FIRST DIVISION
August 17, 2015

No. 1-13-3649
2015 IL App (1st) 133649-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	10 CR 15960
WYSINGO TURNER,	)	
Defendant-Appellant.	)	Honorable Kevin M. Sheehan, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

Held: Defense counsel was not ineffective for failing to tender certain jury instructions and failing to elicit certain evidence from a witness; the trial court did not err when it excluded evidence that the victim threatened to kill defendant, allowed defendant to be cross-examined about the legality of carrying a gun in his car, refused defense counsel's tendered jury instructions regarding intent and knowledge, sustained an objection from the State during defense counsel's cross-examination of a witness, and refused to ask certain questions during *voir dire*.

¶ 1 Defendant, Wysingo Turner, was convicted of first degree murder following a jury trial, and was sentenced to 60 years in the Illinois Department of Corrections. On appeal, defendant contends that he was deprived of effective assistance of counsel by counsel's failure to: (1) tender a jury instruction on involuntary manslaughter; (2) tender a jury instruction with respect to prior inconsistent statements; (3) tender a jury instruction with respect to no duty to retreat; (4) tender a jury instruction with respect to proof of other crimes; (5) elicit from a witness an alleged threat by the victim to defendant. Defendant also contends that the trial court erred when it: (1) excluded evidence that the victim threatened to kill defendant; (2) allowed defendant to be cross-examined about whether he knew that it was illegal to carry a gun in his car; (3) refused defense counsel's tendered jury instructions defining intent and knowledge; (4) sustained an objection to a question of a certain witness; and (5) refused to ask defense counsel's tendered *voir dire* questions to the venire. For the following reasons, we affirm the judgment of the circuit court.

¶ 2 BACKGROUND

¶ 3 At trial, the following evidence was presented. The victim's son, Demar'J Bankston, testified that he was 12 years old in August of 2010 and that he lived with the victim in the basement of Queen Spencer's house at 7019 South Justine in Chicago. The victim's half-sister, Silvia Gandy, lived upstairs. Demar'J testified that on the morning of August 12, 2010, defendant arrived at 7019 South Justine in his silver BMW and had a conversation with the victim outside that Demar'J did not hear. He testified that defendant returned later and defendant approached him outside with a beer bottle in his hand and asked for Silvia. Demar'J told defendant she was not home, so defendant asked for the victim. Demar'J told defendant that the victim was in the basement. Defendant then went to his car, put his beer bottle in the trunk, and knocked on the basement window. The victim came out and she and defendant argued.

¶ 4 Demar'J testified that defendant then pulled a silver gun from the back of his pants and pointed it at the victim. Demar'J heard the victim say, "I'm sorry," and then defendant shot the victim in the neck and she fell to the ground. Demar'J testified that defendant then walked to where Demar'J's cousin was standing and handed him some money. He then went to his car and drove away.

¶ 5 Raymond Washington lived at 7021 South Justine at the time of the incident. Washington testified that he was in his living room on the afternoon in question, and saw defendant's silver BMW pull up and saw defendant get out. A few minutes later, Washington heard a gunshot and went toward his front door. He saw defendant walk back to his car with what appeared to be a weapon in his hand. Washington looked into the gangway and saw the victim on the ground with a bullet hole in her neck.

¶ 6 Queen Spencer lived at 7019 South Justine with her son, Walter Gandy, her granddaughter Silvia, and Silvia's three-year-old son Ya'Shon. Spencer testified that she knew the victim as Silvia's half-sister, and that she had seen defendant at her house a few times a week visiting Ya'Shon and taking him places. Spencer was home on the afternoon of the incident and saw defendant standing in the gangway between her house and the house next door. She testified that she heard defendant say, "What you want to do now?" and the victim answer, "Nothing. I was just playing." Queen then heard a gunshot and went to the front porch. She saw defendant walking from the gangway to his car with a gun in his hand. Spencer testified that defendant got in his car, put his head on the steering wheel, and said, "Oh, my god," and then drove away. She called the police.

¶ 7 Chicago police officer Wade Clark testified that he responded to the scene at 7019 South Justine and went to the gangway, where he saw paramedics working on the victim. He spoke to witnesses at the scene, and then began looking for the shooter and a silver BMW.

¶ 8 Chicago police officer Richard Barber was patrolling the area when he heard the dispatch of the shooting which included a description of the shooter and the car he was driving. As Officer Barber was driving, he observed a silver BMW pull into an automotive store, about two miles from 7019 South Justine. Officer Barber saw defendant open his door to exit and a full bottle of Corona rolled out of the car. Officer Barber asked defendant his name, which defendant provided. The officer handcuffed him and placed him in the back of the squad car. Officer Barber testified that defendant asked him to loosen his handcuffs, stating that he was going to prison for a long time. Officer Barber further testified that he looked into defendant's car through the open driver's door and observed a chrome handgun on the driver's side floor.

¶ 9 Chicago police officer Zbigniew Niewdach, a forensic investigator, testified that he processed the scene of defendant's arrest. He saw a full Corona beer bottle on the ground next to the driver's side door, a liquor bottle in the passenger seat of the silver BMW, a blue towel on the driver's seat, and the barrel of a handgun on the driver's side floor. He recovered a .44 caliber revolver from inside the car.

¶ 10 The defense called Walter Gandy, who testified that he lived with his mother, Queen Spencer, at 7019 South Justine. He knew the victim and was familiar with her voice. Gandy testified that at approximately 10 or 11 a.m. on the day in question, he heard the victim's voice speaking loudly and "violent like in an up rage." He was not present at the time of the shooting.

¶ 11 Defendant testified on his own behalf. He testified that he was 63 years old, and was a retired fireman after 25 years of employment at the Chicago Fire Department. Defendant

testified that he had hernia surgery in early August 2010, and a tooth extracted on August 8, 2010. On August 10, 2010, Silvia called and asked him to take Ya'Shon to get his shots for school. Defendant testified that he agreed even though he felt weak. He stated that he weighed approximately 150 pounds at the time.

¶ 12 Defendant testified that when he arrived to pick up Ya'Shon, Silvia, Ya'Shon, and the victim entered his car. As he drove, Silvia told defendant to drop the victim at another location, but defendant did not feel like it. He testified that the language between them became "quite heated," so he drove to a police station and told the desk sergeant his dilemma. The desk sergeant and other officers made Silvia, Ya'Shon, and the victim get out of the car.

¶ 13 Defendant testified that on August 12, 2010, he went to 7019 South Justine between 10:30 and 11 a.m. He saw Ya'Shon riding his bicycle and stopped to explain why he had made him get out of the car two days before. Defendant testified that as he was crouched down talking to Ya'Shon, the victim came out and kicked his shoulder, causing him to fall back. Defendant then got in his car and drove to Ogden Park, where he stayed for several hours. Defendant testified that he kept a loaded gun in his car for protection.

¶ 14 He then went back to 7019 South Justine at approximately 3 p.m. Defendant testified that when he arrived back at the residence, he got out of his car and took his gun with him because sometimes there were “thugs” in the basement. He walked down the gangway, but the victim approached him as he reached the end of the gangway. She did not say anything to him, and she appeared calm. Defendant testified that the victim then "snatched the gun" from him and held it facing him. He thought his life was in danger and thought the victim was going to kill him so he struggled with her but the gun discharged during the struggle. Defendant denied pulling the trigger or shooting the victim.

¶ 15 On cross-examination, defendant admitted that although he had emergency medical training, he did not help the victim after she was shot. Defendant denied that a bottle of Corona fell from his car when he got out at the automotive store, and testified that the bottle was a "prop."

¶ 16 At the jury instruction conference, defendant requested a jury instruction on self-defense, to which the State objected. The trial court granted the request to instruct the jury on self-defense. The jury found defendant guilty of first degree murder and personally discharging a firearm that proximately caused the victim's death. At the conclusion of the sentencing hearing, the trial court sentenced defendant to 35 years for first degree murder and a consecutive term of 25 years for personally discharging a firearm that proximately caused death. Defendant now appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant contends that he was deprived of effective assistance of counsel for various reasons discussed below. Defendant also contends that the trial court erred when it: (1) excluded evidence that the victim threatened to kill defendant; (2) allowed defendant to be cross-examined about the legality of carrying a gun in his car; (3) refused defense counsel's tendered jury instructions defining intent and knowledge; (4) sustained an objection to a question of a certain witness; and (5) refused to ask defense counsel's tendered *voir dire* questions to the venire.

¶ 19 Ineffective Assistance of Counsel

¶ 20 We first address defendant's ineffective assistance of counsel claims. Defendant contends that he was deprived of effective assistance of counsel by counsel's failure to: (1) tender a jury instruction on involuntary manslaughter; (2) tender a jury instruction with respect to

prior inconsistent statements; (3) tender a jury instruction with respect to no duty to retreat; (4) tender a jury instruction with respect to proof of other crimes; (5) elicit from a witness an alleged threat by the victim to defendant.

¶ 21 Every defendant has a constitutional right to effective assistance of counsel under the sixth amendment to the United States Constitution and the Constitution of Illinois. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. Claims of ineffective assistance are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by Illinois in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Id*.

¶ 22 We turn to defendant's first ineffective assistance of counsel claim, which is that defense counsel failed to tender the jury instruction for involuntary manslaughter. A defendant commits involuntary manslaughter when he unintentionally kills another person without lawful justification by recklessly acting in a manner likely to cause death or great bodily harm. 720 ILCS 5/9-3 (West 2008).

¶ 23 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). It is well-settled in Illinois that counsel's choice of jury instructions is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). "Such decisions enjoy a strong

presumption that they reflect sound trial strategy rather than incompetence," and therefore are "generally immune from claims of ineffective assistance of counsel." *People v. Enis,* 194 Ill. 2d 361, 378 (2000). However, the failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel if the instruction was so critical to the defense that its omission "den[ied] the right of the accused to a fair trial." *People v. Pegram*, 124 Ill. 2d 166, 174 (1988); *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008).

¶ 24 The State presented evidence that defendant intentionally killed the victim by a shot to the neck. Defendant presented evidence that a struggle ensued between him and the victim and the victim shot herself during the struggle. There was no evidence presented that defendant killed the victim recklessly. In the absence of any evidence of recklessness, defendant was not entitled to an involuntary manslaughter instruction. See *People v. Jones*, 174 Ill. 2d 126, 131-32 (1997) (a defendant is entitled to an instruction on his theory of the case only if there is some foundation for the instruction in the evidence). Accordingly, defendant was not prejudiced by defense counsel's failure to request the instruction for involuntary manslaughter, and therefore his claim of ineffective assistance of counsel fails.

¶ 25 The case of *People v. Salas*, 2011 IL App (1st) 091880, is instructive here. In *Salas*, two witnesses testified that they saw the defendant shoot the victim. Several other witnesses testified that they saw defendant with a gun either immediately before or immediately after the shooting of the victim. The defendant testified that he was riding his bike down an alley when he saw a Hispanic male come out of a gangway flashing gang signs toward the defendant. The defendant testified that when he was within four feet of him, the person pulled a gun from his pocket and tried to point it at the defendant. The defendant testified that they struggled and the person fired the gun without hitting defendant. The person eventually tired during the struggle and dropped

the gun. Defendant picked it up and ran to his bicycle. He testified that he did not shoot anyone. *Salas*, 2011 IL App (1st) 091880, ¶ 39. The defendant was found guilty of first degree murder.

¶ 26 The *Salas* defendant argued on appeal that his counsel provided ineffective assistance by failing to investigate, consider, or discuss with him whether an involuntary manslaughter instruction should have been tendered. The court found that the State presented evidence that the defendant intentionally killed the victim by a shot to the back of the head, and that the defendant presented evidence that he did not shoot and did not kill the victim. *Salas*, 2011 IL App (1st) 091880, ¶ 93. The court specifically found that there "was no evidence that [the] defendant recklessly killed [the victim]," and thus absent any evidence of recklessness, the defendant was not entitled to an instruction on involuntary manslaughter. *Id*.

¶ 27 The circumstances are precisely the same in the case at bar. Defendant presented evidence that a struggle ensued between he and the victim, but that he did not pull the trigger. Accordingly, as in *Salas*, we find that defendant presented no evidence that defendant recklessly killed the victim, and thus he was not entitled to an instruction of involuntary manslaughter, and his claim of ineffective assistance fails on this point.

¶ 28 Defendant's next claim of ineffective assistance of counsel is that defense counsel failed to tender Illinois Pattern Jury Instruction (IPI) Criminal 4th No. 3.11, which provides:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement or acted in a manner that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom."

When evidence of a witness' prior inconsistent statement is admissible to impeach his or her credibility, such evidence is not admitted as proof of the truth of the facts stated out of court, but to cast doubt on the testimony by showing his inconsistency. *People v. Larry*, 218 Ill. App. 3d 658, 666 (1991). An instruction to that effect should be given upon request. *Id.* A prior inconsistent statement encompasses omissions as well as affirmative statements. *Id.*

¶ 29 Defendant contends that one of the State's witnesses, Queen Spencer, testified that just before the shooting, she heard defendant say "What do you want to do now?" and heard the victim reply, "Nothing. I was just playing." Defendant argues that Spencer admitted, however, that when interviewed by police immediately after the incident, she did not tell them about the conversation she overheard between defendant and the victim. Defendant claims that if the jury had been tendered IPI Criminal 4th No. 3.11, the jury would have known that it "could discount Queen Spencer's testimony, [and it] might well have concluded that [defendant's] account of the killing was accurate, and that he was acting in self defense." We disagree.

¶ 30 We reiterate that defense counsel's choice of jury instructions is considered a tactical decision, within the discretion of defense counsel. *Enis*, 194 Ill. 2d at 378. The alleged contradictory statements " 'must have the reasonable tendency to discredit a witness' testimony on a material matter' " for reversal error to be found. *Larry*, 218 Ill. App. 3d at 666 (quoting *People v. Villa*, 93 Ill. App. 3d 196 (1981)).

¶ 31 Applying these principles to the case at bar, we conclude that the omission of which defendant complains, that Spencer failed to tell the police that she heard an exchange between defendant and the victim, was not material to the issue of defendant's guilt of first degree murder. Accordingly, we cannot say that it was ineffective assistance of counsel for defense counsel to fail to request IPI Criminal 4th No. 3.11.

¶ 32 Defendant's next contention regarding ineffective assistance of counsel is that defense counsel should have tendered IPI Criminal 4th No. 24-25.09X, which provides:

> "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."

¶ 33 Defendant maintains that this instruction was pertinent in this case because he returned to the scene of the crime several hours after being "attacked" by the victim, and without knowing that defendant had no duty to attempt to escape the danger, the jury might have concluded that his return to the scene "deprived him of the right to act in self-defense." The State responds that the jury was properly instructed in this case, and we agree.

¶ 34 We again reiterate that defense counsel's choice of jury instructions is considered a tactical decision, within the discretion of defense counsel. *Enis*, 194 Ill. 2d at 378. The jury was instructed on defendant's right to self-defense. Had the jury believed that appropriate circumstances existed, it could have found defendant not guilty. See *People v. Miller*, 259 Ill. App. 3d 257, 266 (1994) (not improper to refuse instruction of no duty to retreat when jury properly instructed on defendant's theory of the case, self-defense). Accordingly, we cannot find that counsel was ineffective for failing to tender the jury instruction on no duty to retreat.

¶ 35 Defendant also claims that defense counsel failed to tender IPI Criminal 4th No. 3.14, which governs proof of other offenses or conduct. Defendant contends that because the prosecutor during closing argument stated that defendant drove around with a loaded gun in his car and that he "doesn't care about the law," defense counsel should have tendered IPI Criminal 4th No. 3.14, which instructs the jury to consider other-crimes evidence only for the limited purpose for which it was introduced. Generally, evidence that a defendant in a criminal case has engaged in other bad acts on a different occasion is not admissible to show that the defendant has

a propensity to commit crime. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Pikes*, 2013 IL 115171, ¶ 13. The law disallows evidence of prior bad acts on this basis, not because it has no probative value, "but rather because it has too much." *People v. Manning*, 182 Ill. 2d 193, 213 (1998). However, evidence of prior bad acts may be admitted to prove any matter other than propensity that is relevant to the case, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Defendant contends that because evidence that he drove around with a loaded gun in his car was introduced for more than the limited purpose of intent to kill the victim, defense counsel's failure to tender the jury instruction on other-crimes evidence was objectively unreasonable.

¶ 36 We reiterate that defense counsel's choice of jury instruction is considered a tactical decision within the discretion of defense counsel. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998). In the case at bar, defense counsel elicited testimony that defendant carried a loaded gun in his car for protection, which supported defendant's theory of self-defense. On cross-examination, the prosecution asked defendant if it was against the law to carry a loaded gun in his car, which defendant denied. Defendant expressed that he did not know it was against the law to carry a loaded gun in his car, and that he carried one because "this is Englewood." The prosecution stated in closing arguments that defendant admitted to carrying around a loaded gun because he did not care about the law. While a limiting instruction may have been appropriate in this case, we cannot find that failing to request one amounted to ineffective assistance of counsel. Namely, we cannot say that there is a reasonable probability that, but for counsel's failure to tender a limiting instruction on proof of

other crimes, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 687. Rather, the evidence against defendant was overwhelming. Several witnesses testified that defendant arrived at 7019 South Justine on the afternoon in question and approached the gangway with a gun in his hand, and shot the victim in the neck. Defendant was apprehended immediately afterward with a loaded gun in his car. Accordingly, we do not find prejudice in this case.

¶ 37 Defendant's final ineffective assistance of counsel claim is that defense counsel failed to elicit from Walter Gandy that on the morning of August 12, 2010, he overheard the victim saying in a loud voice that she was going to kick defendant's car and "beat his ass." At trial, Gandy testified that at about 10 or 11 a.m. while he was at 7019 South Justice, he heard the victim speaking in a loud voice, "kind of violent like, in an up rage." After trial, Gandy signed an affidavit saying that he would have testified further as to what he heard on August 12 if he had been asked. Defendant contends that defense counsel should have elicited further testimony about the threat Gandy overheard the victim make about defendant, as such evidence would have established that the victim "had violent intentions towards [defendant]." The State responds that the proffered testimony was not admissible under *People v. Lynch*, 104 Ill. 2d 194 (1984).

¶ 38 *Lynch* provides the seminal law regarding the admissibility of character evidence in cases where self-defense has been raised. The *Lynch* court held that when self-defense "is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected [his] perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened." *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005) (discussing *Lynch*).

¶ 39 Here, defendant does not specify which reason under *Lynch* for which he would be offering this alleged evidence of the victim's "aggressive and violent character." *Id*. However, since defendant did not know at the time of the offense that the victim had made these alleged threats regarding defendant, we assume defendant would be offering the evidence to support his version of the facts, namely that he was acting in self-defense. "A prior altercation or an arrest, without a conviction, can be adequate proof of violent character when supported by firsthand testimony as to the victim's behavior." *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004); see also *People v. Huddleston*, 176 Ill. App. 3d 18, 28 (1988) (noting that a victim could testify that the decedent had struck her, but a police officer who had not observed the incident could not).

¶ 40 We find that the alleged testimony by Gandy would not have been adequate proof of the victim's violent and aggressive nature. Overhearing someone state that she was going to kick defendant's car and "beat his ass," is not the type of evidence that has been contemplated by this court to show a violent and aggressive nature. See *Lynch*, 104 Ill. 2d at 201 (victim had three battery convictions); *People v. Simon*, 2011 IL App (1st) 091197, ¶ 69 (victim had previously shot and attacked defendant); *People v. Bedoya*, 288 Ill. App. 3d 226, 235-36 (1997) (victim had three aggravated battery convictions). Accordingly, we are unwilling to say the defense counsel's performance fell below an objective standard of reasonableness where the evidence defendant sought to introduce did not show that the victim had a violent or aggressive nature.

¶ 41 Evidence of Alleged Threat to Defendant

¶ 42 Defendant's next argument on appeal is that the trial court erred by excluding evidence that the victim threatened to kill defendant. At trial, defendant testified that during his first encounter with the victim on August 12, 2010, at about 10 a.m., defendant was on his knees speaking to Ya'Shon when the victim kicked defendant in the shoulder and said "I'm going to

kill you, mother fucker." After the State objected to this statement a sidebar was held. At the sidebar, defense counsel argued that the victim's statement was admissible as an excited utterance, and also for its effect on defendant to explain why he had his gun when he returned to the residence that afternoon. The State responded that the testimony was hearsay and that the gap between the victim's statement and the victim's killing did not warrant admission as evidence of defendant's state of mind. The trial court found that the statement was not an excited utterance and that hours had passed between the threat, defendant's departure, and defendant's return, which rendered the statement irrelevant. Defendant now argues that the testimony was not hearsay, and that even if it was, it would be admissible as an exception to show the victim's violent character and to prove that she was the aggressor. We disagree.

¶ 43 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.* "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception." *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Defendant maintains, relying on *People v. Quick*, 236 Ill. App. 3d 446 (1992), that his testimony was not hearsay evidence of what the victim said, offered to prove not the truth of the matter asserted (that she was going to kill defendant) but rather to show the victim's effect on defendant's state of mind.

¶ 44 In *Quick*, the defendant was accused of solicitation to commit murder and raised compulsion and entrapment as defenses. The defendant attempted to show that she went through with a plan to kill her husband only because the friend who introduced her to the hitman told her

that she would be killed, or her children would be killed, if she did not go through with the murder. The trial court barred her from testifying as to any statements made by the friend, finding that they were hearsay statements. The court in *Quick*, however, noted that an "out-of-court statement used for purposes other than establishing the truth of the matter asserted may be admissible to show the state of mind of the recipient after hearing the statement." *Quick*, 236 Ill. App. 3d at 453. The court went on to state that if the statement is offered to prove its effect on the listener's mind or to show why the listener acted as she did, it is not hearsay. *Id*. The court found that the out-of-court statements made by defendant's friend were crucial to her defense, and were offered to show the defendant's state of mind after she heard them. *Id*.

¶ 45 In the case at bar, the testimony by defendant regarding what the victim said to him on the morning of the shooting was not crucial to his defense. Defendant raised self-defense, arguing the victim snatched his loaded gun from him in the gangway, and that he then grabbed the victim's wrist because the victim was trying to point the gun in his face, and he felt that she was trying to kill him. Defendant claimed that during the struggle, the gun discharged, but he did not pull the trigger and did not shoot the victim.

¶ 46 Self-defense exists when (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm is imminent; (4) the threatened force is unlawful; (5) the person threatened actually and subjectively believed a danger existed that required the use of force applied; and (6) the beliefs of the person threatened were objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). Here, the alleged statement by the victim that she was going to kill defendant, which occurred several hours before the incident, would have little or no bearing on any of the six elements of self-defense. Defendant's testimony indicated that the imminent danger of harm came from the victim pointing a gun at his face.

Accordingly, we do not find that it was error for the trial court to exclude this out-of-court statement allegedly made by the victim.

¶ 47 Second Amendment Right to Bear Arms

¶ 48 Defendant's next contention is that the State violated his second amendment right to bear arms when it cross-examined defendant about whether defendant knew that it was illegal to carry a gun in his car, and where the State improperly argued during closing argument that defendant had a general criminal propensity. During direct examination, defendant testified that he kept a loaded gun in his car for protection. On cross-examination, the following colloquy occurred:

"Q. And it's a revolver, correct?

A. Yes, it is.

Q. And you say you carried it in your car for protection?

A. Yes, I do.

Q. And it's against the law to carry your gun in the car, isn't it?

A. No, it's not."

¶ 49 At this point, defense counsel's objection was overruled. Cross-examination continued:

"Q. And it's against the law to carry a loaded gun on the streets of the City of Chicago when you're driving your car, correct?

A. No.

Q. And you think that you are entitled to just break the law, correct?

A. I never known it was a law."

¶ 50 During closing arguments, the prosecution stated, "Let's just talk about a couple of things. 'I drove with a loaded gun in my car. I always drive with a loaded gun in my car.' Apparently he

doesn't care about the law, because he can pick and choose the law that he does or does not want to follow * * *."

¶ 51 Defendant contends that he had a constitutional right to carry a loaded gun in his car for protection and that his second amendment right was violated when the State cross-examined him about his possession of a gun, and when it made comments on the legality of carrying a gun during closing arguments. The State responds that defendant's right to bear arms was never infringed upon because he was never charged with or convicted of unlawful use of a weapon. The State maintains that while defendant has a constitutional right to bear arms, this does not extend to a constitutional right not to be questioned about his right to bear arms.

¶ 52 Defendant, relying on *Dawson v. Delaware*, 503 U.S. 159 (1992), argues that his rights were infringed upon despite not being convicted of illegal possession of a gun. In *Dawson*, the Supreme Court held that it the defendant's first and fourteenth amendment rights were violated by the admission of evidence of defendant's membership in a white racist prison gang because the evidence had no relevance to the issues being decided in the proceeding. Here, however, evidence that defendant carried a gun, which was introduced by defendant himself, was relevant as to why defendant had a loaded gun with him on the day in question. Accordingly, we cannot find a violation of defendant's second amendment right to bear arms in this case.

¶ 53 Jury Instructions on Intent and Knowledge

¶ 54 We next address defendant's argument that the trial court erred in refusing to give IPI Criminal 4th Nos. 5.01A (the definition of intent) and 5.01B (the definition of knowledge). The State maintains that the trial court's ruling was a proper exercise of its discretion.

¶ 55 Jury instructions convey the legal rules applicable to the evidence presented at trial and guide the jury's deliberations toward a proper verdict. *People v. Hudson*, 222 Ill. 2d 392, 399

(2006). It is within the trial court's discretion to determine which issues are raised by the evidence and whether an instruction should be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). The proper standard of review is whether the trial court abused its discretion. *Id*. at 66. " 'A trial court abuses its discretion if jury instructions are not clear enough to avoid misleading the jury. ***.' " *Id*. (quoting *In re Timothy H*., 301 Ill. App. 3d 1008, 1015 (1998)).

¶ 56 Defendant argues that the jury should have been instructed on the definitions of intent and knowledge because the instructions "were particularly critical here, where [defendant's] defense was that the shooting was an accident which occurred during the course of a struggle over the gun." Generally speaking, however, "a jury need not be instructed on the term knowingly because that term has a plain meaning within the jury's common knowledge." *People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006). Likewise, the jury need not be instructed on the term intentionally because it has a plain meaning within the jury's common knowledge. *People v. Powell*, 159 Ill. App. 3d 1005, 1013 (1987). The trial court only has a duty to instruct the jury further "when clarification is requested, when the original instructions are insufficient or when the jurors are manifestly confused." *Sanders*,368 Ill. App. 3d at 537.

¶ 57 Defendant does not contend that any clarification was requested by the jury, that the original instructions were insufficient, or that the jury was manifestly confused. Rather, defendant merely states, relying on *People v. Brouder*, 168 Ill. App. 3d 938, 946 (1988), that the definitions of intent and knowledge "should be given in the absence of a jury request." In *Brouder*, the jury sent several written questions to the trial court indicating that it was confused as to the meaning of "knowing resistance." The trial court twice sent back a response telling the jury it had heard all the evidence and had been given instructions, and to continue deliberations. *Brouder*, 168 Ill. App. 3d at 946. The *Brouder* court found that the jury had specifically

requested assistance as to the meaning of "knowing resistance" and therefore should have been instructed on "knowingly." The court held that because the jury demonstrated confusion as to the term "knowing resistance," it was error for the trial court to refuse defense counsel's tendered instruction of "knowingly." *Id*. at 948.

¶ 58 Here, there is no evidence that the jury requested a definition of either knowingly or intentionally, and there is no evidence that the jury was manifestly confused. Accordingly, we find that the trial court did not abuse its discretion in refusing defense counsel's tendered jury instructions on the definitions of intent and knowledge.

¶ 59 Objection to Witness Questioning

¶ 60 Defendant also contends that the trial court erroneously sustained the State's objection to a question posed by defense counsel to Queen Spencer. At trial, Spencer testified that she heard a conversation between defendant and the victim, but admitted that she did not tell the police about the conversation. Defense counsel suggested on cross-examination that she had not really heard such a conversation. The State objected, and the trial court sustained the objection. Defendant contends that suggesting that Spencer had not really heard the conversation she testified to was proper as it explained, modified, or discredited what she had said on direct examination.

¶ 61 It is true that on cross-examination, the cross-examiner may go beyond the scope of direct examination to impeach a witness, and that the cross-examiner may question the witness about any matter that explains, modifies, or discredits what he or she said on direct examination. *People v. Santamaria*, 165 Ill. App. 3d 381, 388 (1987). However, while leading questions are proper, the cross-examiner "should not inject unsupported insinuations into the questioning process." *Id*. We find that the trial court did not abuse its discretion in sustaining the State's

objection to defense counsel's leading question that injected the unsupported insinuation that Spencer had not actually heard the conversation since she failed to report it to the police.

¶ 62 *Voir Dire*

¶ 63 Defendant's final contentions on appeal focus on the jury selection process. Defendant contends that the trial court erred by refusing to tender two questions to the venire: whether they had any bias about firearms (and about their familiarity with firearms), and any bias about a man defending himself from a woman. The trial court ruled that it would not ask these questions, but would read the charges of first degree murder involving the discharge of a firearm and ask whether the charges would affect potential jurors' ability to render a fair and impartial verdict, and whether they or a family member had been a victim of a crime involving a weapon such as the one charged in this case.

¶ 64 The trial court is given the primary responsibility of conducting the *voir dire* examination, and the extent and scope of the examination rests within its discretion. *People v. Strain*, 194 Ill. 2d 467, 476 (2000). However, the trial court must exercise its discretion in a manner consistent with the purpose of *voir dire*. *Id.* As our supreme court observed in *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993), "[t]he purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath."

¶ 65 We find no abuse of discretion in the trial court's refusal to question the venire concerning their viewpoints on handguns. In *People v. Howard*, 147 Ill. 2d 103 (1991), the defendant was charged with murder and attempted armed robbery in connection with the shooting death of the victim. The defense counsel requested that the prospective jurors be

questioned about their attitudes toward guns. Because the offenses were committed with a handgun, and because of the controversial nature of handgun use, the defendant argued that a special inquiry was warranted. Our supreme court disagreed, finding that defendant's use of a handgun as his weapon in committing the crimes charged "was not a central issue at trial, much less pertinent to any of the forms of verdict." *Howard*, 147 Ill. 2d at 135. Likewise in the case at bar, defendant's use of a handgun was not pertinent to any of the forms of verdict, and was not a central issue in the case. Accordingly, we find that the trial court did not abuse its discretion in its refusal to question the venire on this issue.

¶ 66 Similarly, we find that it was not an abuse of discretion for the trial court to refuse to question the venire about bias regarding a man defending himself against a woman. Our courts have consistently refused to allow *voir dire* questions concerning a defendant's theory of self-defense. *People v. Karim*, 367 Ill. App. 3d 67, 91 (2006). The rationale is that "allowing [a] defendant to question the prospective jurors regarding any pre-disposition to a self-defense claim goes to an ultimate question of fact and would serve no purpose other than to improperly attempt to preeducate and indoctrinate the jurors as to defendant's theory of the case." *People v. Skipper*, 177 Ill. App. 3d 684, 688 (1988). Defendant argues, however, that the question had less to do with self-defense than with gender bias. Defendant does not cite to any cases where the venire was properly instructed on gender bias. Rather, defendant argues that "common sense tells us that many jurors might be prejudiced against a man engaged in a struggle with a woman." We find no authority for this proposition and find that the trial court properly exercised its discretion in refusing to question the venire on this issue.

¶ 67 CONCLUSION

¶ 68 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 69 Affirmed.