept coming" at him. Because of the previous conflicts he had with Spencer, defendant explained that he became "terrified." Accordingly, when Spencer appeared to reach into the waistband of his pants and then lunged at

him, defendant acknowledged closing his eyes, throwing his hands up and striking Spencer in the neck with the utility knife that he regularly carried in his pants pocket. Defendant's account of the immediate events preceding the stabbing, however, differed markedly from those provided by eyewitnesses at trial. Clarence Miller, Adam Kuhn, and Sabrina Holquist each observed defendant and Spencer engaged in a brief verbal argument that concluded when defendant made a "slashing" motion to Spencer's neck. In direct contravention of defendant's description of the events that precipitated that slashing motion, these witnesses all testified that there had been no physical contact between the two men and that Spencer had not raised his arms in a threatening manner before he was struck; rather, Miller, Kuhn and Holquist each testified that Spencer's hands were down by his sides when he was struck by defendant. In addition, none of these witnesses observed a weapon in Spencer's possession and no weapon was ever found or recovered from his person. Constance Nelson, the only eyewitness called to testify for the defense, also failed to corroborate key components of defendant's account of the altercation. Namely, her testimony failed to corroborate defendant's contention that Spencer pushed him from behind and that Spencer reached toward the waistband of his pants immediately prior to being struck.

¶ 38 Faced with differing accounts of the events that transpired between defendant and Spencer, the jury was called upon to evaluate the credibility of the witnesses and determine which version of the events preceding the stabbing was more credible in order to determine the reasonableness of defendant's belief that deadly force was necessary when he stabbed Spencer. After reviewing the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant's belief that circumstances justified the use of deadly force was unreasonable given that Spencer was unarmed and no eyewitnesses observed any physical

contact between the two men prior to the stabbing or otherwise substantiated defendant's account of the events that transpired before he stabbed Spencer. We reiterate that the trier of fact is not obligated to accept a defendant's claim that he acted in self-defense particularly where, as here, the trier of fact hears conflicting accounts of the events that led to the victim's injury or death. See, *e.g.*, *Lee*, 213 Ill. 2d at 225-26 (finding the defendant's argument that the jury erred in rejecting his claim that he shot the victim in self-defense to be without merit where the jury heard different version of the events and resolved the inconsistencies against the defendant); *People v. Flemming*, 2015 IL App (1st) 111925-B ¶¶ 57-58 (rejecting the defendant's argument that his conviction for aggravated battery should be reversed because he acted in self-defense where the court heard conflicting version of the events that precipitated the stabbing, found the defendant's version less credible and concluded that the defendant's belief that he was justified in using deadly force was not reasonable); *Rodriguez*, 336 Ill. App. 3d at 15-16 (affirming the defendant's first degree murder conviction where the circuit court heard conflicting testimony from trial witnesses, concluded that the State's witnesses were more credible and rejected the defendant's claim that he shot the victim in self-defense). Ultimately, after viewing the evidence in the light most favorable to the prosecution, we find that the State proved beyond a reasonable doubt that defendant did not, in fact, act in self-defense when he stabbed Spencer.

¶ 39 In so holding, we are unpersuaded by defendant's reliance on *People v. Jordan*, 4 Ill. 2d 155 (1954), a case in which the supreme court reversed the defendant's involuntary manslaughter conviction after concluding that the jury had improperly rejected the defendant's self-defense claim. In that case, the defendant admitted to punching the victim, with whom he had a contentious history, and further admitted that his punch caused the victim to fall to the ground and hit his head on a concrete abutment. There were no eyewitnesses to the altercation, and in

the statement that the defendant provided to investigating officers, he indicated that he and the victim exchanged words, that the victim ran at him while swinging a dark object in his hands and that the defendant punched the victim to protect himself. In reversing the defendant's conviction, our supreme court emphasized that there were "no eyewitnesses as to what actually happened when the two men met, and the only evidence as to what actually occurred in that time and place appears in a written statement signed by defendant and introduced in evidence as part of the People's case and also in the testimony of the defendant after the close of the People's case. *** There was, therefore, no conflict in the evidence as to which of the two men was the aggressor nor as to whether the defendant struck the blow in self-defense." *Id*. at 157, 162. Accordingly, because there was no evidence in the record that refuted the defendant's self-defense claim and because the defendant's account of the altercation was not improbable or unreasonable, the supreme court concluded that the jury erred in rejecting the defendant's affirmative defense. *Id*. at 163-64. Here, in contrast, there was an abundance of testimony that contradicted defendant's claim that he stabbed Spencer in self-defense. Accordingly, because the facts in *Jordan* and those present in the case at bar are markedly different, we do not find that *Jordan* mandates reversal of defendant's involuntary manslaughter conviction.

¶ 40 Jury Instruction Error

¶ 41 Next, defendant contends that his involuntary manslaughter conviction should be reversed and the cause remanded for a new trial because the issues instruction for that offense that the circuit court provided to the jury failed to include a proposition informing the jury that the State was required to prove beyond a reasonable doubt that the force that he used against Spencer was not justified in order to convict him of that offense. He argues that the absence of

this proposition effectively diminished the State's burden of proof, precluded the jury from considering his claim of self-defense, and ultimately rendered his trial fundamentally unfair.

¶ 42 The State initially responds that defendant failed to properly preserve this issue for appellate review because defense counsel raised no objection to the omission of the proposition from the involuntary manslaughter instruction that the circuit court provided to the jury and failed to raise this issue in defendant's post-trial motion. On the merits, the State acknowledges that the disputed proposition was omitted from the involuntary manslaughter issues instruction, but argues that the omission does not constitute error because "the jury instructions as a whole properly informed the jury of the elements of involuntary manslaughter as well as defendant's affirmative defense of self-defense."

¶ 43 As a threshold matter, defendant concedes that this argument was not properly preserved for appellate review because the involuntary manslaughter issues instruction that defense counsel tendered to the circuit court failed to include a proposition that informed the jury that the State was required to disprove the defendant's self-defense claim beyond a reasonable doubt to obtain a conviction for that offense. See Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it"). Moreover, defense counsel never raised an objection to the involuntary manslaughter issues instruction and its omission of the aforementioned proposition at trial or in a post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (recognizing that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a post-trial motion and that his failure to satisfy both requirements results in forfeiture of appellate review of his claim).

¶ 44 In an effort to avoid forfeiture however, defendant invokes Illinois Supreme Court Rule 451(c), which provides "limited relief" from the forfeiture rule. *People v. Downs*, 2015 IL 117934, ¶ 14; *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). That rule, in pertinent part, provides that "substantial defects [pertaining to criminal jury instructions] are not waived by failure to make a timely objection thereto *if the interests of justice require*." (Emphasis added.) Ill. S. Ct. R. 451(c) (eff. Feb. 10, 2006). Overall, "[t]he purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed." *Sargent*, 239 Ill. 2d at 189. Rule 451(c) is co-extensive with the plain error doctrine outlined in Illinois Supreme Court Rule 615(a), which permits a reviewing court to consider improperly preserved issues on appeal if the evidence is closely balanced or if the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Belknap*, 2014 IL 117094, ¶ 48; *Sargent*, 239 Ill. 2d at 189; *Piatkowski*, 225 Ill. 2d at 564-65. The purpose of the plain error doctrine is to ensure that a defendant receives a fair rather than perfect trial, and as such, the doctrine does not operate as a general savings clause, but instead constitutes a narrow exception to the forfeiture rule. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010); *People v. Herron*, 215 Ill. 2d 167, 177 (2005). The first step in any plain error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565. If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *Sargent*, 239 Ill. 2d at 189-90. Keeping these principles in mind, we now address the substantive merit of defendant's claim.

¶ 45 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence so that the jury may reach a correct conclusion according to both the law and the evidence. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004); *People v. Wales*, 357 Ill. App. 3d 153, 157 (2005). Fundamental fairness requires that the jury be provided with instructions that delineate the elements of the charged offense as well as standards pertaining to the burden of proof and presumption of innocence. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). In evaluating the propriety of a set of jury instructions, the relevant inquiry is "whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). Generally, an error in a set of jury instructions will only rise to the level of plain error where it can be determined that the error created a serious risk that the jury incorrectly convicted the defendant because jury members did not understand the applicable law. *Herron*, 215 Ill. 2d at 193; *Hopp*, 209 Ill. 2d at 8.

¶ 46 Illinois Supreme Court Rule 451(a) provides that "[w]henever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal Instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. July 1, 2006). In accordance with this rule, the circuit court, at defendant's request, provided the jury with Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (IPI Criminal 24-25.06), which sets forth the affirmative defense of self-defense. That instruction provides: "A person is justified in the use of force when and to the extent that he reasonably believes such conduct is necessary to defend himself against the imminent use of unlawful force. However, a person is justified in the use of

force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." IPI Criminal 24-25.06. The committee notes that accompany that instruction direct the circuit court to also "[g]ive Instruction 24-25.06A" when self-defense is properly before the jury. IPI Criminal No. 24-25.06, Committee Note. Illinois Pattern Jury Instructions, Criminal, No. 24-25.06A (4th ed. 2000) (IPI Criminal 24-25.06A), in turn, sets forth the following proposition: "That the defendant was not justified in using the force which he used." IPI Criminal No. 24-25.06A. The committee notes accompanying this instruction direct the circuit court to "[g]ive this issue as the final proposition in the issues instruction for the offense charged." IPI Criminal 24-25.06A, Committee Note.

¶ 47 Based on those instructions, courts have recognized that when the circuit court provides a jury with a general self-defense instruction, it must also include an issues instruction for each applicable offense that contains language informing the jury that the State bears the burden of proving that the defendant was not justified in his use of force against the victim in order to convict the defendant of each offense. See, *e.g.*, *People v. Thurman*, 104 Ill. 2d 326 (1984); *People v. Getter*, 2015 IL App (1st) 121307, ¶ 40; *People v. Lowe*, 152 Ill. App. 3d 508 (1987); *People v. Wells*, 110 Ill. App. 3d 700 (1982).

¶ 48 In this case, the jury received instructions for three different offenses: first degree murder, second degree murder and involuntary manslaughter. Moreover, as explained above, the jury also received a general self-defense instruction. The issue instructions that the circuit court provided for the offenses of first and second degree murder complied with the requirements of IPI Criminal No. 24-25.06A and included the requisite proposition that the State was required to

prove that defendant was not justified in the force that he used against Spencer. Specifically, the circuit court instructed the jury as follows:

"To sustain either the charge of first degree murder or the charge of second degree murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of Joshua Spencer; and

Second: That when the defendant did so, he intended to kill or do great bodily harm to Joshua Spencer;

or

he knew that such acts would cause death to Joshua Spencer;

or

he knew that such acts created a strong probability of death or great bodily harm to Joshua Spencer;

and

Third: That the defendant was not justified in using the force he used.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, your deliberation on the first and second degree murder should end, and you should go on with your deliberations to decide whether the defendant is guilty of involuntary manslaughter.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should go on with your deliberations to decide whether a mitigating factor has been proved so that the

defendant is guilty of the lesser offense of second degree murder instead of first degree murder." (Emphasis added.)

¶ 49 In contrast, the issues instruction that the court provided for the offense of involuntary manslaughter did not contain the final proposition required by IPI Criminal No. 24-25.06A. Rather, the jury was instructed as follows:

"To sustain the charge of involuntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of Joshua Spencer; and

Second: That the defendant performed those acts recklessly; and

Third: That those acts were likely to cause death or great bodily harm.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty of involuntary manslaughter.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

¶ 50 The jury was therefore not instructed that the State was also required to prove that defendant was not justified in the force that he used against Spencer in order to convict defendant of the offense of involuntary manslaughter. This omission constitutes error. See, *e.g.*, *Thurman*, 104 Ill. 2d at 330-31; *Getter*, 2015 IL App (1st) 121307, ¶ 41; *Lowe*, 152 Ill. App. 3d at 511-12. Having found error, we must now determine whether it constitutes plain error.

¶ 51 Defendant relies on the second-prong of plain error review, arguing that the omission of the aforementioned proposition from the issues instruction for involuntary manslaughter constituted a "grave" error that impacted the fairness of his trial as well as the integrity of the judicial process.

¶ 52 Our supreme court has equated second-prong plain error to "structural error," (*People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009); *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010)), which the United States Supreme Court has defined as a " 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *Neder v. United States*, 527 U.S. 1, 8 (1999), quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Accordingly, "[a]n error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 609. The United States Supreme Court has recognized "structural error" in a "very limited class of cases." *Thompson*, 238 Ill. 2d at 609; *Glasper*, 234 Ill. 2d at 198. That limited class of cases includes those involving: "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Thompson*, 238 Ill. 2d at 609. The Illinois Supreme Court, however, has found second-prong plain error in cases involving errors beyond those six instances recognized by the United States Supreme Court. See, *e.g.*, *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (holding that the failure to apply the one-act, one-crime rule constituted second-prong plain error); *People v. Walker*, 232 Ill. 2d 113, 131 (2009) (holding that the failure of the circuit court to exercise discretion in denying a request for a continuance was second-prong plain error).

¶ 53 As a general rule, instructional errors are not considered to fall within the domain of structural errors. See, *e.g.*, *People v. Washington*, 2012 IL 110283, ¶ 60 (recognizing that instructional errors may be harmless). More specifically, courts have found that the mere failure to provide an issues instruction that omits the final proposition required by IPI Criminal 24-25.06A in cases in which the affirmative defense of self-defense is raised, standing alone, does not constitute plain error. See *People v. Huckstead*, 91 Ill. 2d 536 (1982). However, courts have repeatedly held that a grave error occurs where, as here, the circuit court provides issues instructions containing the language regarding the defendant's lack of legal justification required by IPI Criminal 24-25.06A as the final proposition for some, but not all, of the offenses, and where the defendant is subsequently convicted of one or more of the offenses for which the jury received an erroneous instruction. See, *e.g.*, *Getter*, 2015 IL App (1st) 121307, ¶ 41; *Wells*, 110 Ill. App. 3d at 707-09; *Ortiz*, 65 Ill. App. 3d at 532-33. In doing so, courts have rationalized that the absence of the proposition from the issues instructions for some but not all of the offenses would lead jurors to reasonably but incorrectly conclude that the State was only required to prove that the defendant's use of force was not justified to convict the defendant of certain offenses and not others. *Getter*, 2015 IL App (1st) 121307, ¶ 41; *Wells*, 110 Ill. App. 3d at 707-08; *Ortiz*, 65 Ill. App. 3d at 532.

¶ 54 The supreme court's decision in *People Thurman*, 104 Ill. 2d 326, 328 (1984) is particularly instructive. In that case, the defendant was charged with multiple offenses following a fatal shooting outside of a tavern and relied on the affirmative defense of self-defense at trial. The issues instructions for the offenses of murder, voluntary manslaughter, and armed violence predicated on voluntary manslaughter contained language that informed the jury that the State was required to prove that the defendant acted without lawful justification. However, the issues

instructions for the offenses of involuntary manslaughter and armed violence predicated on involuntary manslaughter lacked that proposition. The defendant was ultimately convicted of both involuntary manslaughter and armed violence predicated on involuntary manslaughter. The supreme court, however, reversed the defendant's convictions, finding that the omission of the proposition requiring the State to prove that the defendant's acted without lawful justification from the issues instructions of the offenses of which he was ultimately convicted, deprived the defendant of a fundamentally fair trial. In doing so, the court rejected the State's argument that the omission of lawful justification phraseology from the involuntary manslaughter issues instruction was harmless because the definitional instruction for that offense defined it as an unintentional reckless killing without lawful justification. The court explained: "The fact the definitional instruction for involuntary manslaughter may include the phrase 'without lawful justification' *** does not, in our judgment, remedy the deficiency, for unless similar language appears in the issues instruction for that offense a prudent juror could easily conclude that the absence of self-defense need not be found before returning a guilty verdict." *Id*. at 331.

¶ 55 The facts in the case at bar closely parallel those present in *Thurman*. Here, as in *Thurman*, defendant was charged with multiple offenses following an altercation with the victim that resulted in the victim's death and raised the affirmative defense of self-defense at trial. The jury instructions that were provided to the jury in both cases were defective in that the issues instructions for the offense involuntary manslaughter failed to contain a proposition specifically informing the jury that the State was required to prove that the force the defendant employed against the victim was not reasonable. The proposition, however, was included in the issues instructions for the other offenses of which both defendants were acquitted. Given this result, there is a strong possibility that the omission of the required self-defense proposition from the

issues instructions for the offense of involuntary manslaughter created a serious risk that the jurors convicted the defendants because they did not understand the applicable law.

¶ 56 The State makes no attempt to distinguish the similarities between this case and *Thurman*; rather, it argues that *Thurman* is not binding authority because it "predates [more recent supreme court authority] setting forth the limited class of structural errors to which second-prong plain error applies." Specifically, the State cites our supreme court's decisions in *People v. Glasper*, 234 Ill. 2d 173 (2009) and *People v. Thompson*, 238 Ill. 2d 598 (2010), where the court equates second-prong plain error with structural error, and argues that an "omitted jury instruction does not constitute structural error" because it does not fall within the "limited class" of structural errors identified by the United States Supreme Court.

¶ 57 This court, however, has repeatedly rejected this proposed limitation on the scope of second-prong plain error review. See, *e.g.*, *Getter*, 2015 IL App (1st) 121307, ¶ 59 ("[W]hile it is true that the Illinois Supreme Court has *analogized* second-prong plain error to structural error, it has never *limited* second-prong plain error to those six types of errors, and in fact has found that errors other than those six qualified as second-prong plain error"); *People v. Clark*, 2014 IL App (1st) 123494, ¶ 40 ("We decline to read the State's proposed limitation to second-prong plain error into *Glasper* or *Thompson*. Although those cases equated second-prong plain error to structural error, they did not restrict plain error to the six types of structural error that have been recognized by the United States Supreme Court. *** Although structural error and second-prong plain error may arise in similar circumstances, we do not believe that the Illinois Supreme Court intended to strictly limit the application of second-prong plain error *** to [the] six identified structural errors"); *People v. Booker*, 2015 IL App (1st) 131872,¶¶ 64-65 (noting that the Illinois Supreme Court has found second-prong plain error beyond the six categories identified by the

United States Supreme Court and concluding that "the second prong of plain error is not limited to [those] six types of error"); but see *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 41 (holding that even if the circuit court erred in denying the defendant's motion to suppress, it would not constitute plain error under the second prong simply because the error "is not included in th[e] class" of cases recognized by the United States Supreme Court as constituting structural error).

¶ 58 Indeed, our supreme court has never departed from the principle that a jury instruction error can constitute grave error in certain limited circumstances such as where the error "create[d] a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Sargent*, 239 Ill. 2d at 191. Rather as case law makes clear, the principle remains valid and the issue of whether a jury instruction error constitutes a grave error is made on a case-by-case basis. Accordingly, the State's argument that *Thurman*'s holding is no longer valid simply because second-prong plain error has been equated to structural error is without merit.

¶ 59 The State's argument regarding the inapplicability of *Thurman's* holding is further weakened in light of this court's recent decision in *People v. Getter*, 2015 IL App (1st) 121307. In *Getter*, this court reversed the conviction of a defendant convicted of aggravated discharge of a firearm. In doing so, we relied, in part, on *Thurman* and found that the circuit court's failure to include justifiable use of force language as the final proposition in the issues instruction for the offense of aggravated discharge of a firearm, "while simultaneously including that [proposition] in the [issues instructions of the] other three charged offenses" constituted second-prong plain error because it created a serious risk that the defendant was convicted of that offense due to the jury's failure to understand that self-defense was a valid affirmative defense to that crime. *Id.* ¶ 54. We reasoned: "Where three of the four charged offenses included a self-defense instruction,

but the remaining aggravated discharge instructions did not, a rational juror employing elementary rules of logic could—in fact, should—find that omission to be particularly meaningful. By far the most logical and coherent interpretation of these jury instructions, as a whole, would be a legally incorrect one: that self-defense was not an affirmative defense to the aggravated discharge count. This error was of particular significance given that self-defense was the central disputed issue at trial." *Id.* ¶ 41.

¶ 60 Accordingly, based on the foregoing authority, we find that the omission of IPI Criminal 24-25.06A language from the issues instruction for the offense of involuntary manslaughter constituted plain error in this case. Because self-defense was the central issue in dispute at defendant's trial, the inclusion of the self-defense proposition in the issues instructions for first and second degree murder and its omission from the issues instruction for involuntary manslaughter, the sole offense of which defendant was convicted, created a serious risk that the jury convicted defendant because it did not understand that self-defense was a defense to the crime of involuntary manslaughter. See, *e.g.*, *Thurman*, 104 Ill. 2d at 330-31; *Getter*, 2015 IL App (1st) 121307, ¶ 64; *Wells*, 110 Ill. App. 3d at 708; *Ortiz*, 65 Ill. App. 3d at 533-33.

¶ 61 Having found that the erroneous jury instruction deprived defendant of his fundamental right to a fair trial, we need not evaluate defendant's alternative claim that defense counsel provided ineffective assistance by tendering the defective instruction. Accordingly, we reverse defendant's involuntary manslaughter conviction and remand for a new trial on that offense. Because we have found that the evidence against defendant was sufficient to convict him of involuntary manslaughter, double jeopardy does not bar his retrial for that offense. *People v. Ward*, 2011 IL 108690, ¶ 50; *Getter*, 2015 IL App (1st) 121307, ¶ 78. Although we find that defendant is entitled to a new trial, we will address defendant's final argument concerning the

circuit court's ruling on the permissible scope of defense counsel's cross-examination because that is an issue that may arise on remand. See *People v. Fuller*, 205 Ill. 2d 308, 346 (2002); *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 49.

¶ 62 Cross-Examination

¶ 63 Defendant's final argument on appeal is that the circuit court erred in precluding defense counsel from cross-examining Anthony Weston about Spencer's reputation for having mental health issues and being violent because such evidence was relevant to establish defendant's self-defense claim.

¶ 64 The State, in turn, argues that the trial court properly precluded defendant from eliciting such testimony from Weston because defense counsel failed to establish a proper foundation for that reputation evidence.

¶ 65 Encompassed in a defendant's constitutional right to confrontation (U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8) is the right to conduct reasonable cross-examination of the witnesses who testify against him. *People v. Davis*, 185 Ill. 2d 317, 337 (1998) ("A criminal defendant has a fundamental constitutional right to confront the witnesses against him and this includes the right to conduct reasonable cross-examination"). A defendant's right to cross-examination, however, is not limitless because the confrontation clause does not preclude the circuit court from imposing reasonable limitations on cross-examination. See *People v. Harris*, 123 Ill. 2d 113, 144-45 (1988), *quoting Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.") As such, the circuit court is afforded wide-latitude to limit the scope of cross-examination to avoid witness harassment, prejudice, jury confusion, or repetitive and irrelevant questioning.

People v. Blue, 205 Ill. 2d 1, 13 (2001). The appropriate latitude to allow during cross-examination is a matter that is within the sound discretion of the circuit court, and as such, will not be reversed absent an abuse of discretion resulting in prejudice to the defendant. *People v. Stevens*, 2014 IL 116300, ¶ 16; *People v. Hall*, 195 Ill. 2d 1, 23 (2000).

¶ 66 In *People v. Lynch*, 104 Ill. 2d 194 (1984), the supreme court held that when a defendant raises a claim of self-defense, "the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence." *Id*. at 200. The court explained:

> "A victim's aggressive and violent character may tend to support a theory of self-defense in two ways. First, the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior. The same deadly force that would be unreasonable in an altercation with a presumably peaceful citizen may be reasonable in response to similar behavior by a man of known violent and aggressive tendencies. One can consider facts one knows, however, and evidence of the victim's character is irrelevant to this theory of self-defense unless the defendant knew of the victim's violent nature ***.
>
> Second, evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened. In this situation, whether the defendant knew of this evidence at the time of the event is irrelevant." *Id*. at 199-201.

¶ 67 Under either *Lynch* rationale, the defendant may present testimony regarding the victim's reputation, as long as the reputation testimony is supported by a proper foundation. *In re Jessica M.*, 399 Ill. App. 3d at 738. "Proper foundation for reputation testimony is established when the

witness is shown to have 'adequate knowledge of the person queried about' and the evidence of reputation is 'based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness.' " *Id. quoting People v. Moretti*, 6 Ill. 2d 494, 523-24 (1955). Whether a witness is qualified to provide reputation testimony rests within the sound discretion of the circuit court and accordingly, will not be disturbed absent an abuse of discretion. *Id*. at 739.

¶ 68 In this case, defendant relies on the second *Lynch* rationale and argues that because there were conflicting accounts of his altercation with Spencer, defense counsel should have been allowed to elicit testimony from Weston about Spencer's reputation. He cites two instances where defense counsel attempted to ask Weston about Spencer's reputation and the circuit court sustained the State's objections. The first instance concerned defense counsel's efforts to elicit testimony from Weston that Spencer had some unspecified mental issues.

¶ 69 Specifically, at trial, during cross-examination, defense counsel inquired:

"[Defense counsel]: And you didn't really know [Spencer] very well, did you?

[Weston]: No, he just moved in a building a little later.

[Defense counsel]: what you did know of him, though, was that he had some mental issues, right?

[State]: Objection.

[Court]: Sustained."

¶ 70 During the sidebar that defense counsel requested, counsel stated: "There was an objection to my asking the witness whether the victim had any mental issues. In the notes of Detective Campbell who interviewed this witness shortly after the incident happened, he indicates to Detective Campbell that the victim is mental, and that information would be

something that the jury would need to evaluate." In response, the court stated: "Okay, I'm going to sustain the objection. This witness certainly is not a professional, to say the least. So I'm not letting his opinion as to the psychiatric or mental status of the victim into evidence. So sustained."

¶ 71 The second instance involved counsel attempting to elicit testimony from Weston that Spencer had a reputation for violence. Specifically, defense counsel inquired:

"[Defense counsel]: And sometimes [Spencer] acted violently?

[Weston]: I ain't never seen him act violent [sic].

[Defense counsel]: Did you see him act aggressively?

[Weston]: Aggressively, no.

[Defense counsel]: You had not seen that?

[Weston]: No.

[Defense counsel]: But he had that reputation?

[State]: Objection.

[Court]: Sustained. Stricken."

¶ 72 Defense counsel did not request a side bar or attempt to present an offer of proof concerning the basis for this line of inquiry or Weston's expected testimony. See *People v. Peeples*, 155 Ill. 2d 422, 457-58 (1993) (recognizing that unless a question posed to a witness shows the purpose and materiality of the evidence, is in a proper form, and clearly admits a favorable answer, the proponent needs to provide an offer of proof detailing what the witness would say as well as the basis for the witnesses testimony in order to properly preserve the issue for review).

¶ 73 Ultimately, reviewing the record, we do not find that the circuit court erred in sustaining the State's objections. As set forth above, a witness may provide *Lynch* reputation testimony as long as the witness's testimony is supported by a proper foundation. *In re Jessica M.*, 399 Ill. App. 3d at 738. Here, defense counsel failed to lay a proper foundation for Weston's testimony. Specifically, defense counsel failed to show that any potential reputation testimony that Weston could provide regarding Spencer was based on contact that Weston had with individuals who were Spencer's neighbors and associates. See *Id*. at 739 (finding that the circuit court did not err in precluding a witness from testifying about the victim's reputation where "no evidence was offered to show that the proffered testimony was based on contact with individuals who were [the victim's] neighbors and associates"). Because defense counsel failed to ascertain the sources of any reputation evidence that Weston may have received regarding Spencer to ensure that those sources were neighbors or associates of Spencer who had an adequate basis to provide such evidence, we find that the circuit court did not err in sustaining the State's objections. *Id*.

¶ 74 CONCLUSION

¶ 75 The judgment of the circuit court is reversed and the cause remanded for a new trial.

¶ 76 Reversed and remanded.