2012 IL App (1st) 101582-U

No. 1-10-1582

FIFTH DIVISION
July 20, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal
	)	from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 11743
	)	
DIONTA RICE,	)	Honorable
	)	Luciano Panici,
	)	Judge Presiding.
	)	
Defendant-Appellant.	)	

JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Epstein and Justice McBride concurred in the judgment.[1]

O R D E R

¶ 1 *HELD*: Because the State offered sufficient evidence that defendant intentionally shot and

[1]Justice Joseph Gordon originally authored this order. Justice Howse adopted it following Justice Gordon's passing.

killed the victim as he lay on the ground following a struggle, and because defendant offered no evidence that he shot the victim in self defense, the trial court did not err in convicting him for first degree murder. Moreover, because the trial court's decision was based squarely on the evidence adduced at trial, there was no error when it cited a lack of "stippling" around the victim's wound, despite there being no mention of stippling in the record. Finally, defendant failed to establish that the trial court's decision to uphold a State objection to testimony regarding the initial aggressor on relevance grounds amounted to plain error.

¶ 2 Following a bench trial, defendant Dionta Rice was convicted of the first-degree murder of Jessie Williams and sentenced to 45 years imprisonment. Defendant now appeals and, for the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted for the first degree murder of Jessie Williams (the victim) and tried at a bench trial in January, 2010. The State presented the following evidence in its case.

¶ 5 Sherman Williams testified for the State that on May 17, 2008, he drove from Dolton to the 15700 block of Turlington in Harvey, Illinois with his friend, Marshawn Lockett, for the purpose of beating defendant up. Sherman testified that he and Lockett met up with his uncle, Jessie Williams, and walked southbound on the 15700 block of Turlington. Sherman observed defendant walking on the street toward them, unaccompanied. Sherman stated that he then approached defendant and, after exchanging some words with him, punched

defendant in the mouth. Defendant then pulled a dark colored handgun from his waistband and held it at his side. Sherman told defendant that "if you pull out a gun, you should use it," but defendant kept holding the gun at his side. The victim then grabbed defendant in a bear hug from the back, pinning defendant's arms to his body as, according to Sherman, defendant was trying to raise the arm with the gun in it. Defendant then "let a shot loose" while his arms were still pinned and the gun pointed at waist level. Sherman then ran towards a nearby gangway, about 15 to 20 feet away, while continuing to look back at the victim and defendant. Sherman testified that defendant fired "four or five" times total, but after the third or fourth shot, defendant was able to shake the victim off, and he fell to the ground, lying face first in "push-up formation."

¶ 6 Sherman testified that after the victim fell to the ground, defendant aimed the gun towards the victim and fired another shot, causing him to drop closer to the ground. Defendant then ran to the north with the gun in his hand. Sherman testified that he then ran up to the victim, who had moved about 15-20 feet since defendant ran. Sherman then called an ambulance from his cell phone. Sherman testified that approximately 1 to 2 minutes elapsed between the first and the last shots.

¶ 7 Marshall Lockett's testimony substantially mirrored that of Sherman's. Lockett testified that immediately before the confrontation and the shooting, he was standing on the sidewalk, about 10 feet behind defendant. He observed Sherman punch defendant in the jaw and defendant pull out a gun. Lockett testified that defendant then cocked the weapon with two

hands, causing a bullet to pop out as defendant pulled back on the slide. The victim then grabbed defendant from behind and defendant fired the gun four or five times, one right after the other the victim held defendant in a bear hug. As the victim lay on the ground, defendant fired the gun again and said, "I told you mother f***ers I wasn't playing," as he walked away towards his house.

¶ 8 Harvey Police Officer Esparza testified that at 5:13 p.m. on May 17, 2008, he was dispatched to 157th and Turlington to attend to a gunshot victim. Once he arrived on the scene, Esparza found the victim lying face down on his stomach in front of a residence at 15720 Turlington with his feet "kind of in the street." Esparza testified that he observed a gunshot wound in his right buttock. Esparza attempted to speak to the victim, but the victim just moaned. The victim was taken by paramedics to the hospital and Esparza then secured the scene.

¶ 9 Illinois State Police Officer Robert Deel testified that he arrived at the scene at 8:20 p.m. Deel recovered three discharged cartridge casings in the street, as well as a live round of ammunition in the grass, all near 15722 Turlington. Deel later attended the autopsy of the victim, during which he recovered a spent bullet from the victim's body. A copy of the autopsy protocol was entered into evidence without objection. That protocol indicated the following:

> "On the right buttock, 27.2 inches beneath the top of the head, 3.2 inches to the right of the posterior midline, there is a

> gunshot wound of entrance, 0.3 x 0.2 inches. *** The wound course involves the skin and subcutaneous tissue in the area, the musculature of the right buttock, the superior margin of the right iliac crest, and enters the abdominal bowel mesentery, the distal inferior vena cava, the distal abdominal aorta, the small intestine, the musculature of the anterior abdominal wall and the subcutaneous tissue of the anterior abdominal wall. *** The wound coursed from back to front, right to left, and slightly downward. Examination of the skin about the wound of entrance reveals no evidence of close range firing."

The protocol further indicated that the victim died of a gunshot wound of the right buttock and the manner of death was homicide.

¶ 10 Harvey police detective Jeff Crocker testified that on May 21, 2008, he went to a home at 15700 Turlington and recovered a bullet lodged in the concrete of the north wall of the home's basement.

¶ 11 Illinois State Police Crime Lab firearms examiner Jeff Parise testified that he examined the bullet recovered from the wall at 15700 Turlington, the three casings recovered from the scene, and the bullet recovered from the victim's body and determined that they were all fired from the same weapon.

¶ 12 Defendant testified on his own behalf. He stated that on the afternoon of May 17, 2008, he observed his uncle, Jessie Rice, and the victim involved in an altercation after the victim shot Rice's daughter's car with a paint ball gun. During that altercation, defendant observed Rice fire a gunshot into the air.

¶ 13 Later that afternoon, defendant testified that he was buying cigarettes at a liquor store near 159th street. He carried with him a pistol that Rice had given him at least an hour before. After purchasing cigarettes, defendant walked alone on a sidewalk towards his grandmothers house, at which point he observed Sherman, the victim, Lockett, Dandre Johnson, and several other, unknown individuals walking towards him. As the group approached, defendant admitted to taking the safety off of the gun, which was stored in his waistband, but denied ever moving the weapon's slide. Defendant stated that as the group approached, he believed that "they were going to try and hurt [him.]" Sherman approached defendant and after the two exchanged words, Sherman punched defendant in the mouth. Defendant then withdrew the gun and held it at his side. He admitted that he was the only person who was armed with a gun at the time. More words were exchanged and defendant started to walk away from the group when someone jumped on his back. He stated that he tried to twist that person off and that the gun in his hand "discharged in the process of [him] twisting," firing three times in close succession. The man then fell and defendant saw that it was the victim who had grabbed him. Defendant stated that he was 6'3" tall and that the victim was shorter.

¶ 14 Defendant testified that after he saw the victim lying on the ground, he ran home. Upon arrival, he called someone to pick him up to help him get away. He admitted that he never called an ambulance nor did he call the police. Defendant testified that he remained in hiding for 4 days while the police searched for him before turning himself in. He stated that he did not know what he did with the gun after the shooting.

¶ 15 On redirect examination, defense counsel sought to ask defendant whether he had "ever seen a gun in Sherman Williams' hand." The State objected to this line of questioning on relevancy grounds, and the trial court sustained the objection. The trial court then sustained another objection on relevancy grounds to the question of whether defendant knew Sherman Williams to carry a gun.

¶ 16 After defendant testified, the defense rested and the State called Dandre Johnson in rebuttal. Johnson testified that on the afternoon of the shooting, he was on the street with the victim and some others when Lockett and Sherman arrived. He knew that there had been a problem earlier between the victim and Jessie Rice over "some paintballs," and knew that Lockett and Sherman had come to attack defendant because of that problem. Johnson testified that he was about 10 feet away from defendant and Sherman when Sherman threw the punch and defendant pulled out a gun. He observed the victim jump on defendant's back and put him in a bear hug. He stated that the gun in defendant's hand went off 3 times before the victim hit the ground. As the victim was lying face down on the ground, defendant pointed the gun down at the victim and shot him again and ran away.

¶ 17 Based on the foregoing evidence, the trial court made the following pertinent findings of fact:

> "Basically in the afternoon of May 17, 2008, there was an initial confrontation between victim Jessie Williams and defendant's uncle, Jessie Rice, *** about something to the effect that Jessie Williams shot Jessie Rice's daughter's car with a paint ball gun.
>
> Later on that afternoon or early evening hours, the defendant, while walking from a liquor store *** was involved in a second confrontation between himself and Sherman and Jessie Williams. The evidence indicates that Jessie Williams apparently had called his nephew, Sherman Williams, and both had decided to confront Jessie Rice and Jessie Rice's nephew, [defendant].
>
> [Defendant], earlier on in the day, in speaking with his uncle, Jessie Rice, decided to carry a gun or was given a gun by his uncle, which was a semi-automatic pistol. After, [defendant] was walking northbound on Turlington, he was met by Sherman Williams and Jessie Williams. Words were exchanged, then Sherman Williams punched defendant *** in the fact, kind of pushing him back up to this point. Everyone is in agreement at this

point, and [defendant] pulls out a gun.

According to witnesses, [defendant] cocks the gun, cocks the pistol by sliding the slider back, and this is in fact supported by the evidence, because as he pulled the slide back, a bullet ejects and is found on the ground and is recovered as evidence.

[Defendant] denies ever doing this. He basically states that as he's approaching the other people that he's going to have a confrontation with, he releases the safety from the gun, but he indicates that he never cocks the gun.

In any event, as he begins the conversation with – some kind of conversation between the two, there's a confrontation, then Sherman Williams punches [defendant] in the fact. As that happens, [defendant] pulls the – pulls out his gun. He pulls out his gun and puts it to his side.

At this point there's testimony that Sherman Williams, the person that originally punched [defendant], runs away to a gangway by a home about fifteen feet away, and as this is happening, the victim jumps on defendant's back or grabs [defendant] from the back in a bear hug to prevent him from raising his hand where he has the gun. As a tussle to struggle

begins, during the struggle/tussle shots are fired and eventually Jessie is dropped to the ground.

Defendant contends during the tussle Jessie Williams is shot in the right buttocks area, and immediately after that he begins to walk away and actually runs away, and runs away to his home about a thousand feet south of the scene.

Witnesses that were there tell somewhat of a different story. They basically all testify that after Jessie Williams falls to the ground and is in – is face down in a push-up position, [defendant] takes aim at the victim and shoots one bullet into the victim's back. Autopsy protocol indicates in fact Jessie Williams died from a bullet wound entry from the rear from the buttocks area.

Further evidence indicates there's no stippling around the area, which would indicate a close shot range, and there is no way that the victim could have been shot while he was on the defendant's back.

The evidence is consistent with the witnesses' testimony that the defendant shot the victim after he was laying on the ground face down in a push-up position. This is further supported by the statement made by [defendant] after allegedly shooting the victim,

> when he said quote, 'I told you mother-f***ers I was not playing around,' end quote.
>
> [Defendant] was not justified in use of force that day. Once Jessie Williams was on the ground and Jessie Williams – and Sherman Williams retreated from the immediate area, he should have left the scene, but he did not. He decided to use deadly force in a situation which now risk of harm had abated; and therefore he was not justified in using deadly force."

¶ 18 The trial court then found defendant guilty of first degree murder. Defendant filed a motion to reconsider, which was denied, and the trial court sentenced him to 45 years' imprisonment, the minimum sentence allowed. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant raises two separate issues on this appeal. He first contends that the State failed to prove him guilty of first degree murder, beyond a reasonable doubt, because he proved that he acted in self defense, and was entitled to a "parting shot" defense. He next contends that his right to a fair trial was violated when the trial court "did not rely upon the actual evidence at trial, and instead relied upon his own supposed knowledge." Defendant finally argues that the trial court abused its discretion when it prevented defense counsel from introducing evidence regarding Sherman Williams's previous possession of a firearm. For the reasons that follow, we affirm.

¶ 21 A. Sufficiency of the Evidence

¶ 22 Defendant's initial contentions relate to the sufficiency of the evidence proffered by the State. He first asserts that the State failed to prove him guilty of first degree murder because he "acted reasonably in self-defense to repel [the victim's] attack," accidentally firing the fatal shot during his struggle with the victim rather than, as the State suggests, once the victim was on the ground. He further contends that if this court should accept the State's theory of when he fired the fatal shot, his conviction should nevertheless be reversed "because an insufficient amount of time passed between the penultimate shot – while Williams was still on Dionta's back – and the final shot." He finally contends, in the alternative, that if we do not reverse his conviction outright, we should nevertheless reduce it to second degree murder because he either acted in unreasonable self defense or as a result of serious provocation. We will address these contentions in turn.

¶ 23 1. Reasonable Self Defense

¶ 24 When considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. Instead, the relevant question on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 329-330 (2000). The weight to be given the testimony, the credibility of the witnesses, the resolution of conflicting testimony, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *People v. Walenksy*, 286 Ill. App.

3d 82, 97 (1996); *People v. Milka*, 211 Ill. 2d 150, 178 (2004). "[W]here a case is tried without a jury, the determination of the credibility of the witnesses and the weight to be accorded their testimony is committed to the trial judge; and unless is can be said that the court's judgment is found to rest on doubtful, improbable or unsatisfactory evidence, or clearly insufficient evidence, a reviewing court will not substitute its judgment for that of the court below even though the evidence regarding material facts is conflicting and irreconcilable." *People v. Powell*, 72 Ill. 2d 50, 62 (1978).

¶ 25 In Illinois, a person commits first degree murder when he "either intends to kill or do great bodily harm to [an] individual or another, or knows that such acts will cause death to [an] individual or another; or he knows that such acts create a strong probability of death or great bodily harm to [an] individual or another." 720 ILCS 5/9-1(a) (West 2008). However, a defendant is justified in using deadly force in self-defense when he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another." 720 ILCS 5/7-1(a) (West 2008). In order to rely on such a defense, a defendant must establish that "the aggressor is capable of inflicting serious bodily harm without the use of a deadly weapon, and is intending to do so." *People v. Hawkins*, 296 Ill. App. 3d 836, 837 (1998). "[A] reviewing court will not reduce a conviction for murder *** where the trier of fact has reasonably concluded that the defendant had no basis whatsoever for his belief that deadly force was necessary for the protection of life." *People v. Kruger*, 236 Ill. App. 3d 65, 70 (1992).

¶ 26 Here, defendant asserts that he acted in self defense from Sherman, who punched him in the face. There is no dispute that Sherman initiated the violence by punching defendant in the face, that defendant justifiedly carried a firearm in order to defend himself, or that Sherman fled once the victim placed defendant in a bear hug and shots were fired. The only factual issue in dispute is whether defendant fired the fatal shot during the struggle or after it, while the victim lay on the ground.

¶ 27 Defendant asserts that the weapon discharged accidentally while he was trying to shake the victim off his back, and that he never fired the alleged final shot. He claims that, contrary to Lockett's testimony, he never cocked the weapon and further alleges that the autopsy protocol corroborates his version of the shooting. The State, however, contends that defendant fired again on the victim after he fell and therefore argues that defendant's need to defend himself had been eliminated because Sherman, the initial aggressor, had fled, and the victim, the second aggressor, was incapacitated. It also argues that the autopsy protocol, supported its position.

¶ 28 The State's version of the events, is supported by the testimony of Sherman Williams, Marshawn Lockett, and Dandre Johnson, all of whom testified that defendant then stood over the victim and fired a final shot as the victim lay on the ground. Sherman additionally testified that he heard defendant state, "I told you mother f***ers I wasn't playing," after that shot was fired. The record further indicates that at the time this final shot, the victim was laying on the ground, Sherman, the initial aggressor was fleeing from the scene, and none of

the other individuals present were threatening defendant in any way. The autopsy protocol, entered into evidence by the State without objection, supports the State's theory that defendant fired the final shot while the victim lay on the ground. It indicates that the fatal wound showed "no evidence of close range firing," which the trial court could have reasonably determined would have likely occurred given the proximity of defendant and the victim during the struggle. The fact that defendant denied cocking the gun and ejecting an unfired round, when one was found at the scene, that he hid from police for 4 days, and that he did not know what he did with the gun after the shooting, all tend to cast doubt upon the credibility of his theory of the events.

¶ 29 As stated above, we "may not reweigh the evidence or substitute [our] judgment for that of the trier of fact, and the trial court's findings of fact are entitled to deference, especially those involving determinations of credibility." *People v. Arman*, 215 Ill. App. 3d 687, 697 (1991). Given this deference, we are unable to say that the trial court abused its discretion by accepting the State's version of the events over defendant's, and finding that he did not act in reasonable self-defense. The State provided sufficient evidence to demonstrate that defendant fired the final, fatal shot into the victim's buttocks as he lay on the ground, and defendant has failed to provide us with any compelling reason to reject those findings. Defendant never asserted that he intentionally fired the initial shots in self defense, but rather argued that the shots were fired accidentally, stating that "the gun went off" and that it "discharged in the process of [him] twisting" during their struggle. He has offered no

evidence that he acted in order to prevent the victim from causing his "imminent death or great bodily harm." This lack of evidence of self-defense, coupled with testimony that defendant stated, "I told you mother f***ers I wasn't playing" when he fired the final shot, provides us with no reason to upset the finding of the trial court and find that the evidence was sufficient to find defendant guilty of first degree murder.

¶ 30 2. Parting Shot

¶ 31 Defendant next contends that even if we accept the State's theory about when the fatal shot was fired, we should nevertheless reverse his conviction for first degree murder because an insufficient amount of time passed between when the victim was shot during the struggle and when defendant shot him again. Specifically, he argues that because he was initially firing in self-defense when the victim was wrapped around his back, the few seconds that elapsed from the time he fell and the time he fired the last shot were insufficient for him to realize that the last shot was unnecessary. We disagree.

¶ 32 Defendant cites three cases which stand for the proposition that a final shot fired after a victim is incapacitated will not necessarily negate a claim of self defense when those shots are fired in rapid succession before a defendant has time to realize that further shooting was unnecessary. *See People v. Bailey*, 27 Ill. App. 3d 128, 135 (1975) (citing *Brown v. United States*, 256 U.S. 335 (1921)) ("the fact the defendant may have fired the final shot when the victim was down was not enough to prove that the defendant had ceased to be reasonably acting in self-defense because the State had failed to prove that this final shot did not follow

close upon the others"). The rulings of these cases, however, are all predicated upon the defendant establishing that the initial shots were fired in self-defense. *People v. Guzman*, 208 Ill. App. 3d 525, 530 (1990) ("When it has been determined that a defendant was initially shooting in self-defense, the State must then prove that a sufficient amount of time had passed between the initial shot and any subsequent shots"), *People v. Chapman*, 49 Ill. App. 3d 553, 557 (1977) (distinguishing *Brown* and *Bailey* because those cases "presuppose that the initial use of deadly force was justified").

¶ 33 Here, because, for the reasons stated above, defendant has failed to present evidence that he acted in self defense, the amount of time that elapsed between the initial and final shots is not relevant to our determination. Moreover, defendant has offered insufficient evidence to support a finding that the fatal shot was fired in rapid succession to the initial shots. Sherman testified that a minute or two elapsed between the first shot and the fatal shot, while Lockett testified that the first shots were fired within a matter of seconds, but did not testify how much time elapsed between the initial shots at the parting shots. Given the lack of definitive testimony on the issue, we are again unwilling to upset the findings of the trial court.

¶ 34 3. Second Degree Murder

¶ 35 Defendant lastly contends that even if we find that he was not legally justified in killing the victim, we should nevertheless reduce his conviction from first degree murder to second degree murder because the evidence indicates that he either acted under an actual but

unreasonable belief that he needed to use deadly force or that he did so under serious provocation. We disagree.

¶ 36 An individual commits second degree murder when he commits first degree murder and "[a]t the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed; *** or [a]t the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing, *** but this belief is unreasonable." 720 ILCS 5/9-2 (West 2008).

¶ 37 Under the unreasonable belief prong, a defendant must actually believe that force is necessary to prevent imminent death or great bodily harm, even though that belief is unreasonable. *People v. Peterson*, 202 Ill. App. 3d 33 (1990). The burden is on the defendant to show, by a preponderance of the evidence, that he held an unreasonable belief that self-defense was necessary." *People v. Garcia*, 407 Ill. App. 3d 195, 203 (2011).

¶ 38 Here, defendant is unable to support his contention that he acted in unreasonable self-defense. As stated above, defendant's theory at trial was that he accidentally shot and killed the victim during their struggle. He denied ever firing on the victim once he was on the ground, and never testified that he intentionally fired upon him during the struggle. He has cited nothing in the record which would support his contention on this appeal that he unreasonably believed "he needed to use deadly force to defend himself against not only Jessie Williams, *** but also against Sherman Williams, Marshawn Lockett and others *** who approached [defendant] with the intent to attack him." The record indicates that

Sherman fled as the initial shots were fired, and no witness testified that defendant was provoked by any of the other individuals present. Nor is there anything in the record which indicates, as defendant suggests, that defendant "believed that further attack was imminent" after the victim fell to the ground. The only indication in the record as to defendant's state of mind was his testimony that he thought they were going to "try to hurt [him]" when he observed the group walking towards him on the street. There was no testimony that he believed, reasonably or unreasonably, that his life was ever at risk, either before, during, or after the confrontations. Accordingly, we refuse to reduce defendant's conviction on grounds of unreasonable self defense.

¶ 39 Nor are we willing to reduce his conviction to second degree murder based on serious provocation. He argues that both the punch by Sherman and the bear hug by the victim amount to serious provocation, each of which would be sufficient to reduce his conviction from first to second degree murder. We disagree.

¶ 40 Serious provocation is defined as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b). "The only categories of provocation recognized by [our supreme court] are substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. [Citations.]" *People v. Garcia*, 165 Ill. 2d 409, 429 (1995).

¶ 41 Defendant first contends that he engaged in mutual combat with the victim when the victim placed defendant in a bear hug. Mutual combat has been defined as "a fight or

struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat. [Citation.]" *People v. Thompson*, 354 Ill. App. 3d 579, 588 (2004). "[T]he provocation must be proportionate to the manner in which the accused retaliated. The crime is murder when a defendant attacks a victim with violence out of all proportion to the provocation. This is especially true if the homicide is committed with a deadly weapon." *People v. Austin*, 133 Ill. 2d 119, 127 (1989).

¶ 42 Under *Austin*, defendant is unable to rely on the mitigating factor of mutual combat. The undisputed evidence at trial indicates that the victim grabbed defendant in a bear hug after defendant pulled out a pistol. The victim never struck defendant and there was no testimony that the victim's actions placed defendant at risk of death or serious bodily harm. Thus, shooting the victim as he lay incapacitated on the ground "was an act completely out of proportion to the provocation. Therefore, mutual combat cannot apply." *People v. Austin*, 133 Ill. 2d at 127.

¶ 43 Similarly, the evidence does not support defendant's claim of serious provocation based on substantial physical injury. Defendant has provided no testimony indicating that either Sherman's single punch or the victim's placing him in a bear hug caused him serious physical injury. See *People v. Lauderdale*, 2012 IL App (1st) 2012, ¶25 ("there was no evidence at trial that defendant suffered a 'substantial physical injury or assault' as a result of one punch to the jaw"). Accordingly, we cannot reduce defendant's conviction on this ground either

and, for the foregoing reasons, we find that sufficient evidence existed for the trial court to convict defendant of first degree murder.

¶ 44 B. Right to a Fair Trial

¶ 45 Defendant next contends that his right to a fair trial was violated because the trial court based its finding of guilt on "his own supposed knowledge," rather than evidence in the record. Specifically, defendant contends that the trial court erroneously stated that the evidence indicated there was "no stippling" around the victim's wound, even though there was no mention of "stippling" in the record. He further argues that the trial court erroneously determined that the live round recovered from near the shooting came from defendant's pistol. The State, however, argues that while there was no mention of "stippling" in the evidence adduced at trial, the trial court nevertheless properly relied upon the conclusions in the autopsy protocol which stated that there was no evidence of close range firing. It further argues that the trial court was permitted to conclude that the unfired round found near the scene came from defendant's gun. We agree with the State.

¶ 46 "In a bench trial, the judge is limited to the record developed during the course of the trial before him. [Citation.] A trial judge is 'free to accept or reject as much or as little as [he] pleases of a witness' testimony.' [Citation.]" *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011). "A determination made by the trial judge based upon *** private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law." *People v. Wallenberg*, 24 Ill. 2d 250, 354 (1962). "Reversal is warranted where a defendant was

not told the facts of which the court took notice, did not know the evidence upon which he was convicted, and was unable to dispute the truth of the facts on which the court relied. [Citation.]" *People v. Jennings*, 364 Ill. App. 3d 473, 483 (2005). Hoever, where a defendant is aware of the evidence being used against him and is "afforded the opportunity to cross-examine and refute the State's evidence," no error will be found. *Jennings*, 364 Ill. App. 3d at 483.

¶ 47 Here, defendant first argues that the trial court relied upon its own, private knowledge when it stated that there was no evidence of stippling on the victim's wound. Specifically, he refers to the trial court's statement that, "Further evidence indicates there's no stippling around the area, which would indicate a close shot range, and there is no way that the victim could have been shot while he was on the defendant's back." There is no dispute that neither the autopsy protocol, nor any other evidence, made any mention of "stippling," or a lack thereof.

¶ 48 While the trial court did mention "stippling," which did not appear in the record, it nevertheless correctly stated that the eviden0ce provided no indication of close range firing, which was ultimately at issue in this case. This conclusion was entirely consistent with the autopsy protocol, which indicated that the victim's wound showed no evidence of close range firing. The record indicates that defendant not only knew of the conclusions in the protocol, but that he stipulated to the protocol's admission. Defendant had the opportunity to object to the admission of the protocol or attempt to refute its conclusions with expert testimony of his own, but chose not to do so. Accordingly, we cannot say that this statement amounted to error. See *Jennings*, 364 Ill. App. 3d at 483-84.

¶ 49 Finally, defendant contends that the trial court relied on its "own special knowledge regarding firearms ammunition" when it linked the unfired round found at the scene to defendant's pistol. Specifically, defendant takes issue with the statement by the trial court that, "According to witnesses, [defendant] cocks the gun, cocks the pistol by sliding the slider back, and this is in fact supported by the evidence, because as he pulled the slide back, a bullet ejects and is found on the ground and is recovered as evidence." Defendant asserts that the trial court had no basis in the evidence to link the recovered live bullet to defendant's pistol. We disagree.

¶ 50 It is axiomatic that it is the responsibility of the trier of fact "'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *People v. Jackson*, 232 Ill. 2d 246, 281 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979)). Here, the State presented evidence that defendant cocked the pistol with two hands, causing a live round of ammunition to be ejected. It provided further testimony that a live round of ammunition was discovered by police shortly after the shooting at the crime scene. We are unwilling to say that the trial court "considered his own private knowledge" when it made the reasonable inference connecting the live round found at the scene to the one ejected from defendant's weapon.

¶ 51 C. Refusal to Allow Testimony

¶ 52 Defendant's final contention is that the trial court abused its discretion in preventing his counsel from questioning him as to whether he had ever seen or heard of Sherman carrying a gun. The State objected to this line of questioning on relevancy grounds and the trial court sustained that objection. Defendant asserts that this amounted to error because such testimony would have provided evidence of Sherman's violent character and bore directly on whether defendant had reason to fear the attack or to resort to self defense. Defendant concedes that he has forfeited review of this issue by not including it in his post-trial motion, and asks us to review it for plain error. We further note that defense counsel failed to make an offer of proof as to what defendant's answers to these questions would have been, providing alternate grounds for his waiver of this issue.

¶ 53 Under a plain error analysis, we may review an otherwise forfeited issue in cases where the evidence is closely balanced or where the error was so serious so as to deprive a defendant of a constitutional right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, where there is no error to begin with, there can be no plain error. *People v. Hanson*, 238 Ill. 2d 74, 114-15 (2010).

¶ 54 Here, we cannot say that the trial court's refusal to allow this line of questioning constituted error. When a defendant acts in self-defense, evidence of "the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence." *People v. Lynch*, 104 Ill. 2d 194, 200 (1984). Under *Lynch*, such evidence can support a theory of self defense (1) by demonstrating "defendant's

knowledge of the victim's violent tendencies" and (2) by "support[ing] the defendant's version of the facts where there are conflicting accounts of what happened." *Lynch*, 104 Ill. 2d at 200.

¶ 55 Testimony regarding whether Sherman ever carried a gun was not relevant to the ultimate issue in this case, namely whether or not he intentionally murdered *the victim* following their struggle. There is no dispute that Sherman was the initial aggressor or that defendant was likely justified in pulling out a gun after being punched and holding it at his side. Nor is it in dispute that defendant did not shoot Sherman, but instead shot the victim accidentally during their struggle, and that Sherman fled once shots were fired. As stated above, defendant never argued, nor was there any evidence, that he shot the victim, during the struggle, in self defense. The only real issue in this case was whether defendant, following his struggle with the victim, fired the final, fatal shot into his buttocks as he lay on the ground. We fail to see, under *Lynch* or any other precedent, how testimony that may have potentially indicated that Sherman carried a gun would be relevant to this determination or provide defendant with any justification for shooting the victim. Accordingly, the trial court did not abuse its discretion by refusing to allow this line of questioning.

¶ 56 Even if we were to find that an error occurred here, defendant would nevertheless fail to satisfy either prong of the plain error analysis. For the reasons thoroughly discussed above, the evidence in this case was not closely balanced. The testimony of the State's three eyewitnesses all suggest that defendant fired the fatal shot after the victim fell to the ground,

not, as he suggests, during their struggle. The autopsy protocol, which indicates that the fatal shot entered through the victim's right buttock supports this theory. Finally, the presence of an unfired round near the scene of the shooting is entirely consistent with the evidence presented by the State and tends to cast doubt upon defendant's credibility, as he denied ever cocking the weapon and ejecting a round.

¶ 57 Moreover, defendant is unable to establish that any error, if one occurred, rose to the level of depriving him of a constitutional right. Under this prong of the plain error analysis, an error will only warrant reversal when it "serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *People v. Glasper*, 234 Ill. 2d 173, 198 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). Such errors have been defined as "defects affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," which "deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Neder v. United States*, 527 U.S. 1, 8-9 (1999). Here, defendant's claimed of error is merely evidentiary in nature, and does not rise to the level of structural errors necessary to invoke plain error. See *Glasper*, 234 Ill. 2d at 198 (holding that the violation of Illinois Supreme Court Rule 431(b)(4) did not warrant reversal under the plain error doctrine).

¶ 58 III. CONCLUSION

¶ 59 For the foregoing reasons, we affirm the decision of the trial court.

¶ 60 Affirmed.