2011 IL App (1st) 100677-U

FOURTH DIVISION
December 15, 2011

No. 1-10-0677

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. 07 CR 7347
	)	
MARKEZ ELLIS,	)	Honorable
	)	Joseph M. Clapps,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE STERBA delivered the judgment of the court.
Justice Lavin and Justice Pucinski concur in the judgment.

ORDER

¶ 1 *HELD*: The trial court did not err in finding the State met its burden of proving that defendant was not acting in self-defense or defense of another when he shot the victim, where there was evidence presented that defendant decided to use a firearm to end the dispute. Moreover, a rational trier of fact could have found that defendant did not actually believe it was necessary to use force to protect himself or his brother and thus, defendant is not entitled to a reduction of his conviction to second degree murder. The trial court's comments during the hearing on defendant's motion for a new trial did not demonstrate an erroneous recollection of the evidence and thus, did not constitute a violation of defendant's due process rights, where the comments referred to the struggle involving defendant's brother, not to the timing of the trunk closing and the gunshot, and

the evidence was not clear regarding the duration of the struggle. Similarly, comments made at various times during the trial and at hearings on posttrial motions do not indicate that the trial court misapplied the law on use of force justification, where the comments were made during a colloquy with defense counsel and were not definitive statements of what the trial court believed the law to be. The trial court did not abuse its discretion in barring evidence of a general reputation for violence during the testimony of a particular witness where defense counsel did not support his theory when requested to do so by the trial court and could have introduced evidence of prior violent acts relating to the same individual. Similarly, the trial court did not abuse its discretion in excluding evidence of prior violent acts of the victim and other individuals involved where it ruled prior to trial that the evidence was excluded unless some evidence was introduced at trial to support the claim of defense of another, and defense counsel never attempted to revisit the issue at trial. Finally, the trial court did not abuse its discretion in barring evidence of the substance of the conversation between two individuals where the details of the conversation were not relevant and basic information relating to the demeanor of the individuals and the substance of the conversation was admitted.

¶ 2 Defendant Markez Ellis was charged with first degree murder in the shooting death of Lenard Bunch. Following a bench trial, defendant was convicted of first degree murder and sentenced to 53 years in prison. On appeal, Markez contends that the State failed to prove him guilty of first degree murder where it failed to disprove that he acted in self-defense or in defense of his brother. Alternatively, defendant contends that his belief that he was justified in defending himself or his brother was unreasonable and he is guilty of, at most, second degree murder. Defendant also contends that the trial court violated his due process rights where it rejected his affirmative defense of defense of another on the basis of an erroneous recollection of the evidence, and that the trial court misapplied the law where it rejected his defenses of self-defense and defense of another on the grounds that he was in possession of a firearm. Finally, defendant contends that the trial court erred in prohibiting evidence of the violent character of the individuals who threatened him and his brother, and in prohibiting defense counsel from questioning a witness about his attempt to calm the victim's brother before the shooting. For the

reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 On November 14, 2006, defendant was involved in a confrontation with five individuals, at least three of whom were known to be members of the Gangster Disciples (GD) street gang, while the remaining two individuals were either GD members or members of other gangs who were friendly with the GDs. The dispute took place in front of defendant's house and was witnessed by a number of people who were in the neighborhood at the time. Defendant was standing outside of his home when he was approached by the GD group. His brother, Jeremy Ellis, was standing near his car in the alley next to the house. The leader of the GD group, Shelton Bunch, was angry that defendant, a member of a rival street gang, was selling drugs immediately adjacent to Shelton's territory. After arguing with defendant for a while, the GD group went into a nearby barber shop.

¶ 5 The argument resumed when the group left the barber shop, and defendant called Lorenzo Williams, Shelton's cousin, and asked him to come over and try to calm Shelton down. Williams left the scene after talking with Shelton for approximately 30 minutes. There were conflicting accounts of the events immediately prior to the shooting. According to one account, the confrontation escalated when three of the GDs, Lenard Bunch, Gerald Washington, and Dwayne Franklin, appeared to be attempting to wrestle Jeremy into the trunk of his car. Although they did not succeed in getting Jeremy into the trunk, Washington slammed the trunk shut. One witness stated that at almost the same time, Shelton said to defendant, "I'm going to show you little boy," and then reached toward his pocket. Defendant pulled a gun out of his own

pocket and fired a single shot, missing Shelton but hitting Lenard in the back and killing him. Another witness stated that defendant said something about being "tired of this shit" before he pulled out the gun. In yet another account, Shelton and Lenard were running away from defendant when he fired the shot. After the shot was fired, everyone ran from the scene, including defendant.

¶ 6 At trial, the State called Nathan Crockett. Crockett testified that on November 14, he was sitting on a friend's porch with several other people, about four to six houses away from defendant's house. Crockett looked down the street where he could see a number of people standing outside arguing. Crockett said that he had known defendant for about two years and saw him standing outside his house. He also saw Shelton, Lenard, Franklin, Washington and George Sanders. Crockett could hear Shelton shouting at defendant and telling him that he had to leave and could not stay there. He could hear defendant responding in what he described as "a nicer tone."

¶ 7 Crockett also saw Jeremy outside near his car. The trunk of the car was open and Crockett saw Washington, Franklin and Lenard wrestling with Jeremy near the car. Crockett said that it looked like they were trying to put Jeremy in the trunk of the car. Washington closed the trunk of the car and Crockett heard Shelton say to defendant, "I'm going to show you little boy." Crockett saw Shelton put his hand in his pocket. He then saw defendant raise his arm. He heard a gunshot but did not see a gun.

¶ 8 Tristan Guzman testified that he was in the neighborhood with Lorenzo Williams on November 14. He parked his car in the middle of the block where defendant lived. Guzman saw

Shelton, his brother Lenard, and a few other people standing outside defendant's house. He heard Shelton telling defendant that this is GD land but did not hear defendant say anything in response. Guzman then moved his car to a lot off of a nearby alley and started walking back with Williams toward the block on which defendant lived. As they got close to the street, they heard a gunshot and started running. Guzman then saw defendant running in the same direction he and Williams were running and saw Shelton and the others running in a different direction. Guzman testified that he did not see defendant carrying a gun. Guzman heard someone say, "I had to shoot him, G." When asked about his grand jury testimony in which he testified that defendant had something in his hand that looked like a gun, Guzman said that he said he saw defendant put something in his pocket that "probably" was a gun. He also said that he did not recall testifying that it was defendant who said, "I had to shoot him, G."

¶ 9 Marcus Green testified that he was in the neighborhood on November 14 and saw defendant arguing with Shelton and some other people. He heard Shelton tell defendant that he had to leave the area. Green walked over and asked defendant what was going on. Defendant told him they were "talking some bullshit" and that he was getting ready to leave. Green walked off to meet Guzman and Williams. He heard a gunshot and started running. He saw defendant and a lot of other people running in the same direction, and saw Shelton and some of the people who were with him running in the opposite direction. Green said that he heard someone saying, "I had to shoot him," but he did not hear defendant say that. He testified that he saw defendant put something in his pocket as he ran but he could not see what it was. Green was questioned about his grand jury testimony in which he stated that he heard defendant saying "I had to shoot

him, I had to shoot him," and that he saw defendant "shoving a chrome object", which he later said was a gun, into his pocket.

¶ 10 Gregory Crosby testified that he was with Guzman and another person on November 14. While he was talking to Guzman, he heard a gunshot and then saw defendant running toward them. Crosby testified that he did not hear defendant say, "I had to shoot him, G." Crosby acknowledged that he gave a statement at the police station. The statement was memorialized in writing and Crosby admitted that he signed it. He further acknowledged that according to the statement, he said that he heard defendant say, "I had to shoot him, G."

¶ 11 Dwayne Franklin testified that in 2006, he was a GD member. On November 14, he saw Shelton and defendant talking outside defendant's house. Franklin walked a block away to sell some drugs, went into the barber shop for a few minutes, and then came back out and sold a few more bags of drugs. He then heard a gunshot so he ran to the corner and saw Lenard on the ground. Franklin testified that he did not witness the shooting. He was then asked about the statement he gave to the police and his grand jury testimony, in which he said that he heard defendant shout something like, "I'm tired of this shit," and then saw him take a gun out of the pocket of his hoodie. According to the statement, he saw defendant point the gun at Shelton, then turn his head away and fire a shot. Franklin said that he lied in his statement because the police threatened him, but that he was telling the truth at trial.

¶ 12 Franklin was then asked about his grand jury testimony in which he stated that when defendant started selling drugs on his block, his bags of cocaine were bigger than the bags that were sold by the GDs so they lost customers and the money "got slow." He also testified to the

grand jury that Shelton planned to take the block over from defendant. He said that while he was in the barber shop, he heard Shelton, Washington and Lenard discussing their plans to take over the block and put Lenard in charge of it. At trial, Franklin acknowledged that he heard the conversation, but said that when the group went back outside, he stayed in the barber shop where he heard a gunshot.

¶ 13 Franklin said that at one point he saw a car parked outside with Jeremy sitting on top of it. However, he denied seeing Washington walk over to the car and close the trunk. He claimed that the detective and the assistant State's Attorney put that information in his statement. He denied hearing Shelton threaten defendant. Franklin was asked about a statement he made to an investigator in the Public Defender's office in which he said that he heard Shelton tell defendant that it was time to take him out of the block and that he understood that to mean that Shelton would either kill defendant or have him killed. Franklin acknowledged that he said that, but explained that he was just repeating the story that the detective had told him to give. Franklin testified that he never told the investigator that he saw Shelton, Lenard and Washington leave the barber shop with guns, or that he saw Shelton reach toward his waist as if to pull out a gun. He acknowledged that he told the investigator that he saw Shelton take a gun from Lenard's pocket after he had been shot but said that he was just telling her what the detective told him to say. Franklin did not recall whether he told the investigator that he also saw Shelton take small baggies from Lenard's mouth.

¶ 14 Shelton testified that on November 14, he was "hanging out" on the block with his younger brother, Lenard. Shelton said that defendant asked them why they were standing near

his house and told them they could not stand there. Shelton testified that he argued with defendant for a few minutes and then defendant walked into the house. Defendant came back out of the house and Shelton saw him pull out a gun. Shelton and Lenard turned to run and Shelton heard a shot. Shelton testified that he and Lenard were approximately 30 feet away from defendant when he pulled out the gun. Shelton ran toward the barber shop and his brother ran toward the alley. When Shelton came out of the barber shop, he saw Lenard lying in the street. Shelton said that he stayed with his brother until the police and ambulance came.

¶ 15 Shelton testified that he did not have a gun at the time of the shooting, and that he did not make a motion toward his pocket or do anything to indicate that he might have a gun. Shelton further testified that he was not in a gang and that he did not sell drugs or know anyone who sold drugs. Shelton said that he refused to talk to the police after the shooting because he was frustrated and angry.

¶ 16 Sergeant Daniel Gallagher testified that he was assigned to investigate Lenard's death. He stated that he did not threaten Franklin. He testified that Franklin cooperated with the investigation and showed no hesitation in providing information about the shooting. Detective Gallagher testified that he did not give Franklin a script or tell him what to say either for his handwritten statement or his grand jury testimony. Detective Gallagher interviewed defendant after his arrest. Defendant initially said that he was not on the block at the time of the shooting. After he was told that several witnesses had identified him as the shooter, defendant said that he was at the other end of the block and saw the commotion in front of his house so he started running. Defendant denied having a gun or getting into an argument with Shelton. He never

told Detective Gallagher that he shot Shelton in self-defense.

¶ 17 Detective Gallagher testified that he also interviewed Shelton, who said that he was in the barber shop getting his hair cut at the time of the shooting. During a second interview, Shelton told Detective Gallagher that he was not going to cooperate with the investigation. Shelton said that the detective should do his job and arrest the person responsible for killing his brother. He said that he would rather see the person who shot his brother dead than in jail, and told Detective Gallagher that "we both have a job to do, you do yours and I will do mine."

¶ 18 Lorenzo Williams testified for the defense. He said that he and defendant were childhood friends, and that he was Shelton and Lenard's cousin. On November 14, Williams was with Guzman. Defendant called him and told him that he had an altercation with his cousin and he needed Williams to come and try to calm his cousin down. Williams went to defendant's house where he saw Shelton, Lenard, Washington, Sanders, and another person he did not know. He also saw defendant and Jeremy. Williams testified that he spoke with Shelton for about thirty minutes and that Shelton was saying that defendant had to leave, that he could no longer be out there on the block. The trial court sustained the State's objection to a question about the details of Williams' conversation with Shelton. Williams testified that at the end of his conversation, Shelton was saying in a loud voice that defendant had to leave and could no longer be out there because it was a GD block. Williams testified that he and Guzman walked with defendant down the block and Williams told defendant to go and get his brother and leave and that Williams would come back and try to calm Shelton down. Williams and Guzman continued to walk away and defendant walked back toward his house. Williams testified that he was on another street

when he heard the gunshot.

¶ 19 Rosa Silva testified that she worked as an investigator for the Public Defender's Office. Silva spoke with Franklin in 2008. Silva testified that Franklin told her that after Shelton and defendant had been arguing for a while, Shelton and the other GDs went into the barber shop where they discussed how they would take the block from defendant. Franklin told Silva that Shelton said it was over for defendant, that it was time to take him down and out of the block and then Lenard would be in charge of the block. Franklin told Silva that he saw Shelton, Lenard and Washington with guns. Franklin told Silva that when the GDs left the barber shop, Shelton told defendant that he could not sell any more drugs on the block and that he either had to move or Shelton was going to move him off the block. Franklin said that he heard Shelton say something like, "Little boy, I'm going to take care of you," and then he saw Shelton move his hand toward his waist as if he was reaching for a gun. Franklin also told Silva that after the shot was fired, he saw Shelton take a gun from Lenard's pocket and some small bags out of Lenard's mouth. Silva testified that Franklin never told her that this was the story Detective Gallagher told him to give.

¶ 20 Both sides stipulated that if the medical examiner was called, she would testify that she recovered a clear small plastic bag containing a hard, white material from Lenard's esophagus. She would also testify that the cause of death was a gunshot wound to the back.

¶ 21 During defense counsel's closing argument, the trial court asked whether defense counsel was suggesting that the evidence pointed to defendant leaving to acquire a firearm. Defense counsel answered that he did not think the evidence suggested that. The court then said:

"Okay. Do you think someone is entitled to the defense of self defense, defense of person either or both, when they did show up on a public street to dispute who is going to sell drugs on a particular piece of property? So it would be okay then to bring a firearm in case, in case? That would entitle you to self defense?"

¶ 22 The court then stated that the dispute was clearly about drug trafficking and asked whether a finding that one side was armed would make it okay for the other side to show up at the same dispute armed. The court asked whether, if people then started shooting at each other, either side would have the right to invoke self defense or defense of another. The court compared the situation to the "wild west" where people just show up with firearms and see who ends up dead, and where the person who shoots can just claim the other person pulled his weapon first. Defense counsel responded that the source of the dispute is irrelevant to the issue of whether or not a person can claim self-defense. The trial court asked if showing up on a public street with a firearm was an act of aggression and defense counsel responded that if a person does not display or mention the firearm, then it is not an act of aggression simply to have a firearm concealed on your person.

¶ 23 In announcing its findings, the trial court noted that the defense argued that the firing of a firearm at the person the defendant intended, rather than Lenard, was done in self-defense. The trial court stated that it evaluated the evidence and found no credible evidence that Lenard or anyone on his side of the dispute was armed or that anyone on his side fired firearms in the direction of defendant or anybody on his side. The trial court stated that it believed the evidence

showed that Lenard's death was a consequence of defendant's intent to end the dispute with violence. Therefore, the trial court entered a finding of guilty of first degree murder.

¶ 24 Defendant filed a motion for a new trial. At the hearing on the motion, defense counsel raised the issue of the court's comment that neither Shelton nor Lenard were armed. The trial court stated that the observation was based not merely on the fact that no witnesses testified that they saw any firearms, but there was also no physical evidence such as spent bullets or shell casings to indicate that anyone other than defendant was armed with a firearm. Defense counsel noted that Franklin's prior statement indicated that he had seen Shelton remove a gun from Lenard's pocket after the shooting. However, defense counsel went on to argue that the issue of others being armed was irrelevant to the question of whether a person reasonably believed he was justified in the use of deadly force.

¶ 25 The trial court asked defense counsel whether people would have a reasonable expectation that force was going to be used against them if someone who was armed with a firearm approached them. Defense counsel responded that the scenario was reasonable but it did not match the factual scenario in this case. The trial court stated that the factual scenario here is that defendant showed up with a firearm. Defense counsel then summarized the testimony relating to the chronological sequence of events, and when he mentioned Jeremy and the trunk, the trial court asked whether, if someone was being put in the trunk of the car, would it be expected that the person's partner would pull out a firearm to prevent it. Defense counsel replied yes, that is precisely what happened here. The trial court said: "Well, that happens somewhat later, not contemporaneous with someone being in [*sic*] trunk." Defense counsel said that the

trunk slammed, the statement was made, and then the witness heard the gunshot. The trial court asked if defense counsel was saying that Jeremy was in the trunk, and counsel replied no, "[t]hey were attempting to stuff him in the trunk." The trial court then said:

> "That's what I am talking about. You are not going to wait until something happens.
>
> If you truly see someone trying to put someone you care about in a trunk and you're armed, you are not going to wait to pull a firearm, are you?
>
> Is that a reasonable expectation of the human behavior? You are going to wait until someone says I got something for you?"

¶ 26 Defense counsel responded that his perception of the testimony was that these events happened contemporaneously. Defense counsel then argued that even if the court felt that defendant's reaction was unreasonable, it would at least be an imperfect belief in either defense of another or self-defense and the court should find defendant guilty of second degree murder. The trial court noted that there was no doubt that the dispute was over selling drugs and, to that extent, it found Shelton's statements on that subject to be untrue and considered that may have affected Shelton's other testimony. However, the trial court went on to explain that in its evaluation of the evidence, defendant brought a firearm to a dispute and waited for an excuse to use it, therefore, it was not second degree murder and the motion for a new trial was denied.

¶ 27 Defendant filed a motion to reopen the case in light of newly discovered evidence regarding Sam Ellis, his brother. Sam had allegedly been shot by the GDs eight weeks before the dispute between defendant and Shelton. The defense sought to introduce this evidence to

explain that defendant was in possession of a firearm on the day of the dispute for defensive reasons. The motion was denied. Following a sentencing hearing, the trial court noted that there was a mandatory 25 year enhancement and sentenced defendant to a total of 53 years. The motion to reconsider sentence was denied and defendant timely filed this appeal.

¶ 28 ANALYSIS

¶ 29 Defendant first contends that he raised sufficient evidence that he acted in self-defense or defense of another, and the trial court erred in finding that the State met its burden of proving beyond a reasonable doubt that these defenses did not exist. Alternatively, if this court determines that the State disproved defendant's affirmative defenses beyond a reasonable doubt, defendant argues the trial court should have found him guilty of second degree murder where he proved by a preponderance of the evidence that he had an unreasonable belief that his actions were justified.

¶ 30 When a defendant challenges the sufficiency of the evidence, the reviewing court does not retry the defendant but determines whether, in considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime to be proven beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). Once the affirmative defense of self-defense is raised, the State has the burden of proving beyond a reasonable doubt not only the elements of the charged offense, but also that the defendant did not act in self-defense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004); 720 ILCS 5/3-2(b) (West 2006). Where, as here, defendant challenges whether the State disproved his affirmative defenses, this court must determine whether, in considering the evidence in the light

most favorable to the State, any rational trier of fact could have found, beyond a reasonable doubt, that defendant did not act in self-defense or defense of another. See *Lee*, 213 Ill. 2d at 225.

¶ 31 It is the province of the finder of fact to assess the credibility of the witnesses, determine the weight to be given their testimony, resolve conflicts or inconsistencies in the evidence, and draw reasonable inferences from the evidence. *Id*.; *Ross*, 229 Ill. 2d at 272. When there is conflicting evidence, this court will not substitute its judgment for that of the trial court. *People v. Felella*, 131 Ill. 2d 525, 534 (1989). The determination of whether a killing is justified is a question of fact. *Id*. at 533. Thus, a finder of fact need not accept a defendant's claims of self-defense or defense of another. *People v. Young*, 347 Ill. App. 3d 909, 920 (2004). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it leaves a reasonable doubt of defendant's guilt. *Felella*, 131 Ill. 2d at 533-34.

¶ 32 Section 7 of the Criminal Code of 1961 (720 ILCS 5/7 *et seq*. (West 2006)) addresses justifiable use of force and provides, in relevant part:

> "(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 defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the

commission of a forcible felony.

(b) In no case shall any act involving the use of force justified under this Section give rise to any claim or liability brought by or on behalf of any person acting within the definition of 'aggressor' set forth in Section 7-4 of this Article ***." 720 ILCS 5/7-1 (West 2006).

¶ 33 Under section 7-4, the affirmative defense of justifiable use of force is not available to a person who:

"(a) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or

(b) Initially provokes the use of force against himself, with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or

(c) Otherwise initially provokes the use of force against himself, ***." 720 ILCS 5/7-4 (West 2006).

¶ 34 The State first argues that it never bore the burden of disproving defendant's affirmative defense because he failed to present some evidence to support each of the elements of his self-defense theory, relying on *People v. Luke*, 253 Ill. App. 3d 136, 141 (1993). We find this reliance to be misplaced. In *Luke*, this court noted that if the State negates any of the elements required for a claim of self-defense beyond a reasonable doubt, it has *met* its burden and the finder of fact may reject the defense. (Emphasis added.) *Id*. However, *Luke* does not remove the burden from the State, nor could it, where the burden is imposed by statute (720 ILCS 5/3-2(b) (West 2006)).

¶ 35 It is well settled that a defendant is entitled to have an affirmative defense considered by the finder of fact even where the evidence of that defense is slight or is inconsistent with other evidence. *People v. Everette*, 141 Ill. 2d 147, 156 (1990). In general, a defendant may have the finder of fact consider any recognized defense for which there exists evidence sufficient to support a finding in his favor. *Id*. (quoting *Mathews v. United States*, 458 U.S. 58, 64 (1988)). Here, there was some evidence that, if believed by the finder of fact, could have supported a finding of either self-defense or defense of another. There was testimony that Shelton said that he was going to show defendant and then made a motion as if he was reaching for a gun. There was also testimony that three of the GDs appeared to be attempting to wrestle defendant's brother into the trunk of his car. Thus, the State bore the burden of disproving these defenses.

¶ 36 However, we cannot agree with defendant that the State failed to meet this burden. Conflicting evidence was presented at trial regarding comments made by defendant right before the shooting and comments made by Shelton. There was evidence that defendant said he was "tired of this shit" right before he pulled out the firearm. There was also some evidence presented that defendant left the scene and returned later wearing a hoody, and that Shelton and Lenard were running away from defendant when the shot was fired. It is not the role of this court to retry defendant, assess the credibility of witnesses, or resolve conflicts in the evidence. Based on the conflicting evidence that was presented, we cannot say that a determination that defendant was not acting in self-defense or in defense of another is so unreasonable, improbable or unsatisfactory as to leave a reasonable doubt of his guilt. Thus, we conclude the circuit court did not err in finding that the State met its burden of disproving the affirmative defenses.

¶ 37 Alternatively, defendant requests that this court reduce his conviction to second degree murder. A person commits second degree murder if, at the time of the killing, he believes the killing is justified under the principles of self-defense or defense of another, but his belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2006). In this context, a reviewing court must determine whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that no mitigating factors were present. *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996). Here, we must determine whether any rational trier of fact could have found that Markez did not believe that the shooting was justifiable under either affirmative defense theory, regardless of the reasonableness of such a belief. Again, it is not this court's role to retry the defendant or make credibility determinations. We conclude that a rational trier of fact could, on the evidence presented here, reject the affirmative defenses outright and find that defendant did not actually believe it was necessary to use force to defend himself or his brother. Thus, we decline to reduce defendant's conviction to second degree murder.

¶ 38 Defendant next contends that the trial court violated his due process rights by rejecting his claim of defense of another based on an erroneous recollection of the evidence. Defendant argues that statements made by the trial court during the hearing on his motion for a new trial demonstrate that the trial court did not accurately recall the evidence regarding the timing of the trunk closing and the shot being fired.

¶ 39 Our supreme court has held that the failure of the trial court to recall and consider evidence that is crucial to a defendant's defense constitutes a denial of the defendant's due

process rights. *People v. Mitchell*. 152 Ill. 2d 274, 323 (1992). Whether defendant's due process rights have been denied is an issue of law and thus, our review is *de novo*. *People v. K.S.*, 387 Ill. App. 3d 570, 573 (2008). Defendant relies on *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976) in which this court determined that the defendant did not receive a fair trial because the trial judge did not remember or consider the crux of the defense when entering judgment. However, the facts in *Bowie* are distinguishable.

¶ 40 In *Bowie*, defense counsel argued that two witnesses testified that they observed an officer strike the defendant twice in the head. Defense counsel then stated that there was blood resulting from this injury. The trial court asked who said that, and defense counsel responded that it was the defendant. The trial court said that it heard nothing about the defendant saying anything about bleeding and ordered that language to be stricken. On review, this court reversed the defendant's conviction, noting that the record contained defendant's testimony in which he stated that after the officer hit him in the head, blood started rushing down and the officer hit him again. *Id*. at 179-80.

¶ 41 Here, the trial court made no reference to the defense of another claim in announcing its findings and entering judgment. In a bench trial, the trial court is not required to mention everything that contributed to its finding. *People v. Curtis*, 296 Ill. App. 3d 991, 1000 (1998). Indeed, a reviewing court may take into account any facts in the record which support an affirmance of the trial court's findings, even where the trial court does not explicitly state that it relied on those facts. *Id*. Moreover, as discussed below, the trial court's comments at the hearing on the motion for a new trial did not demonstrate an erroneous recollection of the evidence.

¶ 42 Approximately one month after announcing its findings and entering judgment, during the hearing on defendant's motion for a new trial, the trial court questioned defense counsel about his argument relating to defense of another. The trial court asked if it would be reasonable to expect a person to pull a firearm, if he believed someone was attempting to put his partner in the trunk of a car and he was afraid that harm would come to him, to prevent the continuation of the activity. Defense counsel replied that according to the testimony in the case, that was exactly what happened. The trial court responded that pulling the firearm happened somewhat later, not contemporaneous with someone being put in the trunk. Defense counsel stated that the testimony was that the trunk slammed, Shelton made his statement, and then the shot was fired. The trial court asked if defense counsel was saying that Jeremy was in the trunk when the trunk was closed. Defense counsel replied that they were attempting to put Jeremy in the trunk. The trial court stated that was the point, that you would not wait until something actually happened or until someone else said something to you before pulling out the firearm.

¶ 43 The comments made by the trial court do not indicate an erroneous recollection of the evidence. Rather, the trial court was making the observation that if defendant believed Jeremy was in imminent danger of death or great bodily harm, he would have pulled the firearm and attempted to stop the struggle right then, rather than waiting for someone to close the trunk and for Shelton to say something to him before pulling out the firearm. Defendant appears to be arguing that not only did the closing of the trunk and the firing of the shot happen at the same time, the struggle itself was also simultaneous and therefore must have only lasted for mere seconds.

¶ 44 Defendant relies heavily on the testimony of Crockett, the only eyewitness to the actual shooting, for his contention that the evidence showed all three events happened contemporaneously. However, the record shows that on direct examination, Crockett merely testified to the sequence of events, without any suggestion of how much time may or may not have elapsed between the start of the struggle and the closing of the trunk. Crockett testified that Washington and the others were wrestling with Jeremy near the car and then Washington closed the trunk. While his testimony does seem to indicate that he heard the gunshot right after the trunk closed, there is no indication of how long the struggle lasted before the closing of the trunk. On cross-examination, Crockett replied affirmatively when asked whether "at some point" during the struggle Washington "slammed" the trunk. Crockett was not asked any questions regarding how much time elapsed between the start of the struggle and the closing of the trunk on either redirect or recross.

¶ 45 We conclude that the comments made by the trial court did not demonstrate an erroneous recollection of the evidence, but rather, an observation that defendant would not have waited until the trunk closed and Shelton said something to him before pulling out his firearm if he truly believed Jeremy was in imminent danger of death of great bodily harm. Thus, the trial court's comments at the hearing on defendant's motion for a new trial did not constitute a due process violation.

¶ 46 Defendant next asks us to reverse his conviction because the trial court misapplied the law of justified use of force when it concluded that he could not claim self-defense or defense of another because he was armed at the time of the confrontation. The State first argues that

defendant has waived this issue because he did not object to the comments made by the court at the time it rendered its findings and did not raise it in his posttrial motion. The State further argues that both affirmative defenses were statutorily unavailable because the evidence showed that defendant was the aggressor in this case.

¶ 47 We note that the comments made by the trial court which defendant argues indicate that the trial court misapplied the law were made during closing arguments, at the hearing on the motion for a new trial, and at the hearing on the motion to reopen the case. Because defendant's argument is based on the totality of the comments made, most of which were made after the trial, defendant could not have raised this issue in his motion for a new trial. Moreover, as defendant notes, forfeiture rules are relaxed when the trial court's conduct is the basis for the objection, in light of "the fundamental importance of a fair trial and the practical difficulties involved in objecting to the conduct of the trial judge." *People v. Heidorn*, 114 Ill. App. 3d 933, 936 (1983). We will consider this issue because it concerns defendant's due process right to present a defense and have that defense considered on the basis of a proper application of the relevant law. See *People v. Caffey*, 205 Ill. 2d 52, 90 (2001).

¶ 48 Defendant contends that whether the trial court misapplied the law is a question of law and is subject to *de novo* review. See *People v. Daniels*, 187 Ill. 2d 301, 307 (1999). The State contends that the question of whether the defendant was justified in relying on self-defense is a question determined by the trier of fact, whose decision is not overturned "unless the evidence is so unreasonable, improbable, or unsatisfactory as to leave a reasonable doubt of the defendant's guilt." *People v. Sanchez*, 206 Ill. App. 3d 90, 108 (1990). Whether the trial court misapplied

the law of justifiable use of force is a question of law and thus, our review is *de novo*. *People v. Carlson*, 185 Ill. 2d 546, 551 (1999).

¶ 49 The trial court is presumed to know the law and apply it correctly. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). That presumption is rebutted only where the record contains strong affirmative evidence to the contrary. *Id.* Defendant cites to comments made at three separate times by the trial court and argues that these comments indicate that the trial court concluded that defendant was the aggressor simply because he possessed a firearm at the time of the confrontation.

¶ 50 During closing arguments, the trial court questioned defense counsel about whether he believed the evidence showed that defendant left to acquire a firearm and then returned. Defense counsel answered that he did not think that was suggested by the evidence. The trial court also asked whether someone was entitled to the affirmative defenses of self-defense or defense of another if that person showed up to dispute the issue of who was going to sell drugs at a particular location and brought a firearm just in case. Defense counsel answered that alone would not be enough, but if someone was physically attacking that person's brother or threatening that person, justification would exist. The trial court then asked defense counsel whether, even if the court determined that both parties to a dispute over drug sales were armed, that would give either side the right to invoke self-defense or defense of another "because after all the other side was armed also." Defense counsel answered that the source of the dispute was not relevant to the self-defense question. The trial court then asked if showing up on a public street with a firearm was an act of aggression. When defense counsel stated that it might not be

legal, the trial court said that was not the question. Defense counsel then said that merely having a firearm that has not been displayed or mentioned to anyone is not an act of aggression. The trial court asked why the defendant would show up with a firearm and defense counsel responded that people carry firearms for many reasons. The trial court questioned whether it was a fair observation that a person would carry a firearm in case he needed to use it and defense counsel agreed that was a fair observation, but stated again that merely having a firearm that has not been displayed or mentioned to anyone is not an act of aggression. The trial court said, "Okay." Defense counsel stated that it was, however, an act of aggression to make a threatening comment and then reach in the direction of where a firearm might be concealed. Defense counsel then continued his closing arguments.

¶ 51 When the trial court issued its findings, it stated that it did not find any credible evidence that anyone on the victim's side of the dispute was armed, and that the evidence showed the shooting was a consequence of the defendant's intent to end the dispute with violence. At the hearing on the motion for a new trial, defense counsel raised the theory of self-defense and the trial court asked if people would have a reasonable expectation that force was going to be used against them if they were standing on a street corner and someone approached them who was armed with a firearm. Defense counsel responded that it would be a reasonable expectation but that was not the factual scenario in this case. The trial court stated that the factual scenario here is that the defendant showed up with a firearm. When defense counsel stated that defendant did not display the firearm, the trial court said it did not say anything about displaying it, just that he showed up with a firearm. Defense counsel responded that defendant had a firearm just in front

of his house and the trial court stated, "There you go," and allowed defense counsel to continue. In denying the motion for a new trial, the trial court said that in its evaluation of the evidence, the defendant came to the dispute armed with a firearm and waited for an excuse to use it, therefore, he was not entitled to a finding of second degree murder.

¶ 52 Defendant then filed a motion to reopen the case in order to present evidence that the reason he was armed is because either Shelton or Washington had shot one of his brothers a few weeks before the incident with defendant. The trial court stated:

> "Now, to the other question, because I'm missing why this would be relevant. As to the reason why he was armed since, one, being armed is unlawful, and, two, what would be the difference if he was armed because he likes to shoot read dense [*sic*] and then this just happened the way it happened by what the witnesses say.
>
> So what really is the relevance? It might be relevant for sentencing. How would it be relevant for the guilt or not guilty?
>
> ***
>
> To me, that would be – as I recall the issues in this case, this would be more mitigation than it is anything else."

¶ 53 Defendant argues that these comments, considered together, demonstrate that the trial court believed the affirmative defenses did not apply to defendant simply because he brought a firearm to the dispute, and that the trial court further believed the defenses were unavailable because defendant illegally possessed a firearm. We do not agree with defendant's interpretation of the trial court's comments. The portions of the transcript highlighted by defendant are

comments made or questions asked by the trial court while engaged in colloquy with defense counsel during arguments. None of the comments are definitive statements about what the trial court believed the law to be. In fact, at the hearing on defendant's motion *in limine* to introduce evidence of other crimes, the trial court made it clear that its questions could not be construed as a statement of the court's position on an issue when it engaged in the following exchange with defense counsel:

> "MR. STAHL [defense attorney]: [A]lthough we're still asking that the drug incidents or that the drug incidents be admitted, but I understand Your Honor's position on those.
>
> THE COURT: Asking questions is not a statement of my position.
>
> MR. STAHL: All right. I will not assume what your position is on that, Judge.
>
> THE COURT: Okay then."

¶ 54 Moreover, when the comments are considered in context, they do not support defendant's interpretation. During closing arguments, the trial court engaged in a colloquy with defense counsel regarding the affirmative defenses of self-defense or defense of another and asked whether a person who showed up at a dispute with a weapon "just in case" would be entitled to either of those defenses. The discussion then turned to whether showing up on a public street with a firearm was, in itself, an act of aggression. Defense counsel twice explained that simply showing up with a firearm that has not been displayed or mentioned to anyone was not an act of aggression. After the second explanation, the trial court stated "Okay," a word that is commonly used to express approval or agreement. See The American Heritage Dictionary of the English

Language (4th ed. 2000). We note that the trial court's statements when its findings were issued and also when it summarized its reasons for denying the motion for a new trial indicate that the trial court ultimately accepted evidence that defendant armed himself with a firearm and waited for an excuse to use it during the dispute, and rejected evidence that defendant only used the firearm because he thought his life or his brother's life was in danger.

¶ 55 Defendant further argues that the trial court's comment at a later time that being armed is unlawful demonstrates that the trial court believed the affirmative defenses were unavailable because defendant illegally possessed a firearm. At the hearing on the motion to reopen the case, the trial court first noted that there was no reason to reopen the case when the defendant was in the best position to know his motive for possessing a firearm and therefore, this information would have been available to the defense at the time of trial. However, the trial court went on to question the relevance and merely noted that for one thing, the possession was unlawful. Because the court reporter failed to accurately record the second, related observation, it is unclear exactly what point the trial court was making. However, there is no support for the contention that the trial court was articulating a definitive statement of law that the claim of self-defense was unavailable because possession of the firearm was illegal.

¶ 56 We agree that some of the comments made by the trial court were unusual and superfluous and indeed, puzzling at times given the evidence and arguments in this case. For example, it is not clear why the trial court was posing questions about the reasonable expectations of the people who were arguing with defendant, when the expectations of Shelton and the others were not an issue in the case. We also do not understand the relevance of the

court's noted observation that the possession of the firearm was unlawful. However, the record does not support defendant's interpretation that these comments were definitive statements of what the trial court believed the law to be or that the trial court's ultimate rejection of the affirmative defenses was based on any of these individual comments or questions. Thus, considering all of the comments made by the trial court in the context in which they were made, we conclude that the record does not contain affirmative evidence sufficient to rebut the presumption that the trial court knew the law and applied it correctly.

¶ 57 Defendant next contends that the trial court erred in prohibiting the introduction of evidence regarding the violent character of Shelton, Lenard, Washington and Sanders. The decision of whether to admit or exclude evidence is left to the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of that discretion. *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984). An abuse of discretion will only be found where the trial court's decision is "arbitrary, fanciful or unreasonable," or "where no reasonable [person] would take the view adopted by the trial court." *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 58 There are two ways in which a victim's aggressive or violent character may provide support for a theory of self-defense. *People v. Lynch*, 104 Ill. 2d 194, 199-200 (1984). First, if the defendant knows of the victim's violent tendencies, it will affect his perceptions of and reactions to the victim's behavior. *Id*. at 200. Second, even if the defendant does not know of the victim's violent character, evidence of the victim's propensity for violence can support the defendant's version of the facts where there are conflicting accounts of the incident. *Id*. Where the victim and a third person acted together against the defendant, evidence of the third person's

aggressive or violent character may also be admissible. *People v. Robinson*, 163 Ill. App. 3d 754, 772-73 (1987). Evidence of the violent character of a third party is also admissible where the victim and a third person are jointly acting as aggressors against the defendant's relative and the defendant claims defense of another, or where a third party and the victim are attacking the defendant and the defendant claims self-defense. *In re W.D.*, 194 Ill. App. 3d 686, 707 (1990).

¶ 59 As an initial matter, we note that the State made it clear at the hearing on the motion in *limine* to admit *Lynch* evidence that it did not object to the introduction of any evidence relating to prior violent acts committed by Shelton. Thus, the court's ruling on the motion only addressed prior acts of violence committed by other individuals who were involved and defendant's only issue with regard to Shelton appears to be with the trial court's refusal to allow defense counsel to elicit testimony regarding Shelton's reputation for violence generally from a particular witness during the trial.

¶ 60 Defendant argues that the trial court's exclusion of the evidence relating to Shelton's reputation for violence was based on a misapprehension of law, citing to the court's comment that someone would have to establish that defendant knew of Shelton's reputation for being a tough guy who settled things on the street. We do not agree that the trial court's comment can be interpreted as a misapprehension of law. When the issue arose at trial, the court questioned defense counsel regarding the theory under which he was seeking to admit the evidence, and defense counsel replied that it was relevant to defendant's self-defense claim. Under that claim, defendant's theory was that Shelton verbally threatened him and then moved his hand as if he was reaching for a gun. Therefore, the evidence would be directly relevant to defendant's

perceptions of and reaction to Shelton's behavior, which is the first way in which the evidence could have supported his theory under *Lynch*, and requires a defendant's knowledge of the violent tendencies. It was in this context that the trial court asked who was going to establish that defendant knew of Shelton's reputation for violence. Defense counsel replied that if he established Shelton's reputation in the community and that defendant lived in the community, the evidence should be admissible. Based on this response, defense counsel appeared to be in agreement with the trial court that the theory under which he was attempting to introduce the evidence would require defendant's knowledge of Shelton's violent tendencies. The trial court then asked defense counsel to provide supporting case law and defense counsel responded by asking for a moment and then moving on to a different line of questioning.

¶ 61 Defendant now argues that the evidence should have been admitted to support his theory based on the second way evidence is relevant under *Lynch*, namely that Shelton's propensity for violence supports his theory that Shelton was the aggressor, regardless of whether defendant knew of this trait. Although this could also support defendant's self-defense theory where there was conflicting evidence on the issue of who the aggressor was, defense counsel did not develop this argument when discussing the issue with the trial court, and apparently abandoned the attempt to introduce the evidence under any theory after the trial court asked for supporting case law. Moreover, in its earlier ruling on the motion *in limine*, the court did not bar defense counsel from presenting evidence related to Shelton's prior violent acts. Thus, we conclude that the trial court did not abuse its discretion in barring evidence of Shelton's general reputation for violence during the testimony of one particular witness during the trial.

¶ 62 Defendant also argues that he should have been allowed to introduce evidence that Lenard and five other offenders approached a victim near defendant's house, struck the victim in the head and body, and attempted to force the victim into the trunk of a car because he allegedly owed them drug money. Defendant further sought to introduce evidence that Washington threatened his girlfriend with a gun and attacked, battered and robbed a man with two other offenders. Finally, defendant sought to introduce evidence that Sanders threatened a victim with a gun, attacked his girlfriend, and threatened to kill his girlfriend and the police officers who arrived to arrest him.

¶ 63 Following the hearing on the motion *in limine* to introduce evidence under *Lynch*, the trial court denied the motion as it applied to Lenard, with the exception that if the defense could establish through a witness at trial that someone was trying to put Jeremy in the trunk, then the evidence could come in. The court stated that it did not have enough information from the motion itself to determine whether that evidence was going to be introduced at trial. The court did not specifically address the motion as it related to the other two individuals. Defense counsel sought clarification, stating, "And then as to all the other individuals listed none of those are admissible *at this point*." (Emphasis added.) The trial court confirmed that defense counsel's understanding was correct. Thus, the ruling on the motion *in limine* expressly left open the door for the evidence against Lenard and potentially against Washington and Sanders to be introduced, provided defense counsel introduced evidence at trial to support a claim of defense of another.

¶ 64 Testimony at trial did indeed establish that at least one witness saw Lenard, Washington

and Sanders attempting to put Jeremy into the trunk. However, defendant does not cite to any portion in the record where defense counsel then sought to introduce evidence of prior violent acts committed by these individuals during trial, nor have we found any indication in the record that defense counsel sought to revisit this issue on the basis of the evidence introduced at trial in support of his defense of another claim. Thus, defendant's argument has no merit and we conclude that the trial court did not abuse its discretion in ruling on the motion *in limine* that the evidence was barred unless defendant introduced evidence at trial to support his defense of another claim.

¶ 65 Finally, defendant argues that the trial court erred in prohibiting defense counsel from asking Williams about specific details of his conversation with Shelton. Defendant contends that because information related to Shelton's attitude and comments during this conversation were relevant to the question of whether Shelton acted as an aggressor, the trial court committed reversible error in excluding the evidence.

¶ 66 Our review of the record discloses that Williams testified that defendant called and asked him to come and calm Shelton down. When Williams was asked whether he tried to calm him down, the trial court sustained the State's objection. When Williams was asked what he said to Shelton at that point, the State's hearsay objection was sustained. Defense counsel explained that he was not admitting it for the truth of the matter asserted but to show the course of events and the actions defendant took to try and resolve the situation. The trial court asked how what Williams said was relevant, and defense counsel did not answer but continued his examination of the witness. Williams was allowed to testify that Shelton said in a loud voice that defendant had

to leave and could no longer be out there on the block. After another objection to a question about what Shelton was saying to Williams, the court again asked defense counsel about the relevance of that information. Defense counsel again stated that it was relevant to show the efforts defendant made and the conduct of Shelton. The trial court stated that anything Shelton said to Williams had no relevance to defendant and asked what else the evidence could refer to that would be admissible. Defense counsel again moved on without answering. Williams was asked what Shelton was saying at the end of the conversation and the trial court overruled the State's objection. Williams testified that at the end of the conversation, Shelton was saying in a loud voice that defendant had to leave and could no longer be out there because it was a GD block.

¶ 67 Williams testified that defendant was calm while he was there talking to Shelton. The trial court then questioned the witness about his statement that defendant walked away from his house with Williams after Shelton and Williams finished talking. Williams testified that he told defendant to get his brother and leave because Williams was going to come back and talk to Shelton to try to calm the situation down. Thus, the trial court heard testimony related to the demeanor of both Shelton and defendant both during and after Williams attempted to calm Shelton down, the very evidence that defendant claims the trial court needed to hear in order to accurately assess his affirmative defense claims. At trial, defense counsel stated the details of the conversation were relevant to show the actions defendant took to resolve the situation and Shelton's demeanor, but never explained how the details of the conversation between Williams and Shelton were necessary. As noted, the trial court heard evidence of the actions taken by

defendant and of Shelton's demeanor. Therefore, we conclude that the trial court did not abuse its discretion in barring testimony related to the details of the conversation between Williams and Shelton.

¶ 68 For the reasons stated, we affirm the judgment of the circuit court.

¶ 69 Affirmed.