THIRD DIVISION
Rule 23 Order filed September 29, 2017
Modified upon denial of rehearing November 22, 2017

No. 1-14-2841

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. 11 CR 6875
	)	
SPENCER JACKSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the evidence was sufficient to prove defendant was guilty of attempt (first degree murder); defendant cannot prove ineffective assistance of counsel because he was not prejudiced by defense counsel's representation; the trial court did not commit plain error when questioning prospective jurors pursuant to Rule 431(b); the State neither committed plain error nor prejudiced defendant during closing arguments; the trial court did not commit plain error when it instructed the jury on attempt (first degree murder); defendant's sentence for

attempt (first degree murder) is not cruel and unusual, nor a disproportionate penalty; defendant's sentence for second degree murder is not excessive.

¶ 2 A jury found defendant, Spencer Jackson, guilty of second degree murder for killing Lytony Dawson (Lytony)and guilty of three counts of attempt (first degree murder) for attempting to kill Anthony Dawson (Anthony), Denise Davis (Davis), and James Jenkins (Jenkins). At trial, defendant raised an affirmative defense that he acted in self-defense. In this appeal defendant argues the State failed to prove he did not act in self-defense. Defendant also contends he was denied effective assistance of counsel; the trial court committed plain error when questioning prospective jurors pursuant to Rule 431(b); the trial court erred instructing the jury and when questioning prospective jurors; that the state prejudiced him during closing arguments; that his punishment for attempt (first degree murder) is unconstitutional under the eighth amendment and the Illinois constitution's proportionate penalties clause; and finally, that his sentence for second degree murder was excessive. For the reasons that follow we affirm defendant's convictions and sentence.

¶ 3 BACKGROUND

¶ 4 On the night of January 30, 2010, Anthony Dawson, his girlfriend Denise Davis, Lytony Dawson and his girlfriend Dejuana drove together to the Celebrity Lounge in Southeast Chicago. They went in Dejuana's car, a red Pontiac G6. The car was driven by Anthony. At the club they were met by James Jenkins. Defendant arrived at the Celebrity Lounge not long after, around 12:30 or 1:00 a.m. At some point in the night Davis walked past defendant and defendant made a gesture pulling at Davis' hair. Davis, who had dated defendant years prior, ignored defendant and continued on. Anthony, who was then in a relationship with Davis, questioned her about why defendant pulled at her hair. Davis told Anthony she did not know defendant and was not sure. Anthony did not believe her and walked over to defendant to question him. Defendant told

Anthony he did not know Davis when defendant saw Davis making a motion to deny knowing her. Defendant and Davis testified defendant then shook hands with Anthony, though Anthony testified he did not shake defendant's hand.

¶ 5 After the club closed for the night at around 2 a.m., Anthony and Davis got into Dejuana's car. Dejuana had gotten into an argument with Lytony and could not be found then. Lytony, who was visibly intoxicated, stumbled back to the car when Anthony and Davis called for him. He sat in the back seat, with Anthony driving and Davis in the passenger seat. Anthony and Davis were arguing about whether Davis knew defendant when defendant approached the car. Defendant testified he heard Davis shout out to him from the car to come over and confirm that he did not know her. Defendant crouched down by the passenger side window and talked with Anthony and Davis. He clarified how he had previously dated Davis, but that they had not been together for some time. They talked for some 10 or 15 minutes.

¶ 6 Jenkins, who drove separately to the club that night, went to his white Ford Expedition truck. When he got in he saw defendant approaching Anthony, Davis, and Lytony. Jenkins pulled his car parallel to the Pontiac, within a couple feet of defendant. When Jenkins drove up to defendant, defendant stood up to see who it was. Jenkins told defendant he knew the people in the other car and that none of them were there to start any conflict. Defendant leaned back over to the passenger side window to keep talking to Davis and Anthony. While defendant talked with Davis and Anthony, he took out a cigarette which he did not light. Lytony rolled down the rear window and repeatedly asked defendant for a cigarette. Defendant testified Lytony initially "was absolutely cool," but Lytony's demeanor completely shifted. Lytony reached his hand out of the window to make a gesture to request a cigarette. Defendant told Lytony to calm himself as Lytony reached for the cigarette in defendant's mouth. Defendant testified that he then saw

Lytony reach into his pocket, and thought Lytony pulled out a gun. Defendant was asked whether this action made him feel nervous and defendant replied: "Lytony was not making me nervous." When asked if he was scared by Lytony, defendant replied "I wasn't scared." Despite his testimony he was not nervous or scared by Lytony's actions, defendant drew a handgun from his pocket and shot Lytony in the chest. Defendant testified his weapon was loaded, had no safety, and had a live round in the chamber when he pulled the trigger pointing the gun at Lytony. The medical examiner who conducted the autopsy of Lytony's body testified the bullet entered Lytony's "upper right chest and it's going down towards the heart *** the wound is going from [Lytony's] right to left and it's going somewhat downward." There was no exit wound. The medical examiner recovered the bullet from Lytony's heart.

¶ 7 After defendant shot Lytony, Anthony frantically drove the Pontiac away in search of a hospital. Defendant then shot three or four times at the fleeing Pontiac. He shot out the rear window, blew out the rear driver's side window, caused bullet damage to the rear passenger door and to an interior beam on the passenger side of the car. Defendant then fired several shots at Jenkins' truck while Jenkins was driving away. One of defendant's shots blew out the rear window of the truck, another was shot into the back door, another bullet through the rear, and another bullet blowing out a side window. Jenkins later recovered a bullet fragment from the ceiling of the truck and police recovered a bullet fragment from the headrest behind the driver's seat of his truck. Defendant testified Jenkins had to back his truck out to allow Anthony to drive away and then began to drive toward defendant. Defendant claimed he feared for his life and thought the car was armed as well. Jenkins testified he did not reverse his truck because the way he parked allowed Anthony to drive away freely.

¶ 8 Defendant fled Illinois after the shooting. Defendant testified he went for a vacation in

Florida that he had paid for already and he then went to Minnesota for a concert. Defendant was eventually apprehended in Minnesota and brought back to Chicago in March 2011 under warrant. Police questioned defendant about the shooting, but defendant initially told police he not present during the shooting outside the Celebrity Lounge on January 31, 2010. He later testified he lied to police about not being present for the shooting because he did not want them twisting his words.

¶ 9 Defendant's trial began shortly after. Defendant filed a pretrial motion in January 2013 to admit evidence of prior violent acts and possession of weapons committed by Lytony and Anthony, relying on *People v. Lynch*, 104 Ill. 2d 194 (1984). After a number of status hearings, the court set the case for trial and brought in prospective jurors. The court first informed the prospective jurors about the presumption of innocence:

> "The criminal trial begins with the accused person presumed to be innocent. Is there anybody here who has a disagreement or a problem with that proposition that when a criminal trial starts the accused is presumed to be innocent? If you have a disagreement or problem with that please raise your hand."

None of the prospective jurors raised their hand. The court, satisfied with this response, continued to inform the potential jurors of the government's burden at trial:

> "Criminal charges have to run through the government. The government has the burden of proof. They have to prove the case beyond a reasonable doubt. We don't guess somebody guilty or think they may be guilty or make a hunch about it. The only way someone can be guilty is if the government who brought the charge can prove guilt beyond a reasonable doubt.
>
> Is there anybody here who has a disagreement or problem with that? That

> the only way that someone can be guilty of a crime is if the government who brought the charge can prove guilty beyond a reasonable doubt? If you have a disagreement or problem with that, please raise your hand."

Again, no person raised their hand. The court continued:

> "In a criminal trial, the accused does not have to prove their innocence. An accused does not have to testify. They don't have to call any witnesses on their own behalf.
>
> In a criminal trial, the burden of proof is on the government. They have proof – they have to prove the case beyond a reasonable doubt, and the accused does not have to prove anything at all.
>
> Hypothetically, there may be a criminal trial. The government may call 100 witnesses against the accused. The accused, which is their perfect right, chooses not to testify, and which is also their perfect right, chooses not to call witnesses on their own behalf.
>
> After hearing from 100 people on one side and no people on the other side, there can be a reasonable doubt in the jury's mind as to whether the government has met their burden of proof.
>
> With that said, is there anybody who has a disagreement or a problem with that, anybody that would hold it against an accused if they did not testify, which is their perfect right, or did not call witnesses on their own behalf, which is their perfect right as well? Anybody have a disagreement or problem with that, please raise your hand."

No prospective juror raised their hand. The court then moved the proceedings to the selection of

jurors.

¶ 10 During the State's direct examination of Anthony, the State questioned Anthony about his prior felony convictions. Anthony testified he had felony convictions for being an armed habitual criminal, for possession of a controlled substance, for delivery of a controlled substance, for attempt (first-degree murder), and for involuntary manslaughter. Once the State finished presenting its case, defendant presented two witnesses for his defense: an officer who arrested Lytony in 2007, and himself. The arresting officer testified under direct examination that he arrested Lytony on December 22, 2007 after he observed Lytony remove a gun from his coat and hand it to another person who deposited the gun in the mail slot of a nearby building. Defendant then testified. In defense counsel's direct examination of defendant, counsel asked defendant if he had two prior gun convictions in 2002 and 2005. Defendant affirmed he had.

¶ 11 In closing arguments the State claimed defendant fabricated his defense, that he was unremorseful for killing Lytony, and that his claim of self-defense was unreasonable. The State argued:

> "Anthony Dawson regrets deeply the decisions and the things that happened on that night. * * * Denis Davis, also regrets deeply the decisions she made on that night and what happened that night. * * * James Jenkins also regrets deeply everything that happened on that night. * * * You know who regrets nothing on that night? This defendant. He regrets nothing. You got an opportunity to see him. He regrets nothing. He is a cold-blooded murderer."

At this point defendant raised an objection, but the court overruled the objection. The State continued: "He's a cold-blooded murderer. You got a chance to see him. That's what this case is about. Make no mistake about it, this is a case of first degree murder."

> "You also know and you heard that saying, necessity is the mother of all invention. Well, the defendant's belief that [Lytony] had a gun and everything that happened on that day and James Jenkins trying to run him over and Denise needing him for some help, that was an invention, it was a fabricated story. You know why we know that's a story? We're going to talk a little bit about it when we get into a discussion about why this is not second degree murder. This is a case of first degree murder."

Defendant raised no objection to this comment.

> "[T]hey didn't have a gun. Make no mistake about that. The defense fabricated the story about a gun so that they could ask all of you to consider that he was acting in self defense. There was no gun. Because Anthony Dawson sure as heck would have used that gun. He told you he used one before. He didn't hide behind the fact he's shot people before, and he would have used it then. Whether or not he would have been justified would have been a story for a different day. But there was no gun. [Defendant] was not reasonable, he was not justified in his actions on that day. He was not the voice of reason. He was a cold-blooded killer."

Defendant again objected to the State calling him a cold-blooded killer, and the trial court again overruled the objection. The State then continued with its closing argument:

> "the analogy would be the same as if John Wilkes Booth put a gun to President Abraham Lincoln and when Abraham Lincoln reached for his play bill or handkerchief, he was shot by John Wilkes Booth, murdered in cold blood. John Wilkes Booth was caught later and claims he was reaching for something. Oh, by

> the way, he had a gun. It doesn't work. You don't get to fabricate the evidence because the truth doesn't lie."

Defendant did not raise an objection to the State's comparison of himself to John Wilkes Booth.

¶ 12 On rebuttal, the State argued defendant concocted his claim of self-defense over a year after he killed Lytony, referenced the John Wilkes Booth analogy made in the State's closing argument, and then drew an example for the jury of a homeless person asking for a cigarette:

> "[Defendant's] first full complete opportunity to tell anybody what happened was 14 months later. He could have said I thought he was reaching for a gun. I thought I saw something. He did not. There was nothing righteous about his shooting. Because the righteous don't fear the truth. The truth is consistent. Watch him when he's on the witness stand when I am asking him questions. Let three minutes go by, ask the same question you get a different answer. That's a sign he is not telling the truth. He cannot be believed.
>
> So March of 2011 he is brought back. He hears the case against him. And he decides I am going to go with I wasn't there. Then time passes. Discovery gets turned over, the police reports. Returns to the attorney. Formulates a plan going forward. And in reality that simply not [*sic*] going to fly. A person who knows you, two other people. You're not going to convince anybody. This becomes sort of the scoundrel's defense. When the case is too good against a person. When they are on video. When there are too many witnesses. Then it has to be I did it, but I was justified. I had to do it.
>
> My partner gave you the analogy of Lincoln in the play. And if John Wilkes Booth came in, and even though he was there with a different intent, he

> shot him. This is like if he was with John Wilkes Booth. He would have shot everybody else in the box. This is a completely – This is so far removed from self-defense.
>
> Imagine a person from your town is walking down Main Street. They are going to go to the theater. And while they're on their way to the theater they meet an individual, a homeless person. And the homeless person says I would like a dollar. And the person is busy, and they don't have time. And they say I'm not going to give you a dollar. I don't have time right now. And they reach into their pocket to pull out a pack of cigarettes because they are going to have one last smoke before they go in the theater. And the homeless person pulls out a knife and stabs him to death. Justified? We are in a concealed carry State. I thought the person didn't like me, and I thought he might be armed with a weapon. Would be ludicrous. And it's not more ludicrous than what was presented to this court in the last 2 days."

Defendant only then objected when the State finished comparing him to a homeless murderer. The court overruled the objection.

¶ 13 After the conclusion of closing arguments, the court instructed the jury. The court initially informed the jury of the elements of first degree murder the State had to prove:

> "The defendant is charged with the offense of first degree murder. The defendant has pleaded not guilty. Under the law a person charged with first degree murder may be found either 1) not guilty of first degree murder, or 2) guilty of first degree murder, or 3) guilty of second degree murder.
>
> The defendant is also charged with the offenses of attempt first degree

> murder and aggravated discharge of a firearm. The defendant has pleaded not guilty on those charges."

The court then explained how "[e]vidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness." Following this instruction, the court explained the elements of first degree murder and how to consider mitigating factors:

> "A person commits the offense of first degree murder when he kills an individual without lawful justification if in performing the acts which cause the death he intends to kill or do great bodily harm to that individual or another, or he knows that such acts will cause death to that individual or another, or he knows that his acts create a strong probability of death or great bodily harm to that individual or another.
>
> A person is justified in the use of force when and to the extent that he reasonably believes that 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.
>
> 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 that he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than use of force which is likely to cause death or great bodily harm to the other person.

A person who is not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor.

A mitigating factor exists so as to reduce the offense of first degree murder that the lesser of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable.

The phrase reasonable belief or reasonably believes means that a person concerned acting as a reasonable person believes that the described fact exist."

¶ 14 The court went on to explain how the jury may find defendant guilty of second degree murder instead of first degree murder if it found the State proved the elements of first degree murder but there was some mitigating factor present to lessen the offense: "You may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have first determined the State has proven beyond a reasonable doubt each of the previously stated propositions."

¶ 15 The court additionally instructed the jury as to the elements of attempt (first degree murder):

"A person commits the offense of attempt first degree murder when he without lawful justification and with intent to kill an individual does any act which constitutes a substantial step toward the killing of an individual. The killing attempted need not have been accomplished.

To sustain the charge of attempt first degree murder, the State must prove the following propositions: First, that the defendant performed an act which constitutes a substantial step toward the killing of an individual. And second, that

> the defendant did so with the intent to kill an individual. And third, that the defendant personally discharged a firearm during the commission of the offense. And fourth that the defendant was not justified."

The jury was informed that it would have to find the State proved the elements of the inchoate offense as to each of the victims.

> "The defendant is also charged with the offense of attempt first degree murder. You will receive six forms of verdict as to this charge. You will be provided with both a not guilty of attempt first degree murder and a guilty attempt first degree murder form of verdict as to each victim. From these six verdict forms you should select one verdict form that perfects your verdict pertaining to the charge of attempt first degree murder of each victim. And sign as I have stated. You should not write at all on the other verdict forms pertaining to the charge attempt first degree murder as to each victim."

¶ 16 Defense counsel did not request the jury receive an instruction to consider evidence of Lytony's prior arrest for possession of a firearm. IPI 3.12X provides:

> "In this case the State must prove beyond a reasonable doubt the proposition that the defendant was not justified in using the force which he used. You have [(heard testimony) (received evidence)] of ____'s [(prior conviction of a violent crime) (prior acts of violence) (reputation for violence)]. It is for you to determine whether ____[(was convicted) (committed those acts) (had this reputation)]. If you determine that ____[(was convicted) (committed those acts) (had this reputation)] you may consider that evidence in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in

> using the force which he used." Illinois Pattern Jury Instructions, Criminal, No. 3.12X (4th ed. 2000).

¶ 17 After, the jury found defendant guilty of second degree murder for killing Lytony, attempt (first degree murder) for trying to kill Anthony, Davis, and Jenkins, and for aggravated discharge of a firearm. The proceedings then moved to sentencing. The court noted how defendant knew that as a felon he could not possess a gun: "[Defendant] had been to the penitentiary several times for both narcotics and gun offenses. He had three prior gun convictions. He absolutely knew he is not supposed to be having a gun ***. You cannot have a gun with a felony record." The court reasoned that "based on [defendant's] criminal history, the second degree murder is Class X mandatory. The attempt first degree murders are Class X on their face, and they also call for an additional 20-year sentence because a gun was used during the commission of the offense."

> "I will sentence [defendant] as follows: For the offense of second degree murder, 15 years in the penitentiary. For the three offenses of attempt first degree murder, ten years in the penitentiary with an additional 20 years in the penitentiary for personally discharging the firearm. They will run consecutive to the second degree murder sentence.
>
> As to aggravated discharge of a firearm into a vehicle, it will be 14 years in the penitentiary. They will run concurrent with all counts.
>
> The attempt first degree murders are concurrent with each other, and the aggravated discharge into the vehicle, they are consecutive only to the second degree murder count by operation of law.
>
> The additional counts of aggravated discharge of a firearm as to victims,

Jenkins, Dawson, and Davis, will merge into the attempt first degree murder counts, and there will be no sentence as to that."

¶ 18 Following sentencing defendant timely filed his appeal.

¶ 19 ANALYSIS

¶ 20 Defendant raises several claims on appeal. He claims the State lacked sufficient evidence to prove he was guilty of attempt (first degree murder) beyond a reasonable doubt. Defendant also argues he was denied effective assistance of counsel because defense counsel did not request instructions for the jury to find him not guilty of attempt (first degree murder) if the jury finds he had an unreasonable belief in the need to use deadly force in self-defense and did not request *Lynch* instructions to assist the jury on how to consider the evidence of a victim's prior arrest; and that he was denied effective assistance of counsel due to defense counsel introducing evidence of defendant being convicted of aggravated unlawful use of a weapon even though the conviction was void *ab initio*. Defendant also argues the court denied him his right to a fair trial by not fully complying with Supreme Court Rule 431(b) when questioning prospective jurors. Defendant next claims the State committed prosecutorial misconduct in closing arguments, amounting to plain error. Defendant argues the trial court committed plain error when instructing the jury of the elements of attempt (first degree murder). Finally, defendant claims his sentence for attempt (first degree murder) is unconstitutionally cruel and unusual, and constitutes a disproportionate penalty; and, that his sentence for second degree murder is excessive based on his capability for rehabilitation.

¶ 21 <u>Sufficiency of the State's Evidence</u>

¶ 22 Defendant argues the State's evidence was insufficient to prove beyond a reasonable doubt defendant committed attempt (first degree murder): defendant maintains the evidence only

shows he fired "warning shots" at the cars while not injuring any of the three surviving victims; he argues the evidence demonstrates he acted in self-defense; and, defendant argues the evidence against him at most proves he had an unreasonable belief in the need to use deadly force in self-defense, which defendant maintains is an affirmative defense to a charge of attempt (first degree murder).

¶ 23 The standard of review for an appeal challenging the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). When viewing the evidence in the light most favorable to the State we find a rational trier of fact could have found the essential elements of attempt (first degree murder) beyond a reasonable doubt. Defendant did not act in self-defense. See, *e.g.*, *People v. Goods*, 2016 IL App (1st) 140511, ¶ 47 (" 'In order to instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable.' "). No witnesses testified any of the victims shot at defendant. Defendant's testimony he thought Jenkins was going to drive into him is contradicted by Jenkins' testimony Jenkins parked parallel to Anthony and that he did not need to reverse for Anthony to drive away. We evaluate the evidence in the light most favorable to the State, not defendant. *Wheeler*, 226 Ill. 2d at 114. As such, defendant cannot support his theory he believed the occupants of the vehicles were armed and posed a threat to his life.

¶ 24 The evidence indicates defendant fired directly at vehicles in which the victims were passengers. Defendant claims he only intended to fire "warning shots," and had no intent to kill those inside the vehicles, but the evidence demonstrates otherwise. Defendant repeatedly shot at vehicles he knew were occupied, and shot at places where occupants were present – for instance, the bullet recovered from the headrest of the driver's seat in Jenkins' Ford. This court has previously held that firing a gun at a vehicle occupied by people constitutes an attempt to commit murder because the natural tendency of firing upon occupied vehicles is the destruction of an occupant's life. *People v. Garcia*, 407 Ill. App. 3d 195, 201-02 (2011) (The defendant's "intent to kill [could] be inferred from the act of firing two bullets in the direction of an occupied car and a crowded street."). In *Garcia* the defendant claimed he fired up and away from an occupied vehicle, but the evidence at trial indicated he fired toward the vehicle and hit a different victim inadvertently. We found the jury was not unreasonable for concluding the "defendant fired at the [vehicle] with the intent to kill or cause great bodily harm to its occupants, or that he acted with the knowledge that doing so was practically certain to result in the death or substantial injury of another." *Id*. at 202. Here defendant fired at occupied vehicles and caused damage to the cabins of both vehicles, where he knew there were people. It was not unreasonable for the jury to infer defendant had the requisite intent to murder the surviving victims.

¶ 25 Defendant also argues that the State lacked sufficient evidence to prove his intent to kill when it only introduced evidence defendant fired his gun at cars. However, the evidence at trial proved defendant fired at occupied vehicles. Defendant argues he was only shooting his gun at property, not people, and attempts to analogize his case to *People v. Trinkle* (*People v. Trinkle*, 40 Ill. App. 3d 730 (1976)), and *People v. Ephraim*, (*People v. Ephraim*, 323 Ill. App. 3d 1097 (2001)). We find *Trinkle* inapposite and *Ephraim* supports the State's position rather than

defendant's.

¶ 26 In *Trinkle*, the defendant was found guilty of attempt (murder)[1] for shooting at a tavern door and wounding a patron inside. *Trinkle*, 40 Ill. App. 3d at 731. The defendant in *Trinkle* went to a tavern, grew angry with the bartender, and threatened to shoot or blow up the bar. *Id*. After, defendant went to another bar where he drank more and then purchased a handgun. *Id*. at 732. Defendant returned to the first tavern and fired a shot at the building, which went through the front door and wounded a patron inside. *Id*. On appeal, the court reduced the conviction from attempt (murder) to aggravated battery because the the defendant did not know anyone was standing behind the door, therefore the intent required for attempt (murder) was not present. Defendant's case can be distinguished from *Trinkle* where the defendant fired at a building without knowing someone was behind the door because here defendant knew both vehicles were occupied because he had just been conversing with the occupants. He did not fire away from the vehicles, but fired directly at them – he blew out the rear windshields in both cars and damaged the cabins of both vehicles.

¶ 27 Defendant relies on *Ephraim*, 323 Ill. App. 3d at 1110, for the proposition that "the act of firing a gun, with nothing more, is not sufficient to prove intent to kill." We find *Ephraim* supports the State's position rather than defendant's. In *Ephraim*, we affirmed the defendant's conviction for two counts of attempt (first degree murder) and two counts of aggravated battery with a firearm when defendant shot at a vehicle containing a rival gang and accidentally shot two children. *Ephraim*, 323 Ill. App. 3d at 1104. The defendant told a detective that he saw a gray car driven by a rival gang in his gang's territory. The defendant went to his car and drove after

[1] Prior to 1987 Illinois did not have first and second degree murder. Instead, there were the crimes of Murder and Voluntary Manslaughter. While Illinois recognized the crime attempt (murder), it did not recognize attempt (voluntary manslaughter). *Reagan*, 99 Ill. 2d at 240.

the gray car. The defendant then fired several shots, with his left hand, attempting to hit the car in front of him. *Id*. "It is readily apparent that defendant did not intend to shoot and injure two young children. The State and defendant agree that defendant was intending to shoot the driver of the gray, four-door vehicle." *Id*. at 1108. We found the doctrine of transferred intent applied to attempt (first degree murder), contrary to defendant's argument:

> "Rival gang members are considered enemies. Further, defendant was chasing a person whom he assumed to be a rival gang member. These two facts, coupled with defendant's act of firing a gun, make it feasible for the jury to conclude that defendant intended to kill the driver of the gray car. Thus, in viewing the facts in the light must favorable to the State, we find that it was not unreasonable for the jury to have found that defendant possessed the specific intent to kill." *Id*. at 1111.

See also *People v. Slater*, 393 Ill. App. 3d 977, 986 (2009) ("We hold *** that the doctrine of transferred intent applies to 'knowing murder' as charged under section 9–1(a)(2) of the Criminal Code."). Just as the *Ephraim* court found the defendant intended to kill individuals by shooting at an occupied vehicle, here a rational jury could find defendant intended to kill Anthony, Davis, and Jenkins because he shot at cars he knew they were driving in. The jury heard evidence defendant fired most of his bullets directly at the two fleeing cars. The bullets hit both cars in the rear windshields and defendant caused damage to the cabins of both vehicles. Though he failed to hit any people while firing at the fleeing vehicles, it was not unreasonable for the jury to find defendant was attempting to kill the surviving victims. As noted above, we review defendant's claim the State lacked sufficient evidence by construing the evidence in the light most favorable to the State. *Wheeler*, 226 Ill. 2d at 114. Under such a standard, we cannot say no rational trier of fact would conclude defendant attempted to murder Anthony, Davis, and

Jenkins.

¶ 28 Defendant maintains even if he only had an unreasonable belief in the need to use deadly force in self-defense, this unreasonable belief should negate the crime of attempt (first degree murder). We disagree. Unreasonable self defense is a mitigating factor in a conviction for murder but not attempted murder. Under Illinois law imperfect self-defense is not a mitigating factor for a charge of attempt (first degree murder). See *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 46 ("because the defendant did not actually kill Flores, the legislature determined he could not lawfully mitigate his attempt to murder him because he had the same unreasonable belief in the need for self-defense"). We explained in *Guyton* that imperfect self-defense is not a defense to the crime of attempt (first degree murder) because there is no crime of attempt (second degree murder) and the jury has no opportunity to consider the imperfect self-defense claim as a mitigating factor for attempt (first degree murder). When the legislature amended the attempt (murder) statute it did not allow for consideration of imperfect self-defense as a mitigating factor:

> "in the almost 20 years since *Lopez*, the legislature has not made any amendments to the attempted murder statute to allow a defendant to mitigate the crime based on an unreasonable belief in the need for self-defense, despite the fact that the legislature amended section 8–4(c)(1)(E) in 2010 allowing for defendants convicted of attempted murder to prove at sentencing, by preponderance of the evidence, that the mitigating factor of provocation was present, so as to reduce the class of offense from a Class X offense to a Class 1 offense. [Citation.] The legislature's inaction suggests agreement with the judicial interpretation of *Lopez*." *Guyton*, 2014 IL App (1st) 110450 at ¶ 61.

The legislature is presumed to have knowledge of judicial decisions. *Kozak v. Retirement Board of Firemen's Annuity & Benefit Fund of Chicago*, 95 Ill. 2d 211, 218 (1983) ("We must presume that in adopting that amendment the legislature was aware of judicial decisions concerning prior and existing law and legislation."). The legislature did not to create a crime of attempt (second degree murder) and did not amend the attempt (first degree murder) statute to allow consideration of imperfect self-defense as a mitigating factor. Nevertheless, defendant claims "since the Illinois Supreme Court has twice held in *Reagan* and *Lopez* that an unreasonable belief in self-defense negates the crime of attempt murder, *Guyton* should not be followed." Defendant fails to explain how *Guyton* is inconsistent with *Reagan* or *Lopez*. Under *Reagan* and *Lopez*, our supreme court found there is no crime of attempt (second degree murder) in Illinois. *Reagan*, 99 Ill. 3d at 240; *Lopez*, 166 Ill. 2d at 448-49. The reason behind this was that a crime of attempt is an inchoate offense requiring the State to prove the elements of the underlying offense. "As the attempt statute provides, for a defendant to commit an attempted offense, he must intend to commit a specific offense." *Lopez*, 166 Ill. 2d at 447-48. A defendant can only be found guilty of second degree murder if the jury first determines the State proved beyond a reasonable doubt the elements of first degree murder. Only then can the jury examine whether defendant sufficiently proved mitigating factors. 720 ILCS 5/9-2 (West 2016). For a crime of attempt (first degree murder), the jury must determine whether the State proved defendant took a substantial step toward the commission of first degree murder with intent to commit first degree murder. 720 ILCS 5/8-4(a) (West 2016). The legislature has not provided for consideration of any mitigating factors for this offense. Thus, contrary to defendant's contention, an unreasonable belief in self-defense does not negate the crime of attempt (first degree murder); the jury has no opportunity to consider mitigating factors after such a finding.

¶ 29 For defendant to have an affirmative defense of self-defense negating the offense of attempt (first degree murder), defendant must show he did not intend to kill without lawful justification.

> "The requirement of the attempt statute is not that there be an intent to kill, but that there be an intent to kill without lawful justification. If, as suggested by the People, defendant at the time of the shooting believed the circumstances to be such that if they existed would justify the killing, then there was no intent to commit an offense." *People v. Reagan*, 99 Ill. 2d 238, 240 (1983).

As noted above, the evidence, when considered in a light most favorable to the State, does not support defendant having a reasonable belief in self-defense.

> "[K]illing in self-defense is not a crime. This court further noted in *Reagan* that a defendant intending to defend himself, although unreasonably, would not have the intent to unlawfully kill. Such a defendant would have the intent to lawfully kill using self-defense. The two different intents, intent to kill unlawfully and intent to kill in self-defense, cannot coexist in the same crime." *Lopez*, 166 Ill. 2d at 448.

For this reason attempt (second degree murder) does not exist in this State.

> "the intent required for attempted second degree murder, if it existed, would be the intent to kill without lawful justification, plus the intent to have a mitigating circumstance present. However, one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force. Moreover, concerning the mitigating factor of an imperfect self-defense, one cannot intend to unlawfully kill while at the same time intending to

> justifiably use deadly force. Thus, the offense of attempted second degree murder does not exist in this State." *Id*. at 448-49.

Therefore, defendant's claim that he at least had an imperfect claim of self-defense fails to negate or even mitigate the crime of attempt (first degree murder). Thus, when considering the evidence in the light most favorable to the State, we find the State had sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt defendant attempted to murder Anthony, Davis, and Jenkins.

¶ 30 Ineffective Assistance of Counsel

¶ 31 Next, defendant raises two claims of ineffective assistance of counsel: first, he was denied effective assistance of counsel when counsel failed to request multiple jury instructions; and second, for counsel questioning defendant about a void prior conviction for aggravated unlawful use of a weapon. We review claims of ineffective assistance of counsel under the *Strickland* test, which looks to whether counsel's alleged error was objectively unreasonable, and whether counsel's error prejudiced defendant by denying him a fair trial. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). To demonstrate prejudice defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant ***. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice *** that course should be followed." *Id*. at 697

¶ 32 A. Unreasonable Self-Defense Instruction for Attempt (First Degree Murder)

¶ 33 Defendant claims he was prejudiced by defense counsel's failure to request the jury be

instructed that if defendant had an unreasonable belief in the need for self-defense, then he could not be convicted of attempt (first degree murder). As noted above, defendant cannot both intend to lawfully kill another and intend an unreasonable belief in the need to use deadly force. *Lopez*, 166 Ill. 2d at 448-49. Therefore, he was not entitled to a jury instruction to acquit him if he had an unreasonable belief of the need to use deadly force in self-defense. After a jury determines defendant intended to unlawfully kill another, it has no opportunity to consider whether defendant unreasonably believed he needed to use deadly force in self-defense. The legislature has not provided for a jury to consider mitigating factors for the crime of attempt (first degree murder). *Guyton*, 2014 IL App (1st) 110450 at ¶ 61. Therefore, defendant's argument he was denied effective assistance of counsel due to counsel's failure to request an instruction for the jury to acquit defendant of attempt (first degree murder) is unfounded. Defendant was not entitled to have the jury receive such an instruction because the jury had no ability to consider mitigating factors on those charges. Therefore, defense counsel's performance was not deficient for not requesting the instruction.

¶ 34 B. *Lynch* Instructions

¶ 35 Defendant next claims defense counsel's failure to request the jury be instructed on how to evaluate the *Lynch* evidence resulted in an unfair trial because the jury did not consider whether Lytony might have been the aggressor. Defendant alleges the following instruction should have been given regarding *Lynch* evidence:

> "In this case the State must prove beyond a reasonable doubt the proposition that the defendant was not justified in using the force which he used. You have [(heard testimony) (received evidence)] of ____'s [(prior conviction of a violent crime) (prior acts of violence) (reputation for violence)]. It is for you to

> determine whether ____[(was convicted) (committed those acts) (had this reputation)]. If you determine that ____[(was convicted) (committed those acts) (had this reputation)] you may consider that evidence in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in using the force which he used." Illinois Pattern Jury Instructions, Criminal, No. 3.12X (4th ed. 2000).

¶ 36 Under *Lynch*, evidence of a victim's propensity for violence may be admissible to support a defendant's theory of self-defense in two ways: first, if the defendant knew of the victim's violent tendencies, and this knowledge "necessarily affect[ed] his perceptions of and reactions to the victim's behavior" (*Lynch*, 104 Ill. 2d at 200); second, "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*. Here defendant did not know of Lytony's criminal history, but there was a conflict in the evidence as to whether Lytony was armed. Therefore, the *Lynch* evidence concerning Lytony's prior arrest for possessing a firearm was properly admitted. *Id*. at 202. However, defendant alleges he received ineffective assistance of counsel because his attorney did not ask the jury to be instructed on how it should consider the *Lynch* evidence.

¶ 37 Defendant cannot show he was prejudiced by defense counsel's failure to request an instruction concerning the *Lynch* evidence because he has not shown that if the jury considered the *Lynch* evidence there was a reasonable probability of them reaching a different verdict. Defendant only admitted evidence of Lytony once being arrested with firearms. Defendant introduced evidence of Lytony once being arrested with firearms and the State elicited testimony from Anthony about his several prior felony convictions. Because the trial court admitted *Lynch*

evidence the proposed instruction should have been given. We next consider under *Strickland* whether defendant was prejudiced by counsel's performance. Although the jury was instructed to only consider such evidence as it related to the credibility of the witness, we find the error was not prejudicial. The evidence defendant committed second degree murder and attempt (first degree murder) is overwhelming. Three witnesses testified the victims were not armed, no firearms were found when police investigated the victims, and no guns were recovered from the vehicles. No witness testified that the victims ever shot back at defendant; defendant and all other witnesses testifying about the night of the shooting clearly stated he was the only one who fired a gun. There was evidence defendant fled the State after the incident, which is evidence of defendant's consciousness of his guilt. See *People v. Henderson*, 39 Ill. App. 3d 502, 507 (1976) ("The concept of flight embodies more than simply leaving the scene of the crime. The accused must be attempting to avoid arrest or detection, actions which imply a consciousness of guilt.").

¶ 38 Defendant failed to show there is a reasonable probability of the jury reaching a different verdict had the jury been provided instructions to consider evidence of Anthony's prior convictions and Lytony's prior arrest because the evidence of defendant's guilt is overwhelming. The jury considered whether defendant reasonably believed he was justified in using deadly force against Lytony, and concluded he did not. The jury found a mitigating circumstance for defendant unlawfully killing Lytony: defendant had an unreasonable belief in the need for self-defense. Given the totality of the evidence, defendant has not shown how an instruction to consider *Lynch* evidence would have altered the jury's findings that defendant unreasonably believed he lawfully killed Lytony in self-defense. Therefore, defendant cannot demonstrate ineffective assistance of counsel under *Strickland*.

¶ 39 C. Defendant's Void Conviction for Aggravated Unlawful Use of a Weapon

¶ 40 Defendant's next claim of ineffective assistance of counsel alleges defense counsel's performance was deficient when counsel asked defendant whether he had been convicted for aggravated unlawful use of a weapon in 2005. Defendant argues his 2005 conviction for aggravated unlawful use of a weapon was a void conviction under *People v. Aguilar*, 2013 IL 112116, and that he was prejudiced by the introduction of this conviction because the trial court relied on the conviction during sentencing. Defendant's 2005 conviction was under 720 ILCS 24-1.6(a)(1), (a)(3)(A). In *Aguilar*, our supreme court declared this statute unconstitutional, finding "section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms." *Aguilar*, 2013 IL 112116 at ¶ 22. Defendant relies on *People v. Billups*, 2016 IL App (1st) 134006, ¶¶ 15-16, to argue his 2005 conviction was void *ab initio* and that his counsel was ineffective for introducing evidence of this conviction because the court may have imposed a lesser sentence had the evidence not been introduced.

¶ 41 We find that consideration of the void conviction was not prejudicial because even if a conviction for aggravated unlawful use of a weapon was declared unconstitutional, defendant was still a convicted felon in possession of a firearm when he knew it was illegal for him to possess a gun. In *Billups*, we relied on multiple prior convictions in sentencing the defendant. Here the court referenced defendant's 2002 and 2005 convictions during sentencing. As we articulated in *Billups*: "To establish prejudice, [the defendant] needs to show only a 'reasonable probability' that the trial judge would have imposed a lesser sentence if his counsel had not erred." *Billups*, 2016 IL App (1st) 134006 at ¶ 16 (citing *People v. Steidl*, 177 Ill. 2d 239, 257 (1997)). Here defendant has not proven there was a reasonable probability the trial court would have imposed a lesser sentence. Defendant only makes the argument he was prejudiced because the trial court relied on both convictions for sentencing. However, defendant never argues he

would have received a lesser penalty had the trial court not relied on the one void conviction. Defendant needs to prove he would have received a lesser sentence, all other factors being equal, if the court had not heard about a void conviction but had heard of defendant's remaining criminal history. Based on defendant illegally possessing a loaded firearm while being a convicted felon with considerable criminal history, he has not proven that consideration of one more offense tipped the scales and would have altered his sentence. Defendant fails to prove he suffered prejudice from counsel's introduction of a void conviction.

¶ 42 We conclude there was no reasonable probability the outcome of the verdict would have been different in spite of defense counsel's alleged deficiencies. Defendant was not prejudiced by defense counsel's performance and therefore cannot satisfy the elements necessary to prove ineffective assistance of counsel under *Strickland*.

¶ 43 Supreme Court Rule 431(b)

¶ 44 We next address defendant's argument the trial court erred by failing to abide by Supreme Court Rule 431(b) when it failed to ask the prospective jurors whether they both understood and accepted the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *People v. Zehr*, 103 Ill. 2d 472, 477 (1984) ("essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him."). Defendant failed to preserve the issue for appeal. Instead, he argues the trial court committed plain error under the first-prong of plain error analysis, claiming the evidence at trial was closely balanced. The first step in plain error analysis "is to determine whether error occurred." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Though a trial court's failure to abide by Rule 431(b) is not automatically reversible

error, such error may be reversible under harmless-error analysis or first-prong plain error analysis. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). "A Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine, absent evidence that the violation produced a biased jury." *People v. Sebby*, 2017 IL 119445, ¶ 52.

¶ 45 The parties agree the trial court did not strictly comply with Rule 431(b) instructions when questioning the prospective jurors. When questioning prospective jurors, Rule 431(b) requires the trial court to inform the jury of the four *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The rule requires the trial court to ask potential jurors whether they understand and accept the four *Zehr* principles:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." *Id*.

In this case the court asked whether the prospective jurors had "a disagreement or a problem with" each principle. "[I]t may be arguable that asking jurors whether they disagreed with the Rule 431(b) principles is tantamount to asking them whether they accepted those principles. However, the trial court's failure to ask whether the jurors understood the principles constitutes error alone." *People v. Belknap*, 2014 IL 117094, ¶ 46.

¶ 46 Moving past the initial step of proving the court committed some error, defendant fails to

prove first-prong plain error because the evidence at trial was not closely balanced. "Where the defendant claims first-prong plain error, a reviewing court must decide whether the defendant has shown that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice." *Sebby*, 2017 IL 119445, ¶ 51. If a defendant can prove the evidence was closely balanced, then the error alone threatened to tip the scales against him and would be reversible. *Id*. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id*. at ¶ 53. After reviewing the record in this case, we do not find the evidence to be closely balanced.

¶ 47 Defendant argues the evidence was closely balanced on the issue of whether he shot Lytony in self-defense and whether the evidence was sufficient to prove he was guilty of attempt (first degree murder) of the other three victims when he shot at their vehicles because his testimony contradicted the testimonies of the three living victims. We disagree.

¶ 48 The evidence was not closely balanced as to defendant being guilty of second degree murder for killing Lytony. Defendant insists he saw Lytony with a gun even though no gun was recovered from either of the two cars or from the four victims and none of the other witnesses saw Lytony with a gun; there was no evidence the victims even once shot at defendant; defendant fled the State and only returned when he was arrested and extradited back. The only support for defendant's claim he acted in self-defense is his self-serving testimony that he thought Lytony was reaching for a gun (which another witness stated could have been Lytony reaching for a lighter). No evidence at trial indicated any victim possessed a weapon. Defendant testified Lytony's actions did not make him scared or nervous. Yet he pointed a weapon he knew was loaded at Lytony and fired at close range, shooting Lytony in the heart, and then fled

the State. When reviewing a claim for plain error we examine all of the evidence (*Belknap*, 2014 IL 117094, ¶ 50) including evidence defendant fled the State and lied to police about even being present during the shooting. See *Henderson*, 39 Ill. App. 3d at 507 (finding flight implies consciousness of guilt). Given the totality of the evidence, the evidence finding defendant guilty of second degree murder was not closely balanced.

¶ 49 The present case is factually distinguishable fro*m Sebby* where our supreme court found the defendant and the State presented conflicting accounts of events without extrinsic evidence "to corroborate or contradict either version," and concluded "both versions were credible." *Sebby*, 2017 IL 119445 at ¶ 63. *Sebby* concerned a defendant's appeal from a charge of resisting a peace officer. The State's witnesses testified the defendant knowingly resisted a peace officer because he pushed an officer and attempted to pull away as officers tried to place him in handcuffs. *Id*. at ¶¶ 9-21. The defendant's witnesses testified that police officers were yelling obscenities at the defendant, that an officer yelled assault even though the witness did not see the defendant push the officer, and that the defendant only appeared to try to prevent injury to himself from falling on gravel and did not resist officers as they pulled his arms in different directions while handcuffing him. *Id*. at ¶¶ 22-25. As a result, the evidence was closely balanced i*n Sebby*. *Id*. at ¶ 61. Not so in the present case.

¶ 50 The evidence showing defendant intended to unlawfully kill Anthony, Davis, and Jenkins was not closely balanced. No witness testified the victims ever fired upon defendant. Defendant claims he thought the occupants of both vehicles were armed and only fired "warning shots" in self-defense. This story fails to account for why defendant decided to fire all the remaining bullets in his gun at two occupied vehicles as they were departing. The story also is inconsistent with defendant's initial statement to police he was not present at the shooting. Further, the

targeting and placement of defendant's shots demonstrates the evidence proving his attempted commission of first degree murder is not closely balanced: defendant shot out the rear window of the Pontiac, along with blowing out its rear driver's side window, caused bullet damage to the rear passenger door and to the passenger side door beam. Defendant also blew out the rear window of Jenkins' Ford, put a bullet through the rear passenger door, another bullet through the rear gate, blew out a side window, and one of his bullets was recovered from the headrest of the driver's seat. The bullets defendant fired consistently hit the rear side of both vehicles in places he knew were occupied by passengers. As noted above, we examine all of the evidence when reviewing a claim of plain error. *Belknap*, 2014 IL 117094, ¶ 50. Also as we noted above, the natural tendency of firing a weapon at occupied vehicles is the destruction of the life of the occupants. *Garcia*, 407 Ill. App. 3d at 202. Defendant thus failed to prove the evidence at trial was closely balanced and his claim fails.

¶ 51 Prosecutorial Misconduct

¶ 52 Defendant also argues he was denied a fair trial because the State engaged in prosecutorial misconduct during its closing and rebuttal arguments. Defendant complains of the State calling him a "cold blooded murderer," for comparing defendant to John Wilkes Booth and to a homeless person asking for either money or a cigarette, and for implying he fabricated his defense. Defendant failed to object to the State's comparison of defendant to John Wilkes Booth, though he raised objections to the State twice calling him a "cold blooded murderer," and the State's comparison of defendant to a homeless killer.

¶ 53 Defendant requests we review the comment not objected to under the plain error doctrine. As noted above, the evidence at trial was not closely balanced and defendant's claim fails under first-prong plain error analysis. His claim also fails under second-prong plain error because

"[e]rror in closing argument does not fall into the type of error recognized as structural." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78. Therefore, defendant fails to prove his forfeited claims constituted plain error.

¶ 54 We review defendant's preserved claims the State engaged in prosecutorial misconduct in closing arguments for abuse of discretion. *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008) ("The regulation of the substance and style of closing argument lies within the trial court's discretion, and thus the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion.") "Closing arguments must be reviewed in their entirety, and the challenged remarks must be viewed in context." *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Prosecutors are "afforded wide latitude in closing arguments" so long as they argue "facts and reasonable inferences drawn from the evidence." *People v. Kliner*, 185 Ill. 2d 81, 151 (1998).

> "The trial court has discretion to determine the proper character, scope and prejudicial effect of closing arguments. [Citations.] Improper remarks warrant reversal only where they result in substantial prejudice to the defendant, considering the content and context of the language, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial." *Id.* at 151-52.

Defendant has not proven the trial court abused its discretion in overruling defendant's objections. The State's comments about defendant being a "cold-blooded murderer" were based on the evidence and not prejudicial. The State was commenting on defendant's lack of remorse when the surviving victims showed remorse for what happened. Further, the State's characterization of defendant's version of events as a fabrication was also based on the evidence. The State may argue defendant's case is based on fabrications or lies if such an argument is a fair

inference based on the evidence admitted at trial. *People v. Watkins*, 220 Ill. App. 3d 201, 209 (1991) ("a prosecutor may comment that the defendant or a defense witness is a 'liar' if conflicts in evidence make such an assertion a fair inference.") Defendant attempts to analogize his case to *People v. Emerson*, 97 Ill. 2d 487, 497 (1983); *People v. Robinson*, 125 Ill. App. 3d 1077, 1081, (1984); *People v Thompson*, 313 Ill. App. 3d 510, 514 (2000). However, here the State's comments on defendant being a liar and fabricating the perceived presence of a gun were based on the evidence. No gun was recovered from either vehicle or any of the victims; no witness other than defendant testified Lytony had a gun or that any victim was armed; defendant fled Illinois and only returned upon arrest and extradition from Minnesota 14 months after the shooting. Defendant was not prejudiced by the State analogizing him to a homeless killer because the jury found he had an unreasonable belief in the need to use deadly force in self-defense against Lytony – he was convicted of second degree murder. Therefore, when viewing the closing arguments in their totality the trial court did not abuse its discretion by allowing the State to make comments based on the evidence.

¶ 55 Defendant argues the cumulative effect of the State's misconduct prejudiced him and that the trial court abused its discretion by allowing all of the State's comments. However, our precedent clearly establishes that the whole is not greater than the sum of all effects of misconduct. *People v. Wood*, 341 Ill. App. 3d 599, 615 (2003) (" 'The whole can be no greater than the sum of its parts ***.' [Citation.] Generally, there is no cumulative error where none of the alleged errors amounts to reversible error." (quoting *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984)). As noted above, the trial court did not abuse its discretion by allowing any one of those comments objected to because they were based on the evidence and not prejudicial.

¶ 56 Jury Instructions

¶ 57 Defendant further contends the trial court committed plain error by instructing the jury using IPI 6.07X for attempt (first degree murder) (Illinois Pattern Jury Instructions, Criminal, No. 6.07X (4th ed. 2000)) without clarifying that the intent to kill an individual must be the intent to kill the specific victim and not just any individual. While "[a] reviewing court will generally review jury instructions only for an abuse of discretion," (*People v. Anderson*, 2012 IL App (1st) 103288, ¶ 33), here defendant failed to preserve the issue on appeal by not objecting during trial. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). We therefore evaluate his claim for plain error. *Thompson*, 238 Ill. 2d at 611-12. There can be no plain error where there was no error. *People v. Hillier*, 237 Ill. 2d 539, 549 (2010). The issue in determining whether the court erred when instructing the jury is whether the instructions were "an accurate recitation of the law and whether it confused the jury." *Anderson*, 2012 IL App (1st) 103288 at ¶ 39. "Jury instructions are intended to convey to the jury the correct principles of law applicable to the evidence submitted so that the jury can 'arrive at a correct conclusion according to the law and the evidence.' " *Id*. at ¶ 40 (quoting *People v. Pinkney*, 322 Ill. App. 3d 707, 717 (2000)). We find the trial court did not err when instructing the jury as to the elements of attempt (first degree murder) because the trial court correctly stated the law and did not confuse the jury.

¶ 58 When examining the jury instruction in its full context, it is clear the court informed the jury it had to find defendant intended to kill each individual victim and that the jury was not misled as to the necessary elements for attempt (first degree murder). The jury was not misled as to who defendant needed to have the intent to kill because the evidence at trial supported the State's claim defendant was firing at the victims in the fleeing cars. He did not fire at cars approaching him, but fired at the rear of cars driving away from him. Defendant shot the rear windscreens of both the Pontiac and the Ford. He shot out the rear window, blew out the rear

driver's side window, caused bullet damage to the rear passenger door and the beam on the right side of the Pontiac. Defendant then fired several shots at Jenkins' truck while Jenkins was driving away. One of defendant's shots blew out the rear window of the truck, another was shot into the back door, another bullet through the rear, and another bullet blowing out a side window. Jenkins later recovered a bullet fragment from the ceiling of the truck and police recovered a bullet fragment from the headrest behind the driver's seat of his truck.

¶ 59 Defendant attempts to analogize his case to *People v. Anderson*. In *Anderson* we found error where the jury "could have concluded that defendant was guilty of attempted murder of" the man he already killed rather than the additional victim. *Anderson*, 2012 IL App (1st) 103288 at ¶ 56. However, we find *Anderson* inapposite; the jury confusion occurring over those instructions is factually distinct from the present case. In *Anderson*, the alleged victim of attempted murder observed an argument over a drug deal in the early hours of the morning at a submarine restaurant in Chicago. *Id*. at ¶¶ 6-7. The victim then saw the defendant exit the restaurant and shoot the man who sold the drugs. *Id*. at ¶ 7. The victim immediately ran to his car and drove off. As he was driving he heard gun shots, but was unsure from which direction the shots were fired. *Id*. The victim later checked for bullet damage to his car and found none. *Id*. When the jury was instructed about the charge of attempt (first degree murder) against the alleged victim, the jury was simply instructed that it could find the elements of the offense present if the defendant had the intent to kill "an individual" and took a substantial step toward killing "an individual" rather than "the individual." *Id*. at ¶ 24. We found the trial court committed plain error when instructing the jury on attempt (first degree murder) because the jury was not informed it had to find defendant attempted to kill the alleged victim rather than actually killing the other deceased victim. *Id*. at ¶ 65. "[D]efense counsel never discussed to whom the

attempted murder instruction applied, and we find that the few comments made by the prosecutor relating to the issue did not clarify that the attempted murder offense referred only to" the alleged victim. *Id*. at ¶ 63. Not so in the present case.

¶ 60 The present case is primarily distinguishable because the evidence at trial was not closely balanced and defendant fails under plain error analysis. It is further distinguishable because in *Anderson* there was no evidence at trial that the defendant ever shot at the alleged victim in the fleeing vehicle. In contrast, in this case both cars were riddled with bullets. Defendant shot the rear of both vehicles and caused bullet damage to the cabins of both vehicles. Firing a gun at an occupied vehicle is evidence of intent to kill the people inside. *Garcia,* 407 Ill. App. 3d at 201-02. There was uncontroverted evidence adduced at trial here that defendant shot at the three surviving victims. No such testimony was present in *Anderson*. Moreover, here the jury was not misled about defendant needing to have the intent to kill each of the three surviving victims to find him guilty of attempting to murder each of them.

¶ 61 Defendant once again claims that even if his argument fails under plain error review, that his claim may be preserved and succeed under a theory defendant's counsel was ineffective for failing to preserve the issue for review. Again, his argument is unavailing. The trial court here did not err when instructing the jury on the elements of attempt (first degree murder), therefore it was not error on defense counsel's part to not raise an objection. See *Caffey*, 205 Ill. 2d at 106 ("trial court would have rightfully rejected any defense challenge to the remarks. Consequently, had defendant's counsel brought these alleged errors to the attention of the trial court, the result would have been no different than the effect of his failure to do so."). Defendant therefore cannot uphold his claim of ineffective assistance of counsel as he was not prejudiced by defense counsel's failure to object – the result would be the same had defense counsel objected or not

objected because the trial court would have rightly overruled the objection. *Id*.

¶ 62 Constitutionality of Defendant's Sentence

¶ 63 Defendant contests his 30 year sentence for attempt (first degree murder), arguing it is unconstitutional under the eighth amendment, the Illinois constitution's proportionate penalties clause, and violates equal protection and due process of law. U.S. CONST. amend. VIII; U.S. CONST. amend. XIV; ILL. CONST. art. I, §§ 2, 11. Defendant posits his 30 year sentence for attempt (first degree murder) shocks the conscience when his sentence for actually completing the offense (i.e. for the second degree murder of Lytony) was only half that. We find defendant's argument inapposite to Illinois law.

¶ 64 Defendant raises an as-applied constitutional challenge, which raises a legal question that we review *de novo*. *People v. Fisher*, 184 Ill. 2d 441, 448 (1998). All statutes carry a strong presumption of constitutionality and "the party challenging the statute bears a heavy burden of clearly establishing its constitutional infirmities. [Citation.] Any reasonable construction which affirms a statute's constitutionality must be adopted, and any doubt regarding a statute's construction must be resolved in favor of the statute's validity." *People v. Morgan*, 203 Ill. 2d 470, 486 (2003).

> "We generally defer to the legislature in the sentencing arena because the legislature is institutionally better equipped to gauge the seriousness of various offenses and to fashion sentences accordingly. [Citation.] The legislature's discretion in setting criminal penalties is broad, and courts generally decline to overrule legislative determinations in this area unless the challenged penalty is clearly in excess of the general constitutional limitations on this authority." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005).

¶ 65 Our supreme court in *Lopez* considered whether "the possibility that a defendant would be sentenced to a greater term of imprisonment if the victim lives than if the victim dies," results in an unconstitutional penalty. *Lopez*, 166 Ill. 2d at 450. The *Lopez* court made clear that a greater sentence for attempt (first degree murder) than second degree murder is constitutionally permissible. *Id*. at 450-51 ("We do not believe that the disparity in sentencing range here is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.). Thus, defendant's contention his sentence for second degree murder is unconstitutional is inapposite to established Illinois law.

¶ 66 Defendant's challenge also fails because his arguments that the statute is unconstitutional are predicated on cross-comparison analysis, analysis our supreme court rejected in *Sharpe*. In *People v. Sharpe* our supreme court settled analysis of proportionate penalties clause claims – it held that it was no longer permissible to challenge the constitutionality of a statute's penalty by arguing a separate offense is supposedly worse but receives a lesser penalty. "A defendant may no longer challenge a penalty under the proportionate penalties clause by comparing it with the penalty for an offense with different elements." *Sharpe*, 216 Ill. 2d at 521. Here defendant contests the proportionality of his sentence for attempt (first degree murder) in exactly this manner. Defendant claims his sentence for attempt (first degree murder) is disproportionate because he received a lesser penalty for a greater crime, namely second degree murder. This is precisely the method of analysis our supreme court rejected in *Sharpe*.

¶ 67 Our supreme court explained that an enhanced sentence for attempt (first degree murder) of 25 years to life is not cruel and unusual, and not a disproportionate penalty.

> "Defendant makes an additional type of cross-comparison argument. Defendant compares the enhanced versions of murder to simple murder and argues that it

> violates the proportionate penalties clause to punish murder in which a firearm is involved more harshly than murder in which a different type of weapon is involved. In making this argument, defendant uses the pre–1997 type of cross-comparison analysis in which two different offenses are compared, but that are judged under the 'cruel or degrading' standard. Defendant argues that it must shock the moral sense of the community that every murder committed with a gun receives a higher minimum penalty than any murder, however foul, committed without a firearm. *Davis*, however, established that cross-comparison challenge and the 'cruel or degrading' challenge are separate types of proportionate penalties challenges and that the latter requires only that the penalty be examined in relation to the offense for which it is applied. [Citation.] Defendant's argument fails under either analysis. First, we have held today that cross-comparison challenges are no longer valid. Second, we have already held in *Morgan* that it is neither cruel nor degrading, nor would it shock the moral sense of the community, to apply the 15/20/25–to–life enhancements to attempted first degree murder." *Id*. at 523-24.

Here defendant received a sentence of 10 years for three counts of attempt (first degree murder) and then a 20 year enhancement due to his use of a firearm during the crime. Our precedent is clear that such a penalty is constitutionally permissible. Defendant failed to articulate a constitutional deficiency in the statute.

¶ 68 Finally, defendant contests his 15 year sentence for second degree murder, arguing the sentence was excessive given the nature of the offense and defendant's potential for rehabilitation. We disagree. We review defendant's claim the trial court's sentence was

excessive for an abuse of discretion. *People v. Rucker*, 260 Ill. App. 3d 659, 664 (1994). Here the trial court did not abuse its discretion. Defendant was convicted of multiple prior felonies, knew it was illegal to carry a firearm, and he carried a loaded pistol nevertheless. Defendant also fled the State, returned only after being extradited from Minnesota, and lied to police about being present during the shooting. We cannot say no reasonable court would have found defendant lacked rehabilitative potential. Even if defendant managed to prove he has rehabilitative potential, he still cannot demonstrate the trial court's sentence constituted an abuse of discretion: "in fixing a penalty for an offense, the possibility of rehabilitation is not given greater weight or consideration than the seriousness of the offense." *Sharpe*, 216 Ill. 2d at 525. Thus, defendant failed to prove the trial court's sentence for second degree murder was excessive at all, much less so excessive to constitute an abuse of discretion.

¶ 69 Defendant fails to uphold his burdens in challenging his convictions and sentence. Defendant failed to prove the State lacked sufficient evidence to convict him of attempt (first degree murder) when construing the facts in the light most favorable to the State given the evidence that defendant repeatedly shot and hit the cabins of both fleeing vehicles. Defendant's claims of ineffective assistance of counsel fail because defendant could not articulate any prejudice resulting from defense counsel's performance. Defendant claimed the trial court committed plain error by not fully complying with Supreme Court Rule 431(b) when questioning prospective jurors, but he failed to prove the evidence at trial was closely balanced or that the error was structural. Defendant could not demonstrate the State committed plain error in closing arguments because the error was not structural and the evidence was not closely balanced. For the same reason defendant's claim the trial court committed plain error when instructing the jury also fails. Finally, defendant has neither proven his sentence for attempt (first degree murder) is

unconstitutional nor that his sentence for second degree murder is excessive.

¶ 70 CONCLUSION

¶ 71 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 72 Affirmed.