

No. 1-13-2521

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 7645
)	
ERIC SCOTT,)	Honorable
)	Neera Lall Walsh,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

O R D E R

¶ 1 **Held:** The trial court committed reversible error when it excluded evidence of the victim’s prior conviction for reckless conduct, which was admissible to show the victim’s aggressive character in support of defendant’s self-defense claim.

¶ 2 Following a jury trial, defendant Eric Scott was convicted of aggravated battery with a firearm and sentenced to 15 years’ imprisonment. On appeal, he contends: (1) a new trial is necessary because the trial court erroneously excluded evidence concerning the victim’s street

gang membership and conviction of reckless conduct, which were admissible to show the victim's aggressive nature pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984); (2) trial counsel failed to move to reopen the record to admit evidence of the victim's reckless conduct conviction after the trial court found a conflict existed concerning who was the initial aggressor; (3) the State argued pretrial that the victim was the aggressor in order to exclude *Lynch* evidence, but later improperly argued that defendant was the aggressor in order to obtain initial aggressor jury instructions; (4) defendant's 15-year sentence is excessive; and (5) his mittimus incorrectly indicates that he was convicted of first degree murder.

¶ 3 For the reasons that follow, we reverse the judgment of the trial court and remand this case for a new trial on the charge of aggravated battery with a firearm.

¶ 4 I. BACKGROUND

¶ 5 On the morning of March 28, 2009, defendant shot Dontue Smith when Smith exited his car and approached defendant's car at an intersection in Chicago. Defendant was arrested a few days later and charged with attempt first degree murder, aggravated battery with a firearm, and two counts of aggravated unlawful use of a weapon. The defense theory at trial was that Smith was the aggressor and defendant fired his gun at Smith in self-defense.

¶ 6 Prior to trial, defense counsel moved, *inter alia*, to admit evidence of Smith's criminal history and bad acts pursuant to *Lynch*. Relevant to this appeal, the defense sought to introduce evidence that (1) Smith was an admitted member of the Maniac Latin Disciples street gang and defendant had knowledge of Smith's involvement in that gang; and (2) Smith was convicted of reckless conduct for approaching a car in traffic and attacking the occupants with a baseball bat. In July 2012, the trial court ruled that (1) Smith's gang membership was not admissible because this case did not involve a gang situation and the crime was not gang motivated; and (2) Smith's

reckless conduct conviction would be admissible if it was reliable and proven.

¶ 7 Thereafter, the State argued that Smith's reckless conduct conviction should be excluded, citing *People v. McGee*, 213 Ill. App. 3d 458 (1991), for the proposition that, when self-defense is put forth to rebut a charge, evidence of the victim's aggressive nature is not admissible when the accounts of what happened are not conflicting. The State argued the jury could conclude that Smith was the aggressor based on the undisputed fact that he exited his car and, thus, the only issue was whether defendant's action to shoot Smith was reasonable. Defense counsel argued that Smith's aggressive nature was relevant because the accounts of what happened conflicted concerning who was the initial aggressor where the State maintained Smith exited his car, not to fight, but merely to talk to defendant. The trial court indicated that it would exclude Smith's reckless conduct conviction because the relevant issue was whether defendant's actions after Smith exited his car and approached defendant were reasonable.

¶ 8 Defense counsel moved the court to reconsider its *Lynch* rulings. The defense argued the accounts of the event conflicted because defendant would testify that Smith followed him before Smith exited his car in a hollering, irate and belligerent manner, threatened defendant, and concealed one hand under his jacket. In contrast, Smith would testify that defendant gave him a menacing look and began following him, so Smith exited his car to speak to defendant, and defendant shot Smith unprovoked. The State responded that any discrepancy concerning who was doing the following was irrelevant and the undisputed fact that Smith exited his car and approached defendant could be interpreted as Smith being the initial aggressor. The trial court denied defendant's motion to reconsider and excluded evidence concerning Smith's reckless conduct conviction, finding there was no conflict between defendant's and Smith's versions of the events.

¶ 9 Thereafter, the defense moved the court to admit Smith's reckless conduct conviction under Rule 404(b) of The Illinois Rules of Evidence (eff. Jan. 1, 2011), arguing Smith had a motive to attack defendant and Smith's *modus operandi* was to attack people in traffic. The trial court denied the motion. The defense also moved the court to instruct the jury that Smith was the initial aggressor, arguing the State had conceded and the trial court had ruled that Smith was the initial aggressor. The State responded that it would not stipulate that Smith was the initial aggressor and acknowledged the jury could determine otherwise after hearing the evidence. The trial court denied defendant's motion.

¶ 10 At the May 2013 jury trial, Smith testified that he was living at 870 N. Mozart Street with his two children, Delilah Ortiz, and her daughter, Kiara. Defendant is Kiara's father. About 9 a.m. on March 28, 2009, Smith left his house and sat in his car while it warmed up. He was going to an auto parts store located on Grand and Central Park Avenues. Smith had a clear view of the intersection of Mozart and Walton Streets and saw defendant's car traveling west on Walton street, even though Smith knew defendant was supposed to be picking up Kiara at her grandparent's house near North and Washtenaw Avenues. Smith and defendant did not make any eye contact. After about one minute, Smith drove west on Walton Street. When Smith reached the stop sign at the intersection of Walton and Richmond Streets, he saw defendant approaching the intersection from Richmond Street. As Smith drove west through the intersection, defendant immediately drove behind Smith and followed him. Smith noticed that Alicia Barber was in defendant's car. Smith drove south on Humboldt Drive, stopped at the traffic light at Grand Avenue, and noticed that defendant was still behind him. Smith turned west onto Grand Avenue, moved into the center lane, and was stopped at a red light at Sacramento Boulevard. Defendant also turned west onto Grand Avenue and pulled up alongside Smith's car in the curbside lane.

The streets were clear and no other cars or pedestrians were present.

¶ 11 Smith testified that he looked over at defendant. Smith wanted to know why defendant was following him, so he exited his car and walked around the front of his car and in between his and defendant's cars. Smith was somewhat upset but not angry. He did not have a gun or any weapon on him. His hands and arms were out in a manner gesturing, "like, what, what, why are you following me?" He asked defendant, "Why are you following . . . ?"; however, before Smith could finish his question, defendant pulled out a gun, held it through the window, pointed it at Smith and shot him in the abdomen. Defendant fired the gun within seconds of pulling it out and never said anything. Smith did not see anything in Barber's hand. Smith fell to the ground and defendant sped off through the traffic light.

¶ 12 Smith testified that he dragged himself back to his car and drove towards a hospital. As he drove, he flagged down Officer Carlos Rivera, who was in a marked police car and followed Smith to the hospital. At the hospital, Smith told Officer Rivera that he was shot by defendant and described defendant and his car. Officer Rivera immediately gave that information to the police dispatcher, and Officer Keith Cali guarded Smith's vehicle at the hospital until an evidence technician could arrive to process it. Smith was hospitalized for two weeks. As a result of the gunshot, a portion of his intestines was removed, he had a scar from the bottom of his chest to the top of his groin, and a piece of the fragmented bullet was still lodged in his hip.

¶ 13 Smith admitted that he had a 2004 conviction for possession of a controlled substance, a 2002 misdemeanor conviction for improper use of a registration or certificate, and a 2007 misdemeanor conviction for displaying a fake insurance card. On cross-examination, Smith stated he did not have anything against defendant. Furthermore, Smith did not know if his sister Teneitha had a relationship with defendant.

¶ 14 On the date of the incident, at about 10:55 a.m., evidence technician Angelo Marconi recovered one .380 caliber cartridge casing from the roadway at the crime scene. He thoroughly searched Smith's car and did not find any weapons.

¶ 15 Three days after the incident, Officer Laurence Odoms and other officers went to a residence to arrest defendant. An officer saw defendant look out the second floor unit, and Officer Odoms learned that someone had attempted to leave the building. Officer Odoms knocked and announced "police" several times. After no response, he ordered the officers to force entry. After the officers struck the door once, defendant opened the door. He and Barber were both present and taken into custody. Thereafter, Detective Robert Goerlich, defendant, and other officers went to defendant's father's house to recover a Lorcin L380 semi-automatic, .380 caliber handgun. The recovered gun was loaded with a total of six live rounds, could hold eight rounds of ammunition, and needed to be manually cocked for the gun to be fired. Forensic scientist Fred Tamosek compared the fired shell casing recovered at the crime scene with test fired shell casings from the recovered gun. Tomasek's findings were inconclusive; he could not eliminate the recovered gun as being the weapon that had fired the shell casing recovered at the crime scene.

¶ 16 Defendant testified that he tried to see his daughter Kiara every weekend, but his visits were allowed only when it was convenient for Delilah's family. Defendant knew Smith from the neighborhood and school, but they were not friends. Defendant knew that Delilah and Smith were dating, and defendant, at the same time, had begun dating Smith's sister, Teneitha, in the summer of 2007. Defendant had gone to Teneitha's mother's house multiple times. Once, in August of 2008, around 9:30 p.m., defendant picked up Teneitha from her mother's house to go to Navy Pier. Smith followed Teneitha as she exited the house. After Teneitha got in defendant's

car, Smith kicked defendant's car door. When defendant asked Smith, "What's up?", Smith lifted his shirt and showed defendant a gun in Smith's waistband. Defendant drove off and never reported the incident to the police. He did not see Smith from that night until the date of the incident at issue in this case.

¶ 17 Defendant testified that, on the morning of the incident, he and Barber had driven to Kiara's grandparent's house and picked up Kiara, who was about four years old at the time. As defendant drove in the vicinity of California Avenue and Augusta Boulevard, Kiara yelled that she and her mother lived in that area. Defendant needed Delilah's address to serve custody papers on her for visitation rights, so he questioned Kiara to figure out where Delilah lived. He did not know Smith was living with Delilah at the time, but suspected that might be the reason why Delilah concealed her address. Defendant followed Kiara's directions and, as defendant drove west on Walton Street and stopped at a stop sign, Kiara pointed to a house on Mozart Street. Barber wrote down the address, and defendant proceeded to drive home. Defendant did not see Smith but noticed his car parked a couple of houses away from the house at which Kiara had pointed.

¶ 18 Defendant testified that as he continued driving west on Walton Street, he saw, in his rear view mirror, Smith turn westbound onto Walton Street from Mozart Street. Defendant "kind of panicked" because he remembered his August 2008 confrontation with Smith, so defendant turned south onto Francisco Avenue, went around the block, drove north through the alley, and then west again on Walton Street. Defendant turned south onto Humboldt Drive and saw Smith's car again, just ahead of him, at the red light at Grand Avenue. Defendant felt nauseous and wanted to avoid any confrontation because his family was in the car. Smith's left turn signal was on, so defendant drove to the right side of Smith's car and turned right onto Grand Avenue.

Defendant, however, got “stuck” at the red light at Sacramento Avenue. Meanwhile, Smith, instead of turning left, made a wide right turn onto Grand Avenue, stopped his car abruptly alongside defendant’s car, and jumped out of his car.

¶ 19 Defendant testified that Smith stood by his door yelling, so defendant rolled his window down to hear Smith. Defendant was scared and did not know what to do. Smith repeatedly yelled, “Do we have a problem?”, called out defendant’s name and cursed. Then, Smith closed his car door and came around his car toward defendant. Smith’s left hand was “up under his jacket.” Defendant told Smith not to “run up on this car,” but Smith ignored him and was still “running up.” Barber was leaning forward in her passenger seat to see out defendant’s window, so defendant pushed her back and pulled out the gun he kept on the right side of his car seat. Smith was still “running up,” so defendant pointed the gun out the window, pointed down, and fired at Smith’s stomach. Smith fell, the light turned green, and defendant drove off.

¶ 20 Defendant testified that he drove to his cousin’s house, switched cars, and then dropped off Barber and Kiara. Then he drove to his father’s house and left the gun there. Later that evening, he went to his grandfather’s birthday party. Defendant evaded detectives’ telephone calls by having his cousin answer his phone. Defendant wanted to turn himself in to authorities after he obtained a lawyer, but was arrested three days after the incident.

¶ 21 On cross-examination, defendant acknowledged that when Smith exited his car and approached defendant’s car, no other cars were around to block defendant from driving away. Nevertheless, defendant claimed that he did not want to run a red light and risk being hit by any potential traffic. Defendant also acknowledged that his gun had to be manually cocked in order to fire a bullet. Defendant claimed that when he pulled out the gun, it was already loaded and cocked but the safety was on. Defendant was then impeached with the handwritten statement he

made to an assistant State's attorney and a police officer. According to that statement, defendant said that Smith's left hand was on his left hip; defendant never said that Smith's left hand was under his jacket, that he shot Smith because he (defendant) panicked, or that he thought Smith had a gun. According to the handwritten statement, defendant knew Smith lived with Delilah and that was why defendant did not know Delilah's current address. Furthermore defendant said he last saw Smith "about a year ago," which would have been about April of 2008; defendant did not mention the August 2008 alleged confrontation where Smith displayed a gun.

¶ 22 Teneitha Smith testified she never dated or had sex with defendant. Although defendant had been to her house, he was never inside of it. She "hung out" with him a couple of times or accepted rides from him, but she never talked to or saw him on a daily basis. Once, she went to Navy Pier with defendant, but Smith, her brother, never came out of the house or kicked defendant's car. Furthermore, Smith never displayed a handgun to defendant and Teneitha never saw Smith with a gun.

¶ 23 Delilah Ortiz testified that she knew Teneitha and got along with her. One day, Delilah was at Teneitha's house when defendant picked Teneitha up, but it did not bother Delilah and nothing happened.

¶ 24 At the jury instructions conference, the defense requested Illinois Pattern Jury Instructions, Criminal, No 24-25.09X (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 24-25.09X) (a person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor). The State requested IPI Criminal 4th No. 24-25.09 (a person who initially provokes the use of force against himself is justified in the use of force only if the force used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every

reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person). The defense objected to IPI Criminal 4th No. 24-25.09, arguing Smith testified that he did not use force but merely said a few words and was shot and the instruction would confuse the jury about whether defendant should have tried to drive away. Over the defense's objection, the court gave IPI Criminal 4th No. 24-25.09, in addition to IPI Criminal 4th No. 24-25.09X, finding a reasonable trier of fact could believe that both Smith and defendant used force.

¶ 25 The State also requested IPI Criminal 4th No. 24-25.11 (a person is not justified in using force if he initially provokes the use of force against himself with the intent to use that force as an excuse to inflict bodily harm upon the other person), and the defense objected, arguing there was no evidence that defendant provoked Smith or that Smith used force against defendant. Over the defense's objection, the court gave IPI Criminal 4th No. 24-25.11, finding a reasonable trier of fact could believe defendant provoked Smith by following him.

¶ 26 The jury acquitted defendant of attempt first degree murder and convicted him of aggravated battery with a firearm. The court denied defendant's motion for a new trial and sentenced him to 15 years in prison. Defendant appealed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant contends: (1) a new trial is necessary because the trial court erroneously excluded evidence concerning the victim's street gang membership and conviction of reckless conduct, which were admissible to show the victim's aggressive nature pursuant to *Lynch*; (2) trial counsel failed to move to reopen the record to admit evidence of the victim's reckless conduct conviction after the trial court found a conflict existed concerning who was the initial aggressor; (3) the State argued pretrial that the victim was the aggressor in order to

exclude *Lynch* evidence, but later improperly argued that defendant was the aggressor in order to obtain initial aggressor jury instructions; (4) defendant's 15-year sentence is excessive; and (5) his mittimus incorrectly indicates that he was convicted of first degree murder.

¶ 29 A. Mittimus Correction

¶ 30 Defendant argues, the State concedes, and this court agrees that the mittimus signed by the trial court erroneously states that defendant was convicted of attempt first degree murder. The jury acquitted defendant of attempt first degree murder and found him guilty of aggravated battery with a firearm. Accordingly, we order that the mittimus be corrected to reflect defendant's conviction of aggravated battery with a firearm. *People v. Brown*, 255 Ill. App. 3d 425, 438-39 (1993) (when a mittimus incorrectly reflects the name of the offense of which a defendant was convicted, this court has the authority to order a circuit court clerk to make necessary mittimus corrections); Ill. Sup. Ct. R. 615(b).

¶ 31 B. *Lynch* Evidence

¶ 32 The admission of evidence lies within the sound discretion of the trial court, and this court reviews the trial court's ruling for an abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful or unreasonable or when no reasonable person would take the view adopted by the trial court. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003); *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 31. Without citing any pertinent authority, defendant contends the issue of whether he was afforded the opportunity to present a complete defense is a question of law subject to *de novo* review. We disagree. Although the right to present a complete defense is violated by arbitrary rules of evidence (see *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006)), the question here is

not whether the general principles of relevancy and admissibility under *Lynch* are arbitrary, but whether the trial court's particular *Lynch* ruling in this case misapplied those principles.

¶ 33 When a claim of self-defense is raised, evidence of the victim's violent and aggressive character may be admissible by appropriate evidence to either (1) show that the defendant's knowledge of the victim's violent tendencies affected the defendant's perceptions of and reactions to the victim's behavior, or (2) support the defendant's version of the facts when there are conflicting accounts of what happened, even if the defendant had no prior knowledge of the victim's violent acts. *Lynch*, 104 Ill. 2d. at 199-201; *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005). In the second situation, the victim's character is circumstantial evidence which may provide the trier of fact with additional facts to help decide what really happened. *People v. Bedoya*, 288 Ill. App. 3d 226, 236 (1997). A defendant may introduce evidence of a victim's violent characteristics only after evidence had been introduced that the victim was, or appeared to be, the assailant. *Nunn*, 357 Ill. App. 3d at 631. The evidence of the defendant's violent character must be reliable and may be proved, for example, by a criminal conviction of a violent offense or "by first hand testimony as to the victim's behavior." *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004).

¶ 34 1. Smith's Alleged Gang Membership

¶ 35 First, defendant argues under the first prong of *Lynch* that evidence of Smith's self-admitted membership in the Maniac Latin Disciples street gang was relevant to support defendant's defense that he feared Smith and reasonably believed he had to defend himself. Defendant argues that a defendant's state of mind is necessarily at issue whenever self-defense is raised and Smith's gang membership was relevant because it provoked fear and panic in defendant.

¶ 36 We conclude that the trial court did not abuse its discretion in excluding this evidence. Under the first prong of *Lynch*, defendant's knowledge of Smith's violent tendencies would be admissible to show how it affected defendant's perceptions of and reactions to Smith's behavior. However, evidence of Smith's alleged gang membership, alone, was too general and indefinite to be probative of aggressive violent tendencies. "Proffered evidence which has little probative value due to remoteness, uncertainty, or its potential prejudicial nature may be rejected as irrelevant." *People v. Booker*, 274 Ill. App. 3d 168, 171 (1995). Here, there was no evidence showing that Smith performed any acts of aggression in association with gang members or that defendant knew of any such acts, and gang membership alone is not evidence of a violent act. Compare *People v. Ware*, 180 Ill. App. 3d 921, 929 (1988) (*Lynch* evidence that the victim associated with street gang members was properly excluded as irrelevant; such general and indefinite evidence did not make it more probable that the victim performed specific acts of violence on the date in question, and there was no evidence showing the victim performed any acts of aggression in his association with gang members) with *Booker*, 274 Ill. App. 3d at 172 (the trial court erred in excluding *Lynch* evidence of, *inter alia*, the defendant's knowledge that the victim had been charged with murder).

¶ 37 Defendant cites *People v. Nichols*, 235 Ill. App. 3d 499, 505-06 (1992), and *People v. Smith*, 141 Ill. 2d 40, 58 (1990), for the proposition that evidence indicating gang affiliation or involvement is admissible to show a motive for an otherwise inexplicable act, typically when a defendant is accused of a gang-motivated offense. In *Nichols*, 235 Ill. App. 3d at 506, gang membership evidence was admissible because the identity of the assailant was a critical issue, the gang evidence gave meaning to the terms yelled during a shooting, and a gang member was bragging about a shooting that linked the defendant to the crime. In *Smith*, 141 Ill. 2d at 58, gang

membership evidence was admissible because it was related to the crime charged, showed a common purpose or design, and provided a motive for an otherwise inexplicable act. Those cases, however, do not assist defendant because he was not accused of a gang-motivated offense and nothing in the record indicates Smith’s actions were gang-motivated. Moreover, defendant’s claim that he shot Smith in self-defense can hardly be described as an inexplicable act where defendant claimed he feared Smith from a previous confrontation where Smith displayed a gun, Smith followed defendant’s car for several blocks, Smith exited his car in an angry and threatening manner, and Smith kept “running up” on defendant’s car—which contained defendant’s family—despite defendant’s warning and while Smith’s hand was concealed under his jacket. Additionally, defendant has not shown that evidence of Smith’s alleged gang membership would have been admissible by reliable evidence or proper witnesses. See *People v. Simon*, 2011 IL App (1st) 091197, ¶ 72 (finding no abuse of discretion where the trial court did not allow *Lynch* evidence where it was based on hearsay).

¶ 38 2. Smith’s Reckless Conduct Conviction

¶ 39 Next, defendant argues that two errors, separately and together, denied him the right to present a complete defense and a fair trial. First, the trial court erred pretrial by excluding evidence of Smith’s reckless conduct conviction, which was based on Smith exiting his car in traffic and attacking the occupants of another car with a baseball bat. Second, after the trial court determined during the jury instruction conference that there was conflicting evidence regarding who was the initial aggressor, defense counsel failed to seek to reopen the record to admit Smith’s reckless conduct conviction.

¶ 40 In this case, the exclusion of Smith’s reckless conduct conviction was error. The relevant and reliable evidence of his prior conviction was admissible under the second prong of *Lynch*

because there were conflicting accounts of what happened, particularly concerning who was following whose car, how Smith approached defendant's car at the intersection of Grand Avenue and Sacramento Boulevard, and what was spoken between Smith and defendant. *Lynch*, 104 Ill. 2d at 200. At the pretrial argument on defendant's *Lynch* motion, it was clear that the accounts of what happened would be conflicting, and although the State would concede that a fact-finder could determine that Smith's act of exiting the car was aggressive, the State would not concede that Smith was the initial aggressor.

¶ 41 At the trial, Smith testified that defendant initially drove past Smith's parked car in cross-traffic but then maneuvered to get behind Smith's car, continued to follow Smith as he turned onto two other streets, and then pulled up alongside Smith's car at the red light at Grand Avenue and Sacramento Boulevard. Furthermore, Smith claimed that he was not angry as he walked toward defendant's car and held both of his empty hands up in a questioning gesture. Smith also testified that defendant never said anything as he pointed his gun and fired at Smith in a matter of seconds and before Smith could even finish asking why defendant was following him.

¶ 42 In contrast, defendant testified that he turned off Walton Street to get away from Smith, who was driving behind him. Defendant drove around the block to avoid Smith but unfortunately caught up to Smith at the red light at Grand Avenue and Humboldt Drive. Then, defendant tried to get away from Smith again by turning right onto Grand Avenue because Smith had signaled that he intended to turn left. Smith, however, made a wide right turn instead and followed defendant to the red light at Grand Avenue and Sacramento Boulevard. Furthermore, when Smith exited his car, he was cursing, yelling and calling out defendant's name while Smith's left hand was concealed "up under his jacket." Moreover, Smith kept "running up" on defendant's car even though defendant verbally warned him not to "run up on this car." Defendant testified

that he feared for the safety of his family and believed Smith was armed with a gun because Smith had shown defendant a gun during a previous encounter.

¶ 43 The State argues the trial court was correct in excluding the evidence of Smith's conviction because the "essential facts and events of the incident were not in conflict," and *Lynch* evidence is not admissible to determine the reasonableness of a defendant's actions. The State argues this case is similar to *McGee*, 213 Ill. App. 3d 458, where the reviewing court affirmed the trial court's exclusion of *Lynch* evidence concerning the victim's two prior robbery convictions. Specifically, the court found no abuse of discretion because there was no factual dispute in the case that the victim stood a few feet from the defendant in an alley and punched him in the face after the defendant had fired several shots that missed the victim, and then the defendant shot the victim in the chest. *Id.* at 469-70.

¶ 44 We find *McGee* distinguishable from the instant case. In *McGee*, where the duration and geographic scope of the conflict between the victim and the defendant was limited, the relevant facts concerned the short time period when the victim confronted the defendant outside the building and the two men then went into the alley to fight, and those relevant facts were not in dispute. Here, in contrast, the conflict between Smith and defendant started close to Smith's house and continued over several blocks before the ultimate confrontation at the intersection of Grand Avenue and Sacramento Boulevard. Moreover, the testimony of Smith and defendant concerning the events before and after Smith exited his car and approached defendant was, as detailed above, in conflict. Accordingly, we cannot conclude that the parties' agreement on the one fact that Smith exited his car and approached defendant's car somehow renders meaningless all the other conflicting facts in their opposing versions of the event.

¶ 45 We find support for our position in *People v. Keefe*, 209 Ill. App. 3d 744, 747 (1991), where the defendant was convicted of armed violence and aggravated battery for stabbing the victim, but the court reversed the defendant's convictions and held that the exclusion of evidence of the victim's propensity for violence was error. The victim and defendant were involved in an altercation where the defendant stabbed the victim after the victim punched the defendant twice while the defendant was in his car. At trial, the defendant argued that he acted in self-defense, but the trial court prevented the defense from questioning the victim and another witness as to whether the victim had been fighting or trying to fight on the evening of the stabbing, before the altercation with the defendant. *Id.* at 754. The trial court excluded the evidence because the case was not a homicide and it was apparent and undisputed that the victim was the initial aggressor. *Id.* at 755.

¶ 46 In reversing the trial court, the reviewing court in *Keefe* rejected the notion *Lynch* evidence was only relevant for the purpose of showing who was the initial aggressor. *Id.* at 756. Specifically, the court acknowledged that it was clear that *Lynch* involved the question of who was the aggressor and the *Lynch* court had limited its holding to that issue. *Id.* Nevertheless, there were conflicting accounts in *Keefe* regarding who was the aggressor at the time of the stabbing, and *Lynch* evidence, in addition to being probative of the question of aggression, would have provided testimony which, if believed by the jury, would have also rendered reasonable the defendant's use of force against the victim. *Id.* (citing *People v. Gossett*, 115 Ill. App. 3d 655, 665-67 (1983)). Here, there were conflicting accounts both concerning who was the initial aggressor and who was the aggressor at the time of the shooting, and Smith's conviction would have been probative of defendant's self-defense claim.

¶ 47 The State also argues that if the exclusion of Smith’s conviction was error, it was harmless error. The State contends defendant was not prejudiced by the exclusion of Smith’s conviction because the evidence against defendant was ample where he testified that he shot Smith when Smith exited his car and approached defendant’s car. Moreover, defendant’s reaction of shooting Smith in the stomach because Smith was approaching defendant’s car was unreasonable. The State argues defendant’s claim that he feared Smith and wanted to avoid a confrontation is illogical because defendant continued to follow Smith over multiple streets, rolled his window down to hear what Smith was saying as Smith approached his car, and remained stopped at the red light even though no cars or pedestrians blocked him from turning right or running the red light and driving away.

¶ 48 “When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence.” *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). An evidentiary error is harmless “where there is no reasonable probability that the jury would have acquitted the defendant absent the” error. *People v. E.H.*, 224 Ill. 2d 172, 180 (2006).

¶ 49 We cannot conclude that the trial court’s exclusion of Smith’s conviction, which was probative of his violent and aggressive character, was harmless error. Defendant should have been allowed to present this evidence, as it clearly was probative of the issues involved in this case where the jury was asked to consider—pursuant to the State’s jury instruction concerning the justifiable use of force by the initial aggressor—whether defendant was the initial aggressor in this incident. Moreover, the State argued in closing argument that defendant was the aggressor

who followed Smith with a loaded handgun in his car, already cocked, and waited for Smith to get close enough to defendant's car so defendant could aim and fire the gun into Smith's stomach. Furthermore, the purpose of admitting Smith's conviction was to support defendant's claim of self-defense; consequently, ample evidence confirming the undisputed fact that the shooting took place is irrelevant to the harmless error analysis in this case. If defendant had been allowed to inform the jury that Smith was convicted based on his conduct of exiting his car in traffic and attacking the occupants of another vehicle with a baseball bat, it is possible that the jury would have given greater weight to defendant's version of the events of that morning or concluded that defendant was provoked and justified in using the amount of force that he used.

¶ 50 Based on our holding that the trial court committed reversible error by excluding evidence concerning Smith's conviction, it is unnecessary, and we decline to consider, defendant's remaining arguments on appeal concerning ineffective assistance of counsel, the propriety of the State's alleged inconsistent positions pretrial and posttrial concerning who was the initial aggressor, and whether defendant's sentence was excessive. For the reasons stated above, defendant's conviction is reversed and the matter remanded for a new trial. Because defendant was acquitted of attempt first degree murder and cannot be retried on that charge, his new trial will be on the charge of aggravated battery with a firearm.

¶ 51 **III. CONCLUSION**

¶ 52 Because the evidence was adequate to support a guilty verdict, the erroneous exclusion of Smith's reckless conduct conviction requires that defendant's aggravated battery with a firearm conviction be reversed and the cause remanded for a new trial.

¶ 53 Reversed and remanded.