FOURTH DIVISION
February 14, 2013

No. 1-10-3511

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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. 08 CR 12327 (01)
	)	
ASHUR HIDOU,	)	Honorable
	)	Larry G. Axelrood,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: State proved beyond a reasonable doubt that defendant committed first degree murder and did not act in self-defense. Trial court did not deny defendant his right to a fair trial where record shows trial court considered option of second degree murder. Defendant failed to show his counsel was ineffective. Mittimus ordered corrected to reflect conviction for one count of first degree murder.

¶ 2 After a bench trial, defendant, Ashur Hidou, was convicted of two counts of first degree murder and sentenced to concurrent terms of 35 years in prison. Defendant now contends,

among other things, that the State failed to prove beyond a reasonable doubt that he was the initial aggressor and the evidence established that he was justified in using self-defense to prevent an aggravated battery. Defendant also argues that, even if he had been the initial aggressor, the trial court should have found him guilty only of second degree murder based on his unreasonable belief in the need to use deadly force. Defendant additionally raises an issue of ineffective assistance of counsel. For the reasons that follow, we affirm defendant's conviction.

¶ 3 Defendant also raises an argument regarding his sentence which the State does not dispute. Therefore, we agree the mittimus should be corrected to reflect a conviction on only one count of first degree murder.

¶ 4 BACKGROUND

¶ 5 A grand jury indicted defendant on two counts of first degree murder for the stabbing death of Israel Moreno. The following evidence was adduced at trial.

¶ 6 Israel Moreno died on June 14, 2008, after being stabbed multiple times by defendant. Moreno, who was known by his nickname, Kiki, was 21 years old at the time and defendant was 18 years old. The two had met in 2005 and had known each other from the neighborhood. They would spend time together a few times a week but their relationship had changed and they were no longer friends. Kiki was a member of the street gang, the Latin Counts; defendant was a member of the Latin Kings.

¶ 7 Vanessa Claudio testified for the State at trial. In June 2008, Vanessa was 18 years old and lived in a second floor apartment on Laurel Avenue in Des Plaines, with her mother (Ida), father (Angelo), younger brother (Anthony), and younger sister (Veronica). Vanessa had had a

prior dating relationship with both defendant and Kiki. Vanessa testified that she had met defendant during her freshman year in high school and they had dated for several weeks. They broke up but became close friends. Defendant also had a close relationship with her entire family. She testified that defendant called her parents "Moms" and "Pops" and would come over to their home and "hang out" twice a week. Defendant was also friends with her older brother, Angelo, Jr.

¶ 8 Vanessa testified that she had met Kiki through Angelo, Jr. Kiki lived about two blocks from the Claudio family. Vanessa stated she had dated Kiki for 14 months and had broken up with him in February 2008, four months before the incident. After the breakup, she saw Kiki every day. She testified that she still talked to Kiki, but not every day, and she exchanged text messages with him. Vanessa also testified that defendant and Kiki never liked each other and never got along. She stated that defendant told her that Kiki was not the right guy for her. Defendant also told her that he was a member of the Latin Kings street gang.

¶ 9 Vanessa testified that, on the evening of June 13, 2008, defendant was at her home. At approximately, 5 p.m., he had showed her and her parents a large knife that he had purchased for $10. Afterwards, more friends arrived at the house and Vanessa "hung out" with them. She stated that Kiki was driving around the building. At around 1:30 a.m. on June 14, 2008, she was in her bedroom with defendant and another friend, Sal, when she heard Kiki through the open window calling her name. Kiki said "Nessa" about three times and then said "I know you can hear me." She testified that defendant "looked a little mad, but not really." Vanessa looked out the window and saw Kiki walking away with his friend, Greg Latson. They were walking in the

direction of Washington Street toward Kiki's house.

¶ 10 Vanessa further testified at trial that defendant left 15-20 minutes later, while she was in her living room, and said he was leaving because "his sister was outside to pick him up." She also testified that her younger brother had come home and that, as defendant was walking out of the house, he said that he was going to go talk to the guys that were messing with her brother and that "he's going to get them." She returned to her bedroom and heard multiple people yelling and screaming. She yelled "they're fighting" and her father ran downstairs. Vanessa ran past her mother, who was initially not letting them leave. When she got outside she saw Kiki lying in the street at the intersection of Laurel Avenue and Washington Street and she ran towards him. She heard Greg say "he has a knife," but testified that she did not see a knife. Vanessa saw defendant and her father but she was focused on Kiki. Kiki was pale and bleeding and "his guts and stuff were coming out." He called her name three times and started gasping for air.

¶ 11 Eventually Vanessa left Kiki's side and then saw defendant by the laundry room in the back of the building. She stated that he was "really bloody" and his eyes were swollen shut. She later went to the police station and gave a handwritten statement.

¶ 12 At trial, Vanessa testified that she did not remember that in her handwritten statement she had said that Greg "was holding Ashur's arm because Ashur still had the knife in his hand, and he was saying that he has a knife; he held it up." She remembered signing her statement which read: "After Kiki walks away, she looked out and saw him. Then she is pretty sure that Ashur heard Kiki and said, I'm going to fucking get him. She said he looked mad." In her statement, she also said that "Greg was holding Ashur on the ground" and "Ashur had a knife."

¶ 13 Vanessa recalled testifying before the grand jury and stating that "[b]efore Ashur left the house," she heard him "saying like, I'm going to get him, as he was walking out the door, because he knew that Kiki was on the block around." At trial, however, she stated that the reason she said that was because her mother had received a telephone call that "some guys" were "messing with her little brother." She testified that defendant "didn't say he was going to go get him. He said he was going to go talk to them 'cause he knew them."

¶ 14 Vanessa also testified that a week before the incident, while she was on her porch talking to her parents at around 7 or 8 p.m., Kiki had come over and stood across the street. He was calling to her as she tried to ignore him. He said: "Don't think I'm afraid to cross the street, 'cause I'm not afraid of the police." He then came over and tried to talk to her. He became angry when she would not look at him and grabbed her face and turned it towards him. Vanessa testified that her father became angry and told Kiki "[s]he's not no one's bitch." Kiki went up to her father and said, "Well, I'll make you my bitch." At that point, her brother and Sal came downstairs from the second floor. Kiki kept trying to get in the building and was "hitting everybody." Vanessa stated she was holding him and trying to hold him back. Kiki then hit Vanessa's mother, who fainted. The police arrived and Kiki tried running, but the police arrested him.

¶ 15 Gregory Latson (Greg) also testified for the State. He and Kiki were best friends. On June 13, 2008, Greg had driven from Aurora, where he lived, to spend the night at Kiki's. Kiki lived with his brother (Hector) and his mother (America). When Greg arrived, Kiki was there, along with Hector, his cousin (Diamonte), and three women that Hector knew from college.

Greg had brought a 12-pack of beer and each man drank about three beers between 10:30 and 2 in the morning. At about 2 a.m. on June 14, 2008, Kiki and Greg went for a walk. They walked until they were across the street from Vanessa's apartment. Kiki shouted out "Nessa" two or three times, but she did not respond.

¶ 16 Greg testified that he told Kiki "let's go." Greg started walking with Kiki behind him. Kiki stopped and said, "Well, who is this walking in the middle of the street?" Greg stopped, turned around and looked. He saw a man dressed in black whom he had never seen before. Kiki then said, "Oh, it's just Ashur." After Kiki acknowledged who it was and disregarded it, Greg did not think anything of it. Then Kiki and Greg proceeded walking north towards Kiki's house. Greg testified that he then heard Kiki say "What's up, bitch?" When Greg turned he saw that defendant had closed the distance between them ("basically he ran up on us from behind") and was standing face-to-face with Kiki. Greg testified that Ashur had to have closed the distance quickly.

¶ 17 On direct examination, when asked what he saw happen next, Greg testified: "I saw Ashur pull out a knife, a large knife, and at the same time Kiki swung with his left arm, and I saw Ashur stab Kiki right here (indicating) like under his left side." On cross examination, Greg testified as follows:

> "[Defense Counsel]: All right. Then what's the next thing that you can recall?
>
> [Greg]: Kiki swung at Ashur. Ashur had the knife in his hand and he stabbed Kiki, and they collapsed on the ground. They fell backwards. He was on the – Ashur was on the bottom; Kiki was on top of him.

[Defense Counsel]: So when you turned around, the first thing you saw was Kiki swing?

[Greg]: No. I saw him – I saw Ashur pull out a knife."

Greg ran towards them and saw them fall backwards. Greg testified that, as they were going down, defendant was stabbing Kiki. As Kiki was falling forward, he was flailing his arms and defendant was stabbing Kiki. Greg testified that defendant stabbed Kiki "[a] lot" and estimated it to be "five, six times."

¶ 18 Greg then tried to get the knife out of defendant's hand by grabbing his wrist. The knife was double-edged and six to eight inches long. Greg testified that he grabbed defendant by the arm, and folded his arm across his chest. Kiki got up and started walking north towards his house. Greg testified that he started kneeing defendant in the face and as he tried to take the knife away, defendant shouted "King Love." Defendant then grabbed the blade of the knife as Greg tried to get the knife away. Greg testified that defendant was "holding the blade and the blade was slashing him." Defendant's hand was cut because Greg was pulling him.

¶ 19 Greg stated that some people came and Vanessa's father grabbed defendant, told Greg to let go, and said "I got him." Greg heard Vanessa scream, "Oh my God, Kiki's dying." She was standing over Kiki where he had collapsed after walking. Greg ran over and saw Kiki laying on the ground and trying to breathe. Kiki was bleeding profusely.

¶ 20 Ray Maldonado testified that Anthony Claudio was his best friend. Ray only witnessed the aftermath of the incident and saw Greg and defendant struggling for the knife. He also saw Kiki walking towards his house and then saw him collapse. Ray testified that he ran over to Kiki

and saw "his insides hanging out" in "the stomach area." Ray saw defendant and Anthony running west and he lost sight of them. Ray called his sisters to come and pick him up.

¶ 21 Four or five minutes later, Ray walked back to the Claudio's house and saw defendant and Anthony in the basement. Meanwhile, Ray's sisters had arrived but the police told them to leave the area. One of his sisters called Ray from the park and he met them over there. He and defendant got in the car. They were going to take defendant to the hospital but defendant said he could not go to the hospital and wanted to go home and see his mother. They dropped defendant off on Devon Avenue in Chicago. Ray gave a statement to the police later that day.

¶ 22 Vanessa's mother, Ida Claudio, testified for the defense. She stated that, after Kiki had been arrested for the incident in which he had hit her and the others, they all had signed complaints. Ida obtained an order of protection against Kiki and he was not allowed on their property.

¶ 23 Ida also testified that, for three to four months before the killing, her family was scared of Kiki because he was always threatening that he was going to get her family." She stated "we were, like, in prison" and "[c]ouldn't go outside."

¶ 24 Anthony Claudio, defendant's witness, testified consistently with the State's witnesses regarding the incident. He also testified that defendant had told him that he was a member of the Latin Kings street gang, and that he heard defendant say "King Love" after the stabbing.

¶ 25 Anthony testified regarding Kiki's violent tendencies which included the incident that occurred a week before the killing when Kiki hit Mrs. Claudio in the face. Anthony also testified regarding an incident where Anthony was in Walgreen's and Kiki came into the store. Anthony

testified "[Kiki] told me to take off my hat, I'm gangbanging. And he hit it off."

¶ 26 Angelo Claudio also testified for the defense. Consistent with his wife's testimony, he said that Kiki had been tormenting the family. Angelo also testified that, during the struggle between defendant and Kiki, he heard defendant yelling, "Fuck you, Kiki. I hope you die."

¶ 27 Defendant testified in his own defense. Defendant admitted he had a knife that he had shown to the Claudio family. He stated that he had begun to carry a knife approximately a month and a half before the murder because he had been "jumped" near his housing complex "by a few guys" who had their faces covered. He stated he believed they were Kiki and the Latin Counts. Defendant denied that he was a member of the Latin Kings street gang, and denied that he had told Vanessa and Anthony that he was a Latin King. He admitted, however, that he associated with Latin King gang members and some were "good friends." He denied knowing that "King Love" meant someone cared about the gang and loved that gang.

¶ 28 Defendant stated that, on the night in question, he left the Claudio's house because his sister was picking him up. He said his good-byes, shook Anthony's hand and left. When he got outside and did not see his sister's car, he started walking north on Laurel Avenue towards Washington Street to go to a convenience store so that his sister could pick him up there.

¶ 29 According to defendant, as he was walking, he saw Kiki and "the black guy" (whom he later learned was Greg) speed walking towards him. Defendant testified that he "got scared" and "felt that it was just my time" meaning that they were going to kill him. He stated that, as he was looking back and forth at Greg and Kiki, "it all happened fast." He "heard someone fall, boom back." He "turned around looking to see what it was." Kiki was behind him and defendant

could not run, so he turned around. Kiki had hit him. Defendant was then "grabbed from behind" and "slammed" to the ground. He remembered getting hit in the face, dragged, kicked and punched. Defendant blacked out for a second and could not see. He pulled out his knife because he "just wanted them to get off" and he "just started swinging wildly." He stated he blacked out again and the next thing he knew "the blade is coming toward the top of my chest, bottom of my chest, the top of my stomach area." He was on his side and managed to grab the blade. There was a struggle for the blade and the next thing he remembered was Angelo's voice telling him it was okay and to let go of the blade.

¶ 30 Defendant admitted that he did not see Kiki with any weapons in his hand. He also admitted that his friends helped him leave the area and he did not stay to tell the police that he was defending himself. He admitted that after the stabbing, while he was cleaning himself in the basement, he did not ask Anthony to call the police.

¶ 31 In delivering its ruling, the court found defendant's testimony not credible, and found the State's witnesses credible.

¶ 32 ANALYSIS

¶ 33 *Defendant's Right to a Fair Trial was Not Violated Where Trial Court Considered Option of Finding Defendant Guilty of Second Degree Murder*

¶ 34 Defendant first argues that he was deprived of his constitutional right to a fair trial where the trial court failed to consider evidence that was crucial to his defense, and failed to rule on the issue of whether defendant committed the mitigated offense of second degree murder. He argues that "the court did not once address evidence pertaining to [his] mental state at the time of the

stabbing, even after that evidence and argument was presented again by Ashur's new counsel in the context of a motion for a new trial.

¶ 35 As we recently explained:

> "Under section 9–2 of the Criminal Code of 1961 (the Code), a person commits second degree murder when he commits first degree murder and "[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 his belief is unreasonable." 720 ILCS 5/9–2(a)(2) (West 2004). For a defendant to be guilty of second degree murder, the State must first prove the defendant guilty of first degree murder beyond a reasonable doubt. 720 ILCS 5/9–2(c) (West 2004). The burden then shifts to the defendant to prove the existence of the mitigating factor by a preponderance of the evidence. 720 ILCS 5/9–2(c) (West 2004). The State is not required to prove the absence of the mitigating factor beyond a reasonable doubt. [Citation.]" *People v. Simon*, 2011 IL App (1st) 091197, ¶ 51.

¶ 36 "In a bench trial, the court is presumed to know the law, and this presumption may only be rebutted when the record affirmatively shows otherwise. [Citation.] 'The trier of fact in a bench trial is not required to mention everything-or, for that matter, anything-that contributed to its verdict.' [Citation.]" *People v. Mandic*, 325 Ill. App. 3d 544, 546-47 (2001). Although defendant concedes that in a bench trial, the court is presumed to have considered competent evidence unless that presumption is rebutted by affirmative evidence in the record, he fails to point to any "affirmative evidence in the record" to rebut the presumption in this case. To the

contrary, the record here shows that the trial court here both knew the law and considered all of the evidence.

¶ 37 The trial court affirmatively acknowledged its duty to consider defendant's evidence of second degree murder when it stated:

> "[T]he defendant is charged with first degree murder. He has asserted the affirmative defense of self-defense, which means I have three options. One option is to find the defendant not guilty. One option is to find the defendant guilty of *second degree murder*. And one is to find the defendant guilty of murder." (Emphasis added.)

As the court further stated:

> "And I must evaluate *all* the evidence and determine whether or not the State has proven him guilty of first degree murder beyond a reasonable doubt.
>
> If the defendant had a belief that he was operating in self defense and if that belief was unreasonable, which would go toward a second degree; or if the State has failed to prove the defendant guilty beyond a reasonable doubt, in which case the defendant would be acquitted." (Emphasis added.)

Defendant concedes that the court acknowledged its duty to make a finding as to whether defendant was guilty of second degree murder. Yet, defendant asserts that the court "ignored all evidence of second degree murder" and "ignored the photographic and testimonial evidence about the extent and serious nature of [defendant's] injuries." However, as noted earlier, defendant fails to cite to any "affirmative evidence in the record" in support of his contentions.

As the State notes, although it was not required to do so, the trial court explicitly stated: "I have had the opportunity to see *all* the exhibits [and] was able to observe the testimony of *all* the witnesses." (Emphasis added.) The trial court expressly referred to and carefully analyzed the testimony of all witnesses, including the "five witnesses [who] testified as to Kiki's assaultive and violent behavior and that [defendant] was aware of it on the date of the incident." Moreover, the trial court expressly referred to and considered defendant's testimony in detail and found it to be "discredited," "nonsensical," and "insulting to the court." The court also explained in detail why it found the defendant not to be credible.

¶ 38 The cases cited by defendant, in which the trial court actually failed to recall crucial evidence, and affirmatively stated as such on the record, are inapposite. Here, the trial court considered defendant's defense, knew the law and there is no indication in the record that the court did not consider all of the evidence. Thus, defendant's right to a fair trial was not violated.

¶ 39 *Evidence Was Sufficient to Prove Defendant Guilty Beyond a Reasonable Doubt of First Degree Murder*

¶ 40 Defendant next challenges his conviction for first degree murder based on the sufficiency of the evidence. Specifically, he contends that the trial court erred in finding him guilty of first degree murder where there was insufficient evidence to prove that he did not justifiably act in self defense and, at most, he was guilty of second degree murder.

¶ 41 Where a defendant challenges the sufficiency of the evidence, our standard of review is well-settled. As our supreme court has explained:

"[T]he State carries the burden of proving beyond a reasonable doubt each

> element of an offense. [Citations.] Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. [Citations.] Under this standard of review, it is the responsibility of the trier of fact to fairly * * * resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. [Citations.] Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses. [Citations.] A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. [Citations.] This same standard of review applies regardless of whether the defendant received a bench or jury trial. [Citation.]" (Internal quotation marks omitted.) *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009).

¶ 42 "Whether a killing is justified under the law of self-defense is a question of fact to be determined by the trier of fact." *People v. Young*, 347 Ill. App. 3d 909, 920 (2004). Once a defendant raises an affirmative defense of self-defense, " 'the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense.' [Citations.]" *Id*. "The standard of review for this issue is whether, taking all of the evidence in the light most favorable to the State, any rational trier of

fact could have found, beyond a reasonable doubt, that the defendant did not act in self-defense." *Id*.

¶ 43 The evidence in this case was sufficient to prove defendant guilty beyond a reasonable doubt of first degree murder. The evidence established that defendant was the aggressor and that the trial court correctly rejected defendant's claim of self-defense. Defendant armed himself with a large knife, sought out Kiki, initiated the physical altercation, and stabbed the unarmed Kiki eight times, including five times in the back. "[W]hether the defendant was the initial aggressor, *i.e.*, the one who provoked the fatal confrontation, is a question of fact to be decided by the trier of fact." *People v. De Oca*, 238 Ill. App. 3d 362, 367 (1992).

¶ 44 Citing *People v. Woods*, 2011 IL App (1st) 092908, defendant concedes that "[i]t is well-settled under Illinois law that the aggressor of an altercation that results in death will not be excused from criminal liability via the affirmative defense of self defense." He acknowledges that self-defense will not be available to someone who "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." 720 ILCS 5/7-4(b). Defendant contends, however, that "[n]o general rule of law exists that prohibits an 'aggressor' from submitting a request for, or being convicted of, the lesser mitigated offense of second degree murder." Defendant contends that, even if the State presented sufficient evidence that he was the initial aggressor, it does not negate the possibility of a second degree murder conviction.

¶ 45 In *People v. Zapata*, 347 Ill. App. 3d 956 (2004), relied upon by the State, the court rejected the defendant's argument that he should have been found guilty of second degree murder.

The court concluded as follows: "the transcript shows that the trial court completely rejected the notion that this was a case of self-defense, finding that defendant was the aggressor, which negates the possibility of reasonable and unreasonable self-defense." *Id*., citing *People v. Morgan*, 187 Ill. 2d 500, 535 (1999). Defendant now contends that the State's blanket assertion that a finding that the defendant is the aggressor in the context of a self-defense claim to first-degree murder negates the possibility of unreasonable self-defense for purposes of second degree murder is unsupported by the law because *Morgan* is no longer good law. As defendant notes, the Illinois Supreme court recently held that "when the evidence supports the giving of a jury instruction on self-defense, an instruction on second degree murder must be given as a mandatory counterpart." *People v. Washington*, 2012 IL 110283, ¶ 56. We agree. However, this bench trial does not involve an issue of jury instructions. More importantly, as we have already explained, the trial court was well aware that defendant could be found guilty of second degree murder, even if his claim of self-defense failed. There is no indication in the record that the trial court did not consider the issue of second degree murder merely because it found that defendant was the aggressor. Rather, as the record indicates, not only did the trial court conclude that defendant was the aggressor, it found defendant's version of the attack to be incredible. Thus, defendant's primary complaint is with the trial court's credibility determinations. However, "in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Moreover, this court "will not reverse a conviction simply because the evidence is contradictory [citation] or because the

defendant claims that a witness was not credible." *Id*.

¶ 46 Defendant also asserts that "Greg Latson's testimony was the only evidence presented by the State to support a conviction for first degree murder." We disagree. Also, as we have already noted, the trial court here expressly stated that it considered *all* the evidence. Defendant has conceded that "[a]dmittedly, there may be an overlap in the facts relevant to the issue of whether one is the aggressor and to the question of mitigation for purposes of second degree murder." However, the record here supports the trial court's determination that defendant was the aggressor and that, *at no time*, did defendant act with a belief - reasonable or not - that he needed to use self-defense. Indeed, in detailing the reasons why it discredited defendant's testimony, the trial court specifically rejected defendant's claim that "he was swinging the knife wildly" to defend himself from the unarmed Kiki. As the court explained, this testimony was inconsistent with the physical evidence of Kiki's fatal injuries of three *stab* wounds to the left front and abdomen and five *stab* wounds to the back." (Emphasis added.) Commenting on the depth of the wounds evidenced by the photographs and the autopsy results, the court found it was "abundantly clear that those were all thrusting stab wounds that cut deeply into [the victim]." The court further found that "[t]hey were not remotely like the wounds you would see had he been slashing the knife wildly. There were no wounds consistent with slashing the knife wildly."

¶ 47 Defendant has additionally asserted that "[t]he trial court never once uttered the word provocation or engaged in any related analysis." He contends that the court heard sufficient evidence of mutual combat and an unreasonable belief in the need to use self defense. We disagree. "Mutual combat is 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." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). There was no mutual combat in this case. It is not mutual combat when the defendant's response is disproportionate to the provocation, especially when a deadly weapon is used. *Id*. at 126-27.

¶ 48 In sum, the evidence established that defendant was the aggressor, was not justified in stabbing the unarmed victim five times in the back and three times in the chest and abdomen with a large knife, and did not act in a belief, either reasonable or unreasonable, that he needed to use deadly force to prevent an aggravated battery upon himself. The State proved that defendant was guilty beyond a reasonable doubt of first degree murder.

¶ 49 *Defendant was Not Denied Effective Assistance of Counsel*

¶ 50 Defendant next argues that he was denied effective assistance of counsel at trial. As the State notes, defendant raises six separate claims of incompetence on the part of his trial counsel, each with multiple parts.

¶ 51 Claims of ineffective assistance of counsel are evaluated under the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) that was adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish a violation of the constitutional right to effective assistance of counsel under the *Strickland* test, a defendant must show first that his attorney's representation fell below an objective standard of reasonableness, and second, that the deficient performance so prejudiced the defense that there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. A defendant has the burden of demonstrating that he has received ineffective

assistance of counsel. *People v. Lundy*, 334 Ill. App. 3d 819, 829 (2002). A defendant must satisfy both prongs of the *Strickland* test. *People v. Jones*, 219 Ill. 2d 1, 24 (2006).

¶ 52 Defendant first contends that his counsel failed to appreciate the distinctions between first degree murder, second degree murder, and self-defense. He argues that "[c]ounsel was ineffective in failing to argue for second degree murder." He also claims his counsel "was unaware of the legal difference between the affirmative defense and the lesser mitigated defense." As the transcript shows, counsel argued that the question was whether defendant, at the time the fight broke out, was justified in using self defense of deadly force to defend himself from great bodily injury. He also argued that the case involved what had happened before, at the time defendant had been jumped, and "the fear that went into his head when he took that knife out. He was under attack." Defendant, noting that the distinction between second degree murder and self defense "hinges upon the degree of reasonableness" of defendant's belief in the need to use deadly force to defend himself from great bodily injury, now contends that "there was no sound strategic reasons [*sic*] for his counsel's failure to argue for an alternative finding of second degree murder."

¶ 53 Nothing in the record, however, shows that his counsel was "unaware" of the distinction between self-defense and second-degree murder. Our scrutiny of counsel's performance is "highly deferential" and we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *People v. Pecoraro*, 175 Ill. 2d 249, 319. A "defendant must overcome the presumption that *** the challenged action might be sound trial strategy." *Id*. at 319-20. As the State notes, a trial counsel's decision to pursue an

"all-or-nothing" defense is recognized as a sound trial strategy. See *People v. Barnard*, 104 Ill.2d 218, 231–32 (1984). In *Barnard*, the Illinois Supreme Court reasoned that the defense counsel's strategy to present the jurors with only the option of finding the defendant guilty or not guilty of the murder charge, and not to present them with the alternative of voluntary manslaughter [now called second degree murder], on which they might reach a compromise verdict, did not demonstrate incompetence of counsel. *Id.* Counsel could have reasonably believed that the instruction would have converted a probable acquittal into a possible conviction of the lesser crime. *Id*. We additionally note that, in the instant case, even if defendant could establish that his counsel's failure to argue for second degree murder was not a trial strategy and was, instead, the result of his counsel's incompetence and misunderstanding of the law, defendant cannot establish prejudice under the second prong of *Strickland*. This was a bench trial, and, as noted earlier, the trial judge expressly stated that he was cognizant of the fact that he could find defendant guilty of second degree murder, after considering all of the evidence.

¶ 54 Defendant next argues that his counsel was incompetent because he "failed to understand and argue the admissibility of evidence pertaining to Kiki's propensity for violence and to properly lay a foundation for [defendant's] state of mind as it related to this evidence." In *People v. Lynch*, 104 Ill. 2d 194 (1984), the Illinois Supreme Court held that when self-defense has been properly raised, a defendant may present evidence of the victim's aggressive and violent character. As the *Lynch* court noted, this evidence may tend to support a defendant's theory of self-defense in two ways. *Id.* at 199-200. "First, the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior." *Id*. at

200. "The same deadly force that would be unreasonable in an altercation with a presumably peaceful citizen may be reasonable in response to similar behavior by a man of known violent and aggressive tendencies." *Id*. "Second, evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened." *Id*. "In this situation, whether the defendant knew of this evidence at the time of the event is irrelevant." *Id.*

¶ 55 As the State correctly notes, "the record unequivocally establishes that extensive *Lynch* evidence – including that of defendant's knowledge about Kiki's attempt to recruit Anthony into the Latin Counts – was repeatedly admitted and vigorously argued." As to the first purpose recognized by *Lynch*, defendant testified to five separate incidents of Kiki's aggressive and violent past, and also testified that Kiki was known to carry weapons such as bats and pipes. Defendant also testified about his state of mind as a result of his knowledge of these incidents and testified that he was afraid Kiki was going to kill him. Moreover, several witnesses testified, corroborating defendant's knowledge of Kiki's violent and aggressive past. Thus, defendant has failed to establish that his counsel's representation fell below an objective standard of reasonableness where defense counsel admitted extensive *Lynch* evidence.

¶ 56 Defendant next argues that he received ineffective assistance of counsel as a result of his counsel's "purposeless and ineffective cross-examination" which resulted in his" fail[ing] to subject the State's case to any meaningful adversarial challenge." Specifically, defendant challenges his counsel's cross-examinations of Kiki's mother, America Miramontes, and Kiki's best friend, Greg Latson. Regarding Kiki's mother, a life-and-death witness, defendant asserts

that his counsel attempted to use her to lay the foundation for defendant's knowledge of Kiki's violent behavior or instances of violence, even though any reasonable attorney would know that she was not the proper witness to lay the foundation. Nonetheless, although defense counsel was unsuccessful in his attempt to elicit testimony of a 2006 incident demonstrating Kiki's violent nature, counsel successfully elicited testimony – from Kiki's own mother – that Kiki was in a gang. Regarding Latson's testimony on cross-examination, defendant contends that his counsel's questioning allowed Latson the opportunity to retell his version of events that he had testified to on direct. However, as the State notes, a review of the entire cross-examination of Latson shows that counsel was testing the plausibility of Latson's version in order to further the defense theory that this was a planned attack on defendant. A defendant is entitled to competent, not perfect representation, and the fact that in retrospect a tactic proved unsuccessful does not demonstrate incompetence. See *People v. Gonzalez*, 238 Ill. App. 3d 303, 324 (1992). Moreover, matters of trial strategy include whether to call particular witnesses and whether and how to conduct cross-examination. See, *e.g.*, *People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 44. Trial counsel's decision regarding how to cross-examine a witness is entitled to substantial deference from this court." *People v. Johnson*, 331 Ill. App. 3d 239, 247 (2002).

¶ 57 Defendant next argues that his counsel "failed to object to improper witness evaluation and irrelevant evidence." On this issue, defendant again challenges his counsel's cross-examination of Latson, as well as the cross-examinations of Cook County assistant medical examiner Dr. Tera Jones, Vanessa Claudio, Greg Latson, and the police officers.

¶ 58 *Dr. Tera Jones*

¶ 59 Although the parties stipulated to the fact that Dr. Tera Jones was an expert in forensic pathology, defendant argues that she was not qualified as a weapons or knife expert and his counsel, therefore, was incompetent for allowing the State to ask questions outside of her area of expertise. He contends that she was not qualified to give her opinion regarding whether the knife that was recovered could have caused the victim's injuries.

¶ 60 As the State notes, however, defense counsel did object to at least one question on this topic and the court overruled the objection. The State argues that Dr. Jones's testimony was *"precisely* the type of opinion testimony that a medical examiner is expected to provide." (Emphasis in original.) The State cites several cases where a medical examiner opined as to the cause of death. See, *e.g.*, *People v. Buss*, 187 Ill. 2d 144, 168 (1999)("In [Dr.] Blum's opinion, the stab and slash wounds were made by a sharp, single edged knife that was relatively long and narrow"); see also *People v. Banks,* 237 Ill. 2d 154, 168 (2010) (noting that the chief medical examiner for Cook County opined that the cause of death "was the gunshot wound to the left thigh and that [the] manner of death was homicide"). Defendant argues that none of these cases involved the issue of whether a proper foundation had been laid, *i.e.*, none of these cases involved a claim by a defendant that the medical examiner was not qualified to provide an opinion as to whether the knife or other weapon could have caused the injury or death. Regardless, it is well-settled that "experts, otherwise qualified, are generally permitted to state their opinions if the information upon which they are basing their opinions is the type reasonably relied upon by the experts in their field." *People v. Sims* 374 Ill. App. 3d 231, 252 (2007). Here, Dr. Jones testified that one of her employment duties was "to determine cause and manner of

death; and in that course, sometimes *** do autopsies." She testified that she performed an autopsy on Kiki on June 15, 2008. Autopsy reports "are reasonably relied upon by experts in the field of forensic pathology to form their opinions as to the cause and manner of death." *Id*., citing *People v. Nieves*, 193 Ill. 2d 513, 528 (held that in reviewing autopsy photographs, postmortem examination report, toxicology report, evidence receipt, diagrams prepared during autopsy, and investigator's report, chief examiner relied upon type of evidence reasonably relied on by experts in the field of forensic pathology to form their opinions as to the cause and manner of the victim's death). Dr. Jones was qualified to give the opinions that she provided. Where an "objection would have been overruled," a defendant is not denied effective assistance of counsel due to trial counsel's failure to object. See, *e.g.*, *People v. Bean*, 137 Ill. 2d 65, 132 (1990); *People v. Eddmonds*, 101 Ill. 2d 44, 66 (1984). We find meritless defendant's argument that his counsel's performance was deficient because he did not object, on foundation grounds, to the State's elicitation of Dr. Jones's opinions.

¶ 61 *Vanessa Claudio*

¶ 62 Defendant also argues that defense counsel's performance fell below an objective standard of reasonableness when, during Vanessa Claudio's testimony, he failed to object when the State asked numerous leading questions and improper questions that had been asked and answered, "until it got its preferred answer." He further asserts counsel allowed the State to repeatedly ask Vanessa what Ashur said before he left the Claudio residence until Vanessa "finally" testified as to what Ashur said.

¶ 63 Our review of the record, including Vanessa's direct examination that took place prior to

the pages cited by defendant, shows that his counsel did object to a leading question and the objection was overruled. The State argues that it was merely trying to confirm Vanessa's answers in order to impeach her with her grand jury testimony, which it later did. We agree. Regarding the elicitation of defendant's inculpatory statement, the following colloquy occurred:

"Assistant State's Attorney (ASA): Vanessa, that wasn't my question. Without getting into who else said anything, because we can't do that, did the defendant say anything? Did you hear him say anything?

Vanessa: No.

ASA: You didn't hear him say any words at all?

Vanessa: When he was walking out?

ASA: Yes.

Vanessa: Yes.

ASA: What did he say?

Vanessa: 'Cause he said he was going to talk to the guys that are messing with my brother.

ASA: What were his words exactly that he said?

Vanessa: That he's going to get them.

ASA: And that's when the defendant left your house, correct?

Vanessa: Yes."

¶ 64 A defense counsel's failure to object to trial testimony does not necessarily establish substandard performance and may be a matter of strategy. *People v. Graham*, 206 Ill. 2d 465,

478-79 (2003). In the instant case, as the State notes, defense counsel did not object and, instead chose to rehabilitate Vanessa upon cross-examination by giving her a chance to fully explain her answer. Defense counsel elicited the following testimony from Vanessa:

> "My mom got a phone call saying some guys and Patchy (phonetic) were messing with my little brother because they said something about he was dismissed.
>
> And Ashur knew them, so he was --
>
> ***
>
> "So Ashur was leaving, and he said he was going to talk to him, meaning like he was going to – he didn't say he was going to go get him. He said he was going to go talk to them 'cause he knew them."

Defendant has failed to establish that his defense counsel's performance fell below an objective standard of reasonableness when he failed to object during Vanessa's direct examination.

¶ 65 *Greg Latson*

¶ 66 Defendant also asserts that "during Greg Latson's testimony counsel allowed the State [to] lead Greg through parts of its most important witness's testimony." However, defendant has failed to indicate which questions were improper, why they were improper or how he was prejudiced, either in his opening brief or his reply brief.

¶ 67 *Police Officers*

¶ 68 Defendant argues that his "[c]ounsel failed to challenge the admissibility of certain evidence based on relevancy, hearsay and its prejudicial nature," including Anthony Claudio's

hearsay statements to Sergeant Dave Daigle, and other cumulative investigative details. Anthony Claudio's statement was in regard to defendant's "departure from the crime scene" which led to the recovery of defendant's knife case. As the State notes, "[t]he fact of flight, when considered with all other evidence in a case, is a circumstance which may be considered by the [trier of fact] as tending to prove guilt." *People v. Lewis*, 165 Ill. 2d 305, 349 (1995). Moreover, testimony used to explain the progress of a police investigation is not offered to prove the truth of the matter asserted and therefore is not hearsay. *People v. Sample*, 326 Ill. App. 3d 914, 920 (2001).

¶ 69 Defendant next argues that counsel did not adequately prepare him to testify since the trial court found him to be not credible. Defendant cites no authority for his argument. Defendant raises another argument which is somewhat contradictory. He argues that "the record clearly shows that the courtroom was filled with tension and animosity in a crowded courtroom where security was a concern that this animosity persistently disturbed the trial judge throughout the entire trial." Yet defendant also asserts that "defense counsel did not make a *specific* record on the commotion or nature of the security problems." (Emphasis added.) In any event, defendant argues only that this "constant distraction *could have* impacted [his] right to a fair trial and due process." (Emphasis in original.) To the extent defendant argues that there were additional problems not reflected by the record, that issue is not before this court. As we have noted, where a defendant's ineffective-assistance-of-counsel claim requires consideration of matters outside the record on direct appeal, defendant's claim can be addressed in a proceeding for postconviction relief because a complete record can be made. *People v. Millsap*, 374 Ill. App. 3d 857, 863 (2007).

¶ 70 Defendant has failed to establish that his counsel's performance fell below an objective standard of reasonableness. Thus, he has failed to meet the first prong of the *Strickland* test. "In determining whether a defendant has received ineffective assistance of counsel, a reviewing court may review either prong first, and the court need not consider both prongs of the standard if a defendant fails to show one prong. [Citation.]" (Internal quotation marks omitted.) *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008). Having determined that defendant failed to meet the first prong, we need not address the second prong of the *Strickland* test. Nonetheless, we agree with the State that, even if defendant could have satisfied the first prong of the *Strickland* test, he could not establish prejudice on this record. The evidence against defendant showed, among other things, that defendant: (1) had animosity toward Kiki; (2) armed himself with a deadly weapon; (3) stated he was going "to get" Kiki; (4) sought out Kiki; (5) approached Kiki from behind as he was walking away; (6) confronted Kiki with a deadly weapon; (7) yelled out hateful comments during the attack ("Fuck you, Kiki, I hope you die") and declared allegiance to his gang ("King Love"); (8) stabbed Kiki three times in the chest and five times in the back, penetrating the heart; (9) fled from the scene; and (10) failed to make a police report. In view of the overwhelming evidence against defendant, he has failed to establish that, but for the alleged errors of his counsel, the outcome of his trial would have been different.

¶ 71 In sum, defendant has failed to establish that he received ineffective assistance of counsel. None of defendant's numerous claims of incompetence on the part of his trial counsel have merit. Even if defendant could satisfy the first prong of the *Strickland* test, defendant has failed to satisfy the prejudice prong of the *Strickland* test.

¶ 72 *Mittimus To Be Corrected*

¶ 73 Defendant contends, and the State agrees, that the mittimus must be corrected. The relevant statutory language states:

> "§ 9-1. First degree Murder
>
> ***
>
> (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1 (West 2003).

Defendant was indicted on two separate counts, under section 5/9-1(a)(1) and section 5/9-1(a)(2), but the trial court did not reference either count of the indictment or any statutory provision when it made its finding that defendant was guilty of "first degree murder." The parties agree that the conviction on the second count must be vacated. See *People v. Smith*, 233 Ill. 2d 1 (2009) (a defendant is "presumed to be convicted of the most serious offense - intentional murder - so that the judgment and sentence should be entered on the conviction for intentional murder."). The appellate court has the authority, pursuant to Supreme Court Rule 615(b) (eff. Jan.1., 1964) to correct the mittimus without remanding the case to the trial court. See also *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Defendant acknowledges this court's authority to modify the judgment, yet requests that we remand the case for re-sentencing. Defendant has presented no

reason why remand is required and we decline his request. Accordingly, we direct the clerk of the circuit court to correct the mittimus to reflect defendant's single conviction for first degree murder under section 9–1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9–1(a)(1) (West 2003)).

¶ 74 CONCLUSION

¶ 75 For the foregoing reasons, we affirm the judgment of the circuit court and direct the clerk to correct the mittimus.

¶ 76 Affirmed; mittimus corrected.