SIXTH DIVISION
June 17, 2011

No. 1-10-0061

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 05 CR 17702
	)	
GREGORY OWENS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices McBride and R.E. Gordon concurred in the judgment.

O R D E R

***Held*:** Defendant's conviction for first degree murder affirmed over defendant's contentions that he was deprived of a fair trial because jury instructions were incomplete; the trial court failed to comply with Supreme Court Rule 431(b); and the State failed to sustain its burden of disproving his affirmative defense that when he killed the victim he was defending his dwelling,. Defendant's 70-year sentence vacated and the cause remanded for a new sentencing hearing. Defendant's mittimus amended to reflect the correct number of days spent in presentence custody and a single conviction of first degree murder. The fines and fees order amended to reflect the correct total of court costs assessed by the trial court.

Defendant Gregory Owens was found guilty by a jury of first degree murder and

sentenced to an aggregate term of 70 years' imprisonment. He argues on appeal that: (1) the State failed to sustain its burden of disproving his affirmative defense that when he killed the victim he was defending his dwelling; (2) he was deprived of a fair trial because the jury instructions were incomplete, confusing and did not define the elements of defense of dwelling; (3) the trial court's failure to strictly comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)), requires reversal and remand for a new trial; (4) his mittimus must be amended to reflect only one first degree murder conviction and an additional day of sentencing credit; (5) his fines and fees order must be corrected because it imposes fees that are not statutorily authorized; and (6) his sentence was excessive. We affirm in part, vacate in part and correct the mittimus.

Defendant was arrested on July 7, 2005, in connection with the February 3, 2005, shooting death of Oscar Kelsey. Defendant was charged by grand jury indictment with six counts of first degree murder.

Jury selection began on January 23, 2008. The court read the charges to the venire *en masse* and admonished them:

> "It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principles; that is, that all persons charged with a crime are presumed to be innocent and that it is the burden of the State, who has brought the charges, to prove the defendant guilty beyond a reasonable doubt.
>
> What this means is that the defendant has no obligation to testify in his own behalf or to call any witnesses in his defense. He may simply sit here and

> rely upon what he and his lawyer perceive to be the inability of the State to present sufficient evidence to meet their burden of proof. Should that happen, you will have to decide the case on the basis of the evidence presented by the Prosecution.
>
> The fact that the defendant does not testify must not be considered by you in any way in arriving at your verdict. However, should the defendant elect to testify or should his lawyer present witnesses in his behalf, you are to consider that evidence in the same manner and by the same standards as the evidence presented by the state's attorneys. The bottom line, however, is that there is *** no burden upon the defendant to prove his innocence. It's the State's burden to prove him guilty beyond a reasonable doubt."

The court explained to the venire the role of the State's Attorneys, defense counsel and the jury in a criminal trial. The court then asked general questions of the potential jurors. At the end of questioning, the court asked each potential juror if he or she had "issues" with the principles of law that the State had the burden in the case of proof beyond a reasonable doubt and that the defendant is presumed innocent of the offenses charged. Each selected juror responded in the negative. Neither defense counsel nor the prosecutor objected to the method of selection or asked the court to inquire further.

At trial, defendant relied on the affirmative defenses of justified use of force in the defense of self and in the defense of dwelling.

Jamieique Yancey testified that about 8:30 p.m. on February 2, 2005, she drove Kelsey,

her boyfriend at the time, to Teresa Hudson's house at 9538 South Merrion Avenue in Chicago. There, Kelsey, Kelsey Jones and another person played "dice." Yancey said the group was gambling for money and that Kelsey was drinking vodka while playing the game. At some point, Kelsey started losing money and took the dice from the game. Hudson began arguing with Kelsey and told him to leave the house. Kelsey refused to leave. Hudson then called defendant and asked him to come to the house.

After Hudson called defendant, Yancey, Kelsey and Jones exited the house and walked to Yancey's car. As they did so, defendant and his friends arrived at the house. Kelsey and Jones went back inside the house with defendant and his friends. Kelsey and defendant then began to argue. Defendant told Kelsey that Hudson did not want him inside her house. Yancey testified that when defendant and Kelsey started to argue, she exited the house and took Kelsey's coat and bottle of vodka to her car. She then called Kelsey's friend Buddha and asked him to help her persuade Kelsey to leave the house.

When Buddha arrived, Yancey and he went inside the house. When she entered the house, Kelsey was arguing with Hudson. Kelsey then began to argue with defendant. Yancey grabbed Kelsey and pulled him out of the house. As the pair exited, Kelsey slammed the front door and kicked the front screen door. The glass in the screen door broke. Kelsey then turned around and went back inside the house. Yancey followed Kelsey into the house and saw him "exchanging words" with defendant. Yancey testified Kelsey and defendant were not physically fighting but were "in each other's faces." Kelsey did not have a weapon. At some point during their argument, Yancey exited the house. As she did so, she heard gunshots. On cross-

examination, Yancey said she did not see defendant shoot Kelsey.

Jones, defendant's cousin, testified that on February 2, 2005, he lived at 9538 South Merrion Avenue with Hudson, her son Myson, Charles Morris and defendant. In the early morning hours of February 3, 2005, Jones, Kelsey and another person were playing pool and gambling in the basement of the house. Hudson arrived at the house and told the group to stop gambling. She also told Kelsey that she did not want him inside her house and asked him to leave. Kelsey refused to leave. The group continued to gamble. Defendant arrived at the house a short time later and asked the group to stop gambling. Kelsey did not want to leave the house and began arguing with defendant and Hudson.

During the argument, Hudson went to her bedroom on the second floor of the house. Jones testifed Kelsey followed Hudson into the bedroom, shouted profanities and called her pejorative names. Kelsey then picked up a television set from inside Myson's bedroom and tried to "smash it on [Hudson's] head." Hudson retrieved a screwdriver from the edge of her bed and tried to "scratch" Kelsey. Defendant grabbed the television from Kelsey. Kelsey then ran down the stairs to the front room. Jones and defendant followed him.

In the front room, Kelsey and defendant continued to argue. Jones testified Kelsey "put his hands in [defendant's] face" and the pair "started to tussle." The other persons in the house separated them. Jones said Kelsey then kicked the front door, causing the glass in the door to break and "ran outside." After Kelsey left, defendant retrieved a handgun from his front right pant's pocket. Jones said defendant "did nothing at that time" with the gun and placed it back into his pocket. Jones acknowledged that in his handwritten statement to police and in his grand

jury testimony he had said he saw defendant "take the safety off the gun and walk toward the door." Jones testified at trial that after defendant took the safety off the gun he heard someone in the house say "it wasn't necessary." Defendant then placed the gun back into his pocket.

After defendant placed the gun into his pocket, Kelsey "came back in[to]" the house with his hands in his pockets. As Kelsey walked into the house, defendant's friends stepped in front of Kelsey and pushed him against a wall. Jones said Kelsey was surrounded by "pretty much everyone in the house," including defendant's friends J.T., F.A., and Devo. Defendant was about six feet away from Kelsey, saying "don't let him get to me." Jones denied that in his handwritten statement he had said he heard defendant say "I'm going to kill him." He acknowledged that in his grand jury testimony he said he heard defendant say "get him, before I hurt him." At some point, Kelsey broke free from defendant's friends and walked toward defendant. As he did so, defendant shot him.

Jones acknowledged that in his handwritten statement he had said he saw defendant "walk up to [Kelsey] and fire the gun three or four times." He also acknowledged that his statement had said Kelsey "could not have seen it coming because he was facing" away from defendant. Jones further acknowledged that his statement had said Kelsey "appear[ed] to get hit once on the first shot, and then run toward the [front] door," at which time defendant fired the additional shots. Jones testified at trial that Kelsey was hit with the first shot and "took three steps toward the [front] door." As he did so, defendant shot him three more times. Defendant left the house and took the gun with him.

On cross-examination, Jones said he was drinking alcohol on the night in question. He

acknowledged that in his grand jury testimony he had said Kelsey was "pushing [defendant] around, because, *** he was bigger than him, so he was trying to, *** muscle him." Jones also acknowledged that in his grand jury testimony he had said he did not hear defendant say he was going to kill Kelsey, but that he was going to "hurt him." Jones said when Kelsey reentered the house he had his hands in his pockets and looked like "[h]e was going to take some shots or do something, shoot." Jones testified that defendant retrieved the gun from his pocket when Kelsey reentered the house.

Former Assistant State's Attorney John Heil testified to the contents of Jones's handwritten statement. In the statement, Jones said when Kelsey entered the house he heard defendant say "y'all better get him" and "I'm going to kill him." Defendant then retrieved a handgun from his pocket, walked toward Kelsey and fired the gun three or four times.

Myson Hudson testified that on the date in question he lived at 9538 South Merrion with his mother Teresa Hudson, Morris, Jones and defendant. In the early morning hours of February 3, 2005, Myson was in his bedroom and heard Hudson yelling that she did not want gambling taking place inside the house. Myson went downstairs to the kitchen and saw Hudson arguing with Kelsey. Myson opined that Kelsey was drunk. Yancey, Jones and Morris were in the kitchen and defendant had not yet arrived at the house. During the argument, Kelsey was poking and choking Hudson. Yancey, Morris and Jones grabbed Kelsey and separated him from Hudson. Hudson then called defendant and asked him to come to the house.

When defendant arrived at the house, Hudson went to one of the upstairs bedrooms. Kelsey followed her. Myson said Kelsey tried to throw a television at Hudson, but Morris

stopped him. Kelsey then went downstairs and began arguing with defendant. At some point, Kelsey exited the house and walked to Yancey's car. Kelsey then returned to the house and kicked the front door, causing the glass in the door to break. Myson acknowledged that in his handwritten statement to police he had said Kelsey broke the glass in the door when he left the house. He also acknowledged that in this grand jury testimony he had said he did not know if Kelsey kicked or slammed the door.

When Kelsey returned to the house, he continued to argue with defendant. Myson testified Kelsey walked up to defendant "with his hands in his pocket[s], like he gonna do something." Defendant then shot Kelsey. Myson acknowledged that he told detectives he saw defendant remove a handgun from his waistband and point it at Kelsey. Myson also acknowledged that he told detectives he saw defendant place the gun barrel against Kelsey's head. After shooting Kelsey, defendant said "I'm sick of him" and left the house through the front door.

Morris testified that on February 2, 2005, he lived at 9538 South Merrion Avenue with Hudson, Jones, Myson and defendant. About 10 p.m. on that date he was in defendant's upstairs bedroom and heard people "arguing down in the basement." Morris went to the basement and saw Kelsey and Jones "trying to shoot dice." Morris said Kelsey appeared intoxicated. Hudson took the dice from the game and asked Kelsey to leave the house. Morris said Kelsey then "started going off, completely off" and called Hudson pejorative names. Kelsey pushed and shoved Hudson. Hudson went to the first floor of the house and Kelsey followed her. There, Kelsey continued to push and shove Hudson. Morris, Myson and Jones "got between them" and

separated them. Hudson then called defendant and asked him to come to the house.

When defendant arrived at the house, he asked Kelsey to leave. Kelsey refused to leave and began choking defendant. Kelsey then tried to hit Hudson. Hudson went to one of the upstairs bedrooms. Kelsey followed her and hit her. Hudson retrieved a screwdriver from the bedroom and hit him with it. Kelsey then grabbed a television and tried to throw it at Hudson. Morris stepped in between them and took the television from Kelsey. Jones and defendant then escorted Kelsey down the stairs to the front room of the house. Morris said he stayed upstairs and heard the front door slam. He then heard about four gunshots. Morris went downstairs and saw Jones and Myson, standing next to Kelsey, who was lying in the front doorway. Morris said he pushed Kelsey's body outside of the front door and called the police.

When police arrived, Morris told them he did not see the shooting and that it was a "drive-by." Morris testified that before the shooting he saw the gun protruding from defendant's pocket and told him "it ain't worth it."

Detective David Shaw testified that he investigated the murder of Oscar Kelsey. After interviewing witnesses, Shaw tried on several occasions to locate defendant. On June 26, 2005, Shaw learned that defendant was in Little Rock, Arkansas. Shaw obtained an arrest warrant, traveled to Arkansas and placed defendant in custody.

Doctor Michel Humilier of the Cook County Medical Examiner's Office performed the autopsy on Kelsey and testified as an expert witness in the field of forensic pathology. He said Kelsey suffered two gunshot wounds to his back, four to his abdomen and one to his neck. Humilier found one of the abdominal gunshot wounds consistent with Kelsey being shot while he

was on the ground and the shooter was at his feet. Humilier said the gunshot wound to Kelsey's neck showed signs of "searing," which indicates the gun was within about an inch of Kelsey when it was fired.

Defendant testified that on February 3, 2005, he lived with Hudson at 9538 South Merrion Avenue. Defendant said he knew Kelsey for over two years and that they were good friends. Defendant acknowledged that he carried a gun because he "had been victimized in the neighborhood" on numerous occasions. Defendant said he saw Kelsey every day before the shooting and saw him with a gun "about every day." On the evening in question, defendant was on his way to his cousin's birthday party when he received a phone call from Hudson. Defendant said Hudson was "ramping and raging" and asked him to return to the house to pick up Kelsey. Defendant went to the house with his friends J.T. and F.A. There, he saw Hudson standing on top of the stairs and Yancey, Morris and another person in the front room. Yancey told defendant that Jones and Kelsey were in the basement.

Defendant went to the basement and saw Jones and another person "shooting dice." Defendant said Kelsey was sitting on a couch in the basement, drinking alcohol. Defendant took the dice from the game and asked the group to leave the house. Kelsey refused to leave. Defendant gave Kelsey $5 and the group went upstairs to the first floor of the house. When they got to the top of the stairs, Kelsey and Hudson began to argue. Kelsey shouted profanities and called Hudson pejorative names. Defendant said Kelsey put his hands on Hudson's face, shouted at her and "was muscling her." Defendant and another person grabbed Kelsey and pulled him away from Hudson. Hudson went upstairs to the second floor. Kelsey tried to follow her, but

defendant grabbed him. Kelsey then began to argue with defendant. Defendant said Kelsey was "right in [his] face," looking for a confrontation. Kelsey grabbed defendant and tried to "toss [him] around." Morris and another person separated them.

While Kelsey and defendant were arguing, Hudson was standing on the stairs, yelling at Kelsey. Kelsey grabbed her and hit her in the face. Defendant and Morris separated them. As they did so, Kelsey grabbed defendant by the throat and tried to hit him. Kelsey then ran up the stairs to the second floor. Defendant said he did not immediately follow Kelsey upstairs because he was out of breath. Defendant went upstairs when he heard Hudson yell "get him off me." In one of the bedrooms defendant saw Kelsey hitting Hudson. Defendant said he heard Kelsey say "she just cut me, [expletive deleted] stabbed me, [expletive deleted] I [will] kill you." Kelsey then picked up a television from inside the bedroom and tried to throw it at Hudson. Morris grabbed the television, while defendant grabbed Kelsey and pulled him down the stairs to the front room.

In the front room, Kelsey "smacked" defendant. The other persons in the house separated them. Yancey then pulled Kelsey out of the house. Defendant said Kelsey slammed the front door when he exited the house. A few seconds later, defendant heard a loud crash and saw Kelsey's foot protruding from the bottom glass section of the screen door. Defendant said Kelsey reentered the house with his hand in his right pocket, "like it was wrapped around something." Defendant said he did not see Kelsey with a gun, but he saw the handle of the object and that "[i]t looked like a gun was hanging out [of] his pocket." Defendant had his own gun at his side and told the other persons in the house to "get [Kelsey], before he hurts somebody." As

Kelsey walked toward him, Kelsey started to pull his hand out of his pocket. When Kelsey pulled his hand out of his pocket, defendant shot him once. Defendant said Kelsey then attempted to "rush" him and reach for defendant's gun. At this time, defendant "fired a few more shots." Defendant said he had his gun in his pocket during the entirety of the argument and did not pull it out until Kelsey left the house and reentered.

On cross-examination, defendant testified he pulled his gun out when Kelsey reentered the house with his hands in his pockets. Defendant said Kelsey was about an inch away from the gun barrel when he fired the first shot and that Kelsey was facing him when he fired the second shot. Kelsey fell in front of the china cabinet in the front room and started crawling to the front door. Defendant acknowledged that he did not know how many times he shot Kelsey and if Kelsey was standing when he shot him the fifth time. After the shooting, defendant exited the house through the front door and went to a friend's house. The next day, defendant traveled to Arkansas with his mother.

Before closing arguments, the court held an *in camera* jury instruction conference with the parties. The court noted that "[i]n the course of the trial there has been evidence of self-defense" and that the jury was going to receive "a couple of instructions that relate to self-defense." The court then admonished defendant that the evidence presented could support a jury instruction on the lesser included offense of second degree murder and asked him if he wanted the jury to be instructed on this offense. Defendant refused and elected a first degree murder instruction with the affirmative defense that he was acting in self-defense. The record shows defendant did not object to the State's proposed jury instructions relating to first degree murder

and self-defense. Defendant offered and the court gave the instruction relating to justifiable use of force in defense of dwelling.

After closing arguments, the jury found defendant guilty of first degree murder and of personally discharging a firearm that caused Kelsey's death. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006).

At the sentencing hearing, the State informed the court that defendant was charged with six counts of first degree murder "but specifically, it's first degree murder in that he personally discharged a firearm that proximately caused the death." The court then heard arguments on defendant's motion for a new trial. Defendant argued that the State failed to prove him guilty of first degree murder beyond a reasonable doubt because the evidence established that when he killed Kelsey he was acting in self-defense. Defendant also argued that the self-defense and defense of dwelling jury instructions may have confused the jury because "the jury never quite understood what is involved with the issue of self-defense." In denying the motion, the court noted it gave the self-defense instruction to the jury and that it was "strictly straight [Illinois Pattern Jury Instruction] (IPI)." The court also noted that it gave the jury instruction on defense of dwelling and that the jury had an opportunity to consider both of those defenses and rejected them.

Aggravating and mitigating factors were then presented. In aggravation, the State presented to the court the victim impact statements of Kelsey's mother, grandmother and sister. The State recounted the facts of the case and pointed out that defendant shot Kelsey multiple times from close range. The State also pointed out that defendant was on probation when he

killed Kelsey and should not have been in possession of a firearm. In mitigation, defense counsel noted defendant was 22 years old, had three children and had no criminal history of violence. Counsel pointed out that defendant's earlier felony conviction was for a drug offense that was not violent in nature. Counsel also pointed out that at the time of the murder, defendant was acting under extreme pressure and that there was no likelihood defendant would commit a crime of this nature again. Defendant then made a statement in allocution, apologizing to the victim's family for his actions.

In announcing sentence, the court considered the applicability of all the statutory aggravating factors (see 730 ILCS 5/5-5-3.2 (West 2006)) and the mitigating factors presented by the defense. The court noted the facts of the case and that there was no need to shoot the victim where he was outnumbered "about four or five to one" and could have been physically restrained or subdued. The court also noted that defendant was on probation when the shooting occurred and that a sentence was necessary to deter others from committing a similar crime. The court then sentenced defendant to 45 years' imprisonment for first degree murder (count I) and 25 years' imprisonment for personally discharging a firearm that proximately caused the victim's death (count V) to be served consecutively. Defendant was also fined $865 and credited with 1,103 days of time considered served.

We first address defendant's contention that he was denied his right to a fair and impartial jury because the trial judge failed to question the prospective jurors about two of the four principles set forth in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), and codified in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). Defendant claims that the

trial court failed to ensure that the jury understood and accepted the principles that he was not required to offer evidence on his own behalf and that his failure to testify cannot be held against him. Defendant maintains that the trial court's error requires automatic reversal. The State does not dispute that the trial court failed to strictly comply with Rule 431(b) but responds that the court's substantial compliance with the rule does not warrant automatic reversal.

This issue is controlled by our supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). We first note that defendant forfeited review of this issue by failing to object to it at trial or raise it in a timely-filed posttrial motion. *Thompson*, 238 Ill. 2d at 611-12, citing *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). As suggested in *Thompson*, "[a] simple objection would have allowed the trial court to correct the error during *voir dire*." *Thompson*, 238 Ill. 2d at 612. Although a defendant may bypass normal forfeiture principles under the plain error rule, defendant here has failed to show the evidence is so closely balanced that the error threatened to tip the scales of justice against him or the error affected the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d at 613-15. The plain error doctrine does not provide a basis for relaxing defendant's forfeiture of this issue.

Defendant next contends that he was not proven guilty beyond a reasonable doubt of first degree murder. When a defendant challenges the sufficiency of the evidence to sustain a conviction, it is not the function of the reviewing court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939 (2004). The reviewing court must decide whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could

have found the elements of the crime beyond a reasonable doubt. *Evans*, 209 Ill. 2d at 209. We will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *Evans*, 209 Ill. 2d at 209.

Here, defendant was found guilty of first degree murder. Under section 9-1(a)(1) of the Criminal Code of 1961 (Code):

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another." 720 ILCS 5/9-1(a)(1) (West 2006).

Defendant argues that the State failed to sustain its burden of disproving his affirmative defense that he was justified in using deadly force against Kelsey because he was defending his dwelling. Section 7-2(a)(1), (2) of the Code provides:

> "(a) A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if:
>
> (1) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him

or another then in the dwelling, or

(2) He reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling." 720 ILCS 5/7-2(a)(1), (2) (West 2006).

Defendant claims that both of these factors were present in this case and that he was justified in using deadly force. Defendant maintains that the first factor was satisfied because Kelsey's reentry into the house was "violent, riotous and tumultuous" and he reasonably believed that deadly force was necessary to prevent Kelsey from assaulting persons in the house. We will consider the manner of Kelsey's entry into the house and the reasonableness of defendant's belief that deadly force was necessary separately.

Although Myson and defendant testified that Kelsey kicked the front door when he reentered the house, Yancey and Jones said that Kelsey kicked the door when he exited the house. The record shows Yancey exited the house with Kelsey and saw him slam and kick the front door. Jones said that Kelsey kicked the front door then "ran outside." He also said that when Kelsey reentered the house he walked in with his hands in his pockets. We note that Myson acknowledged that in his handwritten statement to police he said Kelsey broke the glass in the door when he left the house. Myson also acknowledged that in his grand jury testimony he said he did not know if Kelsey kicked or slammed the door. Based on this evidence, we do not believe Kelsey entered the house in a "violent, riotous or tumultuous manner."

We are likewise unpersuaded by defendant's argument that he reasonably believed that deadly force was necessary to prevent Kelsey from assaulting him or other persons inside the

house. "The reasonableness of a defendant's subjective belief that he was justified in using deadly force is a question of fact for the jury to determine." *People v. Sawyer*, 115 Ill. 2d 184, 193, 503 N.E.2d 331 (1986). As mentioned, a reviewing court will not disturb a jury verdict unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *Evans*, 209 Ill. 2d at 209.

Defendant claims that he reasonably believed that Kelsey was about to assault him or Hudson when he reentered the house. In support of this argument, defendant relies on the evidence in the record showing that Kelsey was drunk, angry about losing money and physically abusive. Defendant notes that Kelsey repeatedly threatened those in the house with physical violence and attempted to hit Hudson with a television. He maintains that Kelsey entered the house and attacked occupants therein until he was killed.

We find the record fails to support the reasonableness of defendant's belief that deadly force was necessary. The record shows that during the argument Kelsey was outnumbered at least four to one inside the house. Defendant was inside the house with his friends J.T. and F.A. as well as Jones, Myson and Morris. Defendant was armed and there was no evidence that Kelsey had a weapon. When defendant retrieved a handgun from his pocket, someone in the house said "it wasn't necessary." Morris testified that he told defendant "it ain't worth it." As Kelsey reentered the house, defendant's friends stepped in front of him and pushed him against a wall. Jones testified that Kelsey was surrounded by "pretty much everyone in the house." In his handwritten statement, Jones said he heard defendant say "y'all better get him" and "I'm going to kill him." Jones acknowledged that in his handwritten statement to police he said he saw

defendant "walk up to [Kelsey] and fire the gun three or four times." Myson acknowledged that he told detectives that he saw defendant remove a handgun from his waistband, point it at Kelsey and place the barrel of the gun against Kelsey's head.

Although defendant testified that Kelsey was walking toward him when he shot him, Jones said in his handwritten statement that Kelsey "could not have seen it coming because he was facing" away from defendant. Jones also said in his handwritten statement that Kelsey was hit with the first shot and then tried to run toward the front door. As Kelsey tried to leave the house, defendant shot him three more times. This is consistent with the medical examiner's findings that Kelsey was shot twice in the back. We believe the jury could have properly concluded from this evidence that defendant did not reasonably believe that deadly force was necessary to prevent Kelsey from committing an assault. *Sawyer*, 115 Ill. 2d at 194-95.

We are also unpersuaded by defendant's argument that his use of deadly force was justified under the second factor outlined in section 7-2(a)(2) of the Code. Defendant asserts that he reasonably believed that deadly force was necessary to prevent the commission of a felony in the dwelling. 720 ILCS 5/7-2(a)(2) (West 2006). He claims that Kelsey's entry into the house without authority from the owner constituted a Class 4 felony, criminal trespass to a residence. See 720 ILCS 5/19-4(a)(2) (West 2006). Defendant maintains that he was justified in using deadly force because he reasonably believed it was necessary to prevent the continuation of the criminal trespass.

Although we agree that Kelsey's reentry into the house was unlawful, we cannot say that the jury erred in rejecting defendant's claim that he reasonably believed that he was justified in

using deadly force in defense of dwelling. See *Sawyer*, 115 Ill. 2d at 196-97. We first note that there is no evidence in the record that Kelsey was about to commit a felony independent of assault. But, even if the jury found that defendant reasonably believed that Kelsey was about to commit a felony, it could have properly found that defendant's belief that shooting Kelsey was necessary to prevent the felony was unreasonable given the circumstances. See *Sawyer*, 115 Ill. 2d at 196-97. The evidence presented was not so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. The State proved defendant guilty of first degree murder beyond a reasonable doubt.

Defendant next contends that the jury instructions were confusing and incomplete. He claims that the State's instruction No. 14 relating to first degree murder allowed the jury to convict him if they found the State had disproved either, rather than both, of his affirmative defenses that he was justified in using force in defense of self and in defense of dwelling. He also claims that the defense instruction No. 1, which set forth the elements of defense of dwelling, was incomplete. Defendant maintains that these instructions absolved the State of a part of its burden to disprove his affirmative defenses and denied him a fair trial.

The State responds defendant has forfeited review of instruction No. 14 because he did not object to the instruction at trial. The State claims defendant waived review of instruction No. 1 because he offered it. Defendant replies that we should review the propriety of the jury instructions for either plain error or as ineffective assistance of counsel.

Under the plain error exception to the waiver rule, a reviewing court may consider a forfeited error when the evidence is closely balanced or the error is so fundamental and of such

magnitude that the accused was denied his right to a fair trial. *People v. Harvey*, 211 Ill. 2d 368, 387, 813 N.E.2d 181 (2004). The first step in plain error review is to determine whether error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403 (2007). Here, we believe it did not.

The function of jury instructions is to provide the jury with accurate legal principles that apply to the evidence so they may reach a correct conclusion. *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190 (2004). We review *de novo* whether jury instructions accurately conveyed the applicable law. *People v. Parker*, 223 Ill. 2d 494, 501, 861 N.E.2d 936 (2006). In doing so, we determine whether the instructions, "taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Parker*, 223 Ill. 2d at 501.

At trial, the State argued defendant was guilty of first degree murder. Defendant argued he was justified in using deadly force against Kelsey because he was acting in self defense and in defense of dwelling. The jury received IPI Criminal 4th No. 7.02 on first degree murder as "People's Instruction No. 14," which provides:

> "To sustain the charge of first degree murder, the State must prove the following propositions:
>
> First: That the defendant performed the acts which caused the death of Oscar Kelsey; and
>
> Second: That when the defendant, did so, he intended to kill or do great bodily harm to Oscar Kelsey;
>
> or

he knew that his acts would cause death to Oscar Kelsey;

or

he knew that his acts created a strong probability of death or great bodily harm to Oscar Kelsey;

and

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

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

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instructions, Criminal, No. 7.02 (4th ed 2000) (hereinafter, IPI Criminal 4th No. 7.02).

Defendant argues that this instruction was misleading because the jury was never instructed that either justification by self-defense or justification in defense of dwelling would defeat the murder charge. He claims that the instruction should have been amended to read:

"Third: that the defendant was not justified in using the force which he used in self-defense, nor was the defendant justified in using the force he used in defense of dwelling."

Defendant maintains that such an instruction would have informed the jury that the State was

required to negate both of his affirmative defenses rather than either of the defenses.

Here, we find no error in the instructions given. We first note that defendant cites no authority in support of his argument that IPI Criminal 4th No. 7.02 is misleading when a defendant has pled more than one affirmative defense. An argument raised on appeal that is not supported by citation to relevant authority is waived. Ill. S. Ct. R. 341(h)(7). IPI Criminal 4th No. 7.02 accurately states what the State must show to prove defendant guilty of first degree murder.

The record shows the jury was also instructed on the affirmative defenses relied on by defendant at trial. The jury received IPI Criminal 4th No. 24-25.06 on self-defense as "People's Instruction No. 16," which provides:

> "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 or another 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 or another." Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed 2000).

The jury also received IPI Criminal 4th No. 24-25.07 on justified use of force in defense of a dwelling as "Defense Instruction No. 1," which provides:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to terminate another's unlawful

entry into a dwelling.

However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if the entry is made or attempted in a violent, riotous, or tumultuous manner and he reasonably believes that such force is necessary to prevent an assault upon himself or another then in the dwelling." Illinois Pattern Jury Instructions, Criminal, No. 24-25.07 (4th ed 2000).

The jury had an opportunity to consider these defenses and, given its verdict, rejected them. We believe these instructions, "taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles" applicable to the evidence presented at trial. *Parker*, 223 Ill. 2d at 501. The trial court did not err in instructing the jury.

In reaching this conclusion, we are unpersuaded by defendant's argument that he was prejudiced by defense instruction No. 1 relating to defense of dwelling because it was incomplete as it omitted the full statutory basis on which deadly force may be used in defense of dwelling. Defendant asserts that the jury should have been instructed that the use of deadly force is also justified if an accused "reasonably believes that such force is necessary to prevent the commission of a felony within the dwelling." See 720 ILCS 5/7-2(a)(2) (West 2006). Although a defendant is entitled to have the jury instructed on his theory of the case, an instruction should only be given if there is evidence to support it. *People v. Davis*, 213 Ill. 2d 459, 478, 821 N.E.2d 1154 (2004). Here, as mentioned, there was no evidence presented at trial that Kelsey was going to commit a felony inside the house independent of assault about which the jury was properly

instructed.

We next consider defendant's argument that his aggregate 70-year sentence for first degree murder is excessive. Defendant does not dispute that this extended-term sentence for murder falls within the permissible statutory range (See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006)), but argues that the trial court abused its discretion in sentencing him to a 70-year term given his rehabilitative potential as evidence by his age and lack of criminal history of violence. Defendant also claims that the court failed to consider that Kelsey was the initial aggressor and that defendant is unlikely to commit a crime of this nature again.

Generally, where, as here, the sentence imposed by the trial court falls within the statutory range permissible for the offense of which the defendant is convicted, a reviewing court may disturb that sentence only if the trial court abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74, 659 N.E.2d 1306 (1995). A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207 (2000). In determining the appropriate sentence, the trial court must carefully consider all the factors in aggravation and mitigation, including the defendant's age, criminal history, social environment, as well as the nature and circumstances of the crime. *People v. Calhoun*, 404 Ill. App. 3d 362, 385, 935 N.E.2d 663 (2010).

Here, in light of the facts of the case, the mitigating factors presented and the trial judge's alleged consideration of an inappropriate aggravating factor during sentencing we find the court abused its discretion in sentencing defendant to 70 years' imprisonment. We initially note that

under section 3-6-3(a)(2)(i) of the Code of Corrections (730 ILCS 5/3-6-3(a)(2)(i) (West 2006)) defendant is required to serve 70 years in prison of his 70 year sentence. The facts adduced at trial do not support such a lengthy term of imprisonment. The record shows that defendant was not the aggressor and shot Kelsey after a heated argument during which defendant unreasonably believed he was acting in self-defense. Given this, it is unlikely that defendant would be a recidivist offender. See *Calhoun*, 404 Ill. App. 3d at 388. Defendant was 22 years old at the time of the offense and did not have a criminal history of violence. See *People v. Newell*, 196 Ill. App. 3d 373, 383, 553 N.E.2d 722 (1990) (defendant's age is an indicator of rehabilitative potential). The record also shows that in sentencing defendant the court noted that defendant's conduct caused or threatened serious harm, a factor which is inherent in the offense of first degree murder. Under these circumstances, we vacate defendant's sentence and remand for a new sentencing hearing. We believe a proper sentence for defendant would be near the minimum sentencing range for first degree murder followed by the mandatory 25-year enhancement term.

Defendant next contends that under the one-act, one-crime rule set forth in *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838 (1977), his mittimus should be amended to reflect a single conviction of first degree murder because there was one victim and the two convictions were based on one physical act. Defendant acknowledges that he did not raise this specific issue in the trial court. But courts review one-act, one-crime objections for plain error if challenges address substantial rights. *People v. Smith*, 183 Ill. 2d 425, 430, 701 N.E.2d 1097 (1998).

The State responds that defendant's sentence is void and his mittimus unclear such that

we should remand the matter to the trial court for resentencing.

Defendant was charged with six counts of first degree murder. In a general verdict form, the jury found defendant guilty of first degree murder. In a separate verdict form, it found that during the commission of the offense, defendant personally discharged a firearm that proximately caused Kelsey's death. At the sentencing hearing, the State informed the court that defendant was charged with six counts of first degree murder "but specifically, it's first degree murder in that he personally discharged a firearm that proximately caused the death." The court sentenced defendant to 45 years' imprisonment for intentional or knowing murder (count I) and a consecutive term of 25 years' imprisonment for intentional or knowing murder during which defendant personally discharged a firearm that proximately caused Kelsey's death (count V). The mittimus reflects defendant was sentenced to 45 years imprisonment on count I and 25 years' imprisonment on count V.

Defendant claims that his 25-year sentence on count V is void because it is outside the permissible range for the offense of first degree murder where the enhancement factor of personal discharge of a firearm has been established. He asks that we vacate this sentence and amend his mittimus to reflect a single conviction of first degree murder (count I) and sentence of 45 years' imprisonment. The State maintains that because defendant's mittimus does not reflect the mandatory enhancement factor that he personally discharged a firearm that caused Kelsey's death (See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006)) his sentence is void.

On remand, we instruct the trial court to enter sentence on a single count of first degree murder (count V) under section 9-1(a)(1) of the Code (720 ILCS 5/9-1(a)(1) (West 2004)) and

the mittimus to reflect an enhancement factor of 25 years under section 5-8-1(a)(1)(d)(iii) of the Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006)) to run consecutive to defendant's murder conviction.

Defendant next contends, and the State agrees, that his mittimus should be amended to reflect one additional day of sentencing credit owing to the fact that 2008 was a leap year. Defendant was arrested on July 7, 2005, and sentenced on July 17, 2008. The total number of days elapsed was 1,106, rather than 1,103 as reflected on the mittimus or 1,104 as asserted by the parties. Under Supreme Court Rule 615(b)(1) (134 ill. 2d R. 615(b)(1)), we order the mittimus corrected to reflect 1,106 days of sentencing credit.

Defendant further contends that the court erred in totaling the sum of his fines and fees. He maintains that he was assessed $825 in court costs and not $865 as reflected by the fines and fees order. The State responds that defendant misstates the fee for a Felony Complaint as $150 when in fact it is $190. See 705 ILCS 105/27.2a(w)(1)(A) (West 2006) (the clerk shall be entitled to costs in all criminal cases for felony complaints a minimum of $125 and a maximum of $190). Although we agree with the State that the fee for filing a felony complaint may be a maximum of $190, defendant's fines and fees order reflects he was assessed a $150 fee for the filing of a felony complaint. The court erred in totaling the sum of defendant's fines and fees as $865 where he was only assessed $825 in court costs.

Defendant next contends and the State agrees that the trial court improperly assessed him: (1) the $5 court systems fee (55 ILCS 5/5-1101(a) (West 2006)), and (2) the $25 court supervision fee (625 ILCS 5/16-104(c) (West 2006)). Both of these fees may only be assessed

for violations of the Illinois Vehicle Code or similar ordinances. See 55 ILCS 5/5-1101(a) (West 2006); 625 ILCS 5/16-104(c) (West 2006). Defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), which is not a violation of the Illinois Vehicle Code or a similar ordinance. We order these fees vacated. See *People v. Price*, 375 Ill. App. 3d 684, 698, 873 N.E.2d 453 (2007).

We affirm the judgment of the trial court and correct defendant's mittimus to reflect his single conviction of first degree murder and aggregate sentence of 70 years' imprisonment. We correct defendant's fines and fees order, vacating the $5 court systems and $25 court supervision fees for a total of $795 in court costs. We remand to the circuit court for resentencing consistent with this order.

Affirmed in part, vacated in part and remanded in part; mittimus corrected.