2016 IL App (1st) 112816-U
No. 1-11-2816

THIRD DIVISION
April 27, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06 CR 9303
	)	
TERRY ROGERS,	)	
	)	The Honorable
Defendant-Appellee.	)	Neera Walsh,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for first degree murder affirmed where the State proved his guilt beyond a reasonable doubt and where the evidence did not support his claim that he shot the victim because he had an unreasonable belief in the need for self-defense such that a conviction on the lesser mitigated offense of second degree murder was warranted. Remand not required for appointment of new counsel to litigate defendant's *pro se* ineffective assistance of counsel claims where the court conducted a preliminary *Krankel* inquiry into defendant's claims and found that the claims pertained to reasonable trial strategy. Defendant's 75-year sentence upheld where the court properly applied a 25-year firearm enhancement and where the record did not reveal that the court relied on improper factors and ignored mitigating evidence when it imposed defendant's sentence, which upon consideration, is not excessive.

¶ 2 Following a bench trial, defendant was convicted of first degree murder and was sentenced to 75 years' imprisonment. On appeal, defendant challenges his conviction and argues that the State failed to prove him guilty of first degree murder beyond a reasonable doubt. Alternatively, he contends that the circuit court erred in rejecting his claim that he acted pursuant to an unreasonable belief in the need for self-defense and that his conviction should be reduced to second degree murder. Defendant also contends that the circuit court erred in failing to appoint outside counsel to argue his *pro se* motion containing claims of ineffective assistance of trial counsel. Finally, defendant challenges his sentence. He argues that the court erred in applying a 25-year firearm sentencing enhancement, relied on improper factors, and failed to consider relevant mitigating evidence, which resulted in an excessive sentence. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On March 24, 2006, Lyntrell Heath suffered multiple gunshot wounds and died as a result of his injuries. Defendant was subsequently arrested in connection with Heath's death and charged with multiple offenses including first degree murder, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon. Defendant elected to proceed by way of a bench trial.

¶ 5 At trial, Glenda Harris, a "close friend" of Heath's, testified that he spent time at her house located at 3452 West Jackson Boulevard, during the afternoon of March 24, 2006. Sometime that evening, Duke, another friend of Heath's, was shot near her house. Following Duke's shooting, Harris and Heath left her residence and drove off in Harris's 2005 Jeep Cherokee. Heath was in the drivers' seat and Harris was in the front passenger seat. Harris testified that they were driving south on Homan Avenue towards 16th Street, when Heath saw

"some guys" that he wanted to talk to driving northbound in another vehicle. He tried to make a U-turn, but the driver of the other car had completed his own U-turn and hit the back of Harris's Jeep. After the collision, "people started shooting." Harris testified that she did not know how many people were shooting because she ducked down inside of the vehicle. Heath, in turn, opened her passenger-side door, jumped over her, exited the vehicle and began running. As Heath was running, Harris "heard a lot more shots." She testified that she had not seen Heath in the possession of a gun at any time that day.

¶ 6 On cross-examination, Harris provided further details about Duke's shooting. She testified that Heath and Duke had been outside of her house in two separate vehicles when she looked out of her window and "saw some cars pull up and start shooting at their cars." Duke ran off while Heath "pulled off" in his vehicle. Harris called Heath to "check on him" and to tell him that she thought Duke had been shot. Heath returned to Harris's house approximately 20 minutes later. When Heath returned, he asked Harris if he could use her Jeep to "talk to some guys that he thought had something to do with [Duke's shooting.]" Although she admitted speaking to detectives following Heath's shooting, Harris denied that she had told them that Heath was using her Jeep to go to his "baby's mama's house."

¶ 7 Chicago Police Officer David Santos testified that he was on patrol during the late evening hours of March 24, 2006. Officer Santos recalled that shortly before midnight, he and his partner, Natalie Fisher, were conducting a traffic stop near 15th Street and Homan Avenue when they heard "several loud reports, gunshots." After hearing those gunshots, they terminated the traffic stop and "proceeded towards the sound of the gunshots." As he drove southbound on Homan Avenue, Officer Santos observed "a SUV[1] [positioned] sideways in the middle of the

[1] For the sake of clarity, we note that witnesses use the terms "SUV" and "Jeep" interchangeably when referring to Harris's vehicle.

street." Once they got closer to the SUV, a dark-colored car backed away from the SUV and began traveling northbound on Homan Avenue. It crashed shortly after passing Officer Santos's marked squad car. Officer Santos stopped his squad car and he and his partner exited their vehicle. He then saw "three male blacks in dark clothing" run from the crashed vehicle. Two of the males ran eastbound and the other male ran westbound. Officer Santos pursued the individual who was running westbound, and his partner got on the radio and gave a "flash message" about the two individuals running eastbound. He was ultimately able to apprehend the man running westbound in a vacant lot located near 15th Street and Homan Avenue. That individual was subsequently identified as Willie Kirkwood.[2] The two other men who fled from the scene of the crash were not apprehended. After apprehending Kirkwood, Officer Santos brought him back to his squad car. As he did so, he noticed that his partner was helping a female to get out of the passenger side of the SUV that was positioned in the middle of the street. Sometime thereafter, he and his partner relocated to the 11th District Police Station.

¶ 8 Chicago Police Officer Joseph Chausse testified that on March 24, 2006, shortly before 12 a.m., he was on routine patrol with his partner, Officer Joseph Ramaglia, near the area of 15th Street and Homan Avenue, when they heard a radio call and "proceeded to the alley between Spaulding and Christiana, on the 1500 block." At that time, Officer Chausse "saw [defendant] run from a location on Christiana, to approximately 1528 Christiana and try [to] summon[] a passing car." Defendant was the only pedestrian on the street at that time. The car did not stop and Officer Chausse placed defendant into custody. After defendant was detained, Officer Chausse and his partner proceeded to the gangway located at 1520 South Christiana, where they

[2] The record does not contain any information as to whether Kirkwood was charged in connection with this case.

had first seen defendant. At that location, they found several items including a semi-automatic handgun, a black jacket, and what appeared to be a bullet-proof vest.

¶ 9 Chicago Police Officer Gustavo Dominguez testified that he was dispatched to the 1500 block of South Christiana sometime after midnight on March 25, 2006. When he arrived at that location and spoke to the officers who were already on scene, he was directed to the gangway located at 1520 South Christiana. At that location, he observed a vest, a black jacket, and a two-toned gun. Officer Dominguez testified that he guarded those items until they were photographed and recovered by police forensic investigators.

¶ 10 Detective Gregory Jones testified that he was one of the lead detectives assigned to investigate Heath's shooting. He confirmed that during the course of that investigation, he spoke to defendant in the presence of Assistant State's Attorney (ASA) Michael Clark at approximately 11:30 a.m. on March 26, 2006. Defendant was read his *Miranda* rights and proceeded to provide a videotaped statement.

¶ 11 On cross-examination, Detective Jones testified that defendant had been in custody for about 11 hours before he provided the videotaped statement. He further testified that he spoke with defendant approximately four times while he was in custody before defendant gave his statement. None of those conversations lasted more than 20 minutes. Defendant's statement lasted approximately 45 minutes, and Detective Jones testified that he had to leave the room several times. He estimated that he was present for approximately 10 minutes of defendant's videotaped statement.

¶ 12 Detective Patrick O'Donovan testified that he too was assigned to investigate Heath's shooting and that he also spoke to defendant after he was taken into custody and before he provided his videotaped statement. Detective O'Donovan was also present for portions of ASA

Clark's interview of defendant. On cross-examination, he confirmed that defendant was in custody for hours before he provided the statement. He also confirmed that he spoke to defendant several times throughout the day and asked him questions about the shooting.

¶ 13 In his videotaped statement, defendant stated that he had been "riding around" and drinking and smoking with his sister, Shamika, Shamika's boyfriend, Richard, and a friend named Jackie and that he exited the vehicle to "tak[e] a piss." At that point, an SUV was making a U-turn and another car crashed into the SUV and people began shooting. Defendant stated that he was simply in the "wrong place, wrong time" and that when shots were fired, he "ducked down." He acknowledged that he had been in possession of a gun and bullet-proof vest that night, but explained that he needed those items for protection because "there was a price on [his] head." He emphasized that he had "no complications[,] no argument" with any of the individuals involved in the shooting and only brought out his weapon when he heard shots fired. At that point, defendant stated that he began "just shooting at everybody" because bullets were "flying [his] way." Defendant recalled seeing one guy exit the SUV in the middle of the street and "at least two[,] maybe three" guys exit the other car. He stated that he "knew of" the men involved but he "ain't never rode around with them, [he] never smoked a cigarette with them, [and he] never drank a beer with them."

¶ 14 Defendant initially stated that he stayed on the east side of Homan Avenue during the shooting. When asked if he had an explanation as to how .40 caliber shell casings could be recovered near the victim's body on the west side of the street, defendant guessed that he might have been in the middle of the street at some point. Later, he admitted running toward the west side of the street, which was the direction that Heath was running. Defendant further stated that his back was turned and he was moving fast and was scared as he tried to get away from the

scene. He estimated that he may have gotten within six to eight feet of Heath, but denied that he had ever stood over him and shot him. Defendant acknowledged that that he "did[] [not] know exactly" whether any of the other guys were shooting at him. Initially, defendant stated that he did not know if Heath had a gun; however, he later admitted that he did not see a gun in Heath's hands. Although he admitted discharging his weapon, defendant denied that he was shooting at any individual person. He stated that he had been shooting "towards the whole thing." Defendant also admitted that he kept shooting until he saw the police arriving on the scene.

¶ 15 During his videotaped statement, defendant was shown the black jacket, vest, and gun that were recovered by police near the scene of the shooting, and acknowledged that those items were his and that he threw them away after the shooting.

¶ 16 In response to inquiries from defendant, ASA Michael Clark acknowledged on videotape that he had spoken to defendant's sister Shamika and that she had provided an oral statement. In her statement, Shamika stated that sometime after 11:30 p.m. on March 24, 2006, she, defendant, and Richard were passenger's in her friend Jackie's car. Defendant was seated in the front passenger's seat. After they passed 16th Street, Shamika observed an SUV driving north on Homan Avenue pull over on the side of the street. Jackie, in turn, pulled her car over and defendant exited Jackie's car. Shamika did not see where her brother went. Shamika did see the SUV attempt to make a U-turn, but stated that a burgundy car arrived on Homan Avenue and cut off the SUV before it could change its direction. Several men with handguns then exited the burgundy car and began firing at the SUV. She saw a male passenger exit the SUV and attempt to run away; however, he was shot while trying to do so. She did not observe a gun in the man's hands. At that point, Jackie began driving away. Defendant never re-entered Jackie's car. During the shooting, Shamika did not see where her brother was at or what he was doing. When

Shamika was shown a picture of a black jacket, and she identified the jacket as an item of clothing defendant had been wearing on March 24, 2006. She also confirmed that she was aware that her brother owned a bullet-proof vest.

¶ 17 David Ryan, a Forensic Investigator with the Chicago Police Department, testified that he was dispatched to the 1500 block of South Christiana Avenue on March 25, 2006, at approximately 12:50 a.m. When he arrived, "there were [already] police on the scene at 1520 South Christiana" as well as two other forensic investigators. He observed several items on the pavement next to the building including a black jacket, a Smith & Wesson .40 caliber semi-automatic handgun, and what appeared to be a bullet-proof vest. After forensic investigator Dunnigan photographed those items, Ryan and Forensic Investigator Stocker recovered the items and inventoried them in accordance with police protocol. Ryan testified that he left the South Christiana scene sometime after 1 a.m. and relocated to Area 4 to administer a gun residue test to defendant. He administered the test to defendant at approximately 1:45 a.m. and subsequently relocated to 1522 South Homan, the scene of the homicide, which had been taped off. There were yellow crime scene markers placed around the scene including around the victim and the Jeep. Ryan testified that he fingerprinted Heath, photographed his wounds, and searched his pockets. Three cell phones were found "either next to the victim or on his person" and were turned over to the detectives on scene. A fired bullet was also recovered "in the back of the [victim's] clothing." Various other items were recovered from the taped-off area between 1500 South Homan to 1523 South Homan, including "metal fragments, fired bullets, fired cartridge casings," "a ball cap" a "small pouch in [a] vehicle" and another cell phone. Altogether, the forensic investigators recovered 19 fired cartridge casings of different calibers, including

multiple .40 caliber cartridge casings. They also recovered several fired bullets, including .40 caliber fired bullets, and bullet fragments.

¶ 18 On cross-examination, Ryan acknowledged that he did not administer a gunshot residue test to Heath or to any part of the Jeep. The only other GSR test was administered to Willie Kirkwood. He also confirmed that he did not personally place any of the yellow crime scene markers throughout the crime scene. Ryan further testified that he had examined that the .40 caliber semi-automatic recovered from the 1520 South Christiana address and had observed that the 10-shot capacity magazine was empty.

¶ 19 Robert Berk, a forensic scientist and trace evidence analyst employed by the Illinois State Police, testified that he performed gunshot residue tests on samples taken from defendant's hands as well as from the cuffs of the black jacket that police had recovered during the course of their investigation into Heath's shooting. Berk testified that the samples taken from defendant's right and left hands did not test positive for the presence of gunshot residue; however, the right cuff of the black jacket tested positive for gunshot residue. The left cuff of the jacket, however, did not yield a positive gunshot residue result.

¶ 20 The parties stipulated to the testimony of Doctor Clare Cunliffe, an assistant medical examiner at the Office of the Cook County Medical Examiner. Pursuant to the stipulation, Doctor Cunliffe would testify that she performed Heath's autopsy and that during the course of that autopsy, she located eight separate gunshot wounds on the victim's body. Specifically, the victim was shot once in the back of his head, once in his left temple, once on the top of his left shoulder, once in his rear left shoulder, twice in his left thigh, once in his outer left thigh, and once in his right palm. Doctor Cunliffe would further testify that during the course of the autopsy, she recovered a deformed lead bullet and copper jacket from the victim's anterior left

scalp, a deformed copper jacketed bullet from the musculature of the victim's left thigh, and a fragment of a copper jacket and lead bullet from the soft tissues of his left thigh. The bullets and fragments were then placed into sealed envelopes and sent to the Illinois State Police Crime Lab for testing and analysis. Finally, Doctor Cunliffe would testify "that the cause of Lyntrell Heath's death was multiple gunshot wounds and the manner of death was homicide."

¶ 21 Peter Brennan, a forensic chemist with the Illinois State Police, confirmed that various items connected with Heath's shooting were sent to the Illinois State Police Crime Lab for analysis. Leah Kane, one of the forensic chemists that he supervised, analyzed various ballistic items collected during the course of the Chicago Police Department's investigation into Heath's shooting, including a .40 caliber Smith and Wesson semi-automatic handgun, fired bullet jacket fragments, fired bullets and additional metal fragments. Kane concluded, and Brennan agreed, that various bullet jackets and bullets recovered from Heath's body and from the scene were fired from the .40 caliber Smith and Wesson handgun. Specifically, the fired bullet jacket that had been removed from the victim's body was fired from that gun and the bullet, which had been recovered from inside of the victim's shirt had been fired from defendant's gun. Additional ballistics evidence recovered on the street at the scene of the crime were also matched to defendant's gun including a fired bullet, two fired bullet jackets, seven .40 caliber cartridge cases.

¶ 22 On cross-examination, Brennan acknowledged that bullet casings are "often times" examined for latent fingerprints if requested by the submitting agency, but no fingerprint analysis was performed on the casings submitted in connection with Heath's death. Based upon the expended bullets recovered at the scene, Brennan testified that "a minimum of two" weapons were fired at the scene.

¶ 23 After presenting the aforementioned evidence, the State rested its case and defendant moved for an acquittal. The court denied the motion after hearing arguments from both parties, finding that the State had "made a *prima facie* case at this time."

¶ 24 Defendant then recalled Forensic Investigator David Ryan and inquired about the means by which physical evidence at the crime scene was marked. Although he did not personally place any of the markers, Ryan testified that he was familiar of the procedure utilized by the Chicago Police Department's forensic investigators. He explained that on Homan Avenue, the street in which the shootout occurred, odd numbered addresses are located on the east side of the street and even numbered addresses are located on the west side of the street. He further testified that all of the .40 caliber ballistics evidence was recovered on the west side of the street. Although the Jeep was examined for firearms evidence, investigators found no spent rounds within the vehicle. They did however, find metal fragments on the driver's-side door. On cross-examination, Ryan confirmed that no firearms were found inside of the Jeep. Similarly, no spent shell casings were recovered from inside of the vehicle.

¶ 25 Defendant elected not to testify and the defense called no other witnesses. The parties subsequently delivered closing arguments. After hearing from the parties and considering the evidence, the court found defendant guilty of unlawful use of a weapon by a felon and first degree murder. In rendering its verdict, the court stated:

> "I think the two sides in this case are definitely diametrically opposed as to what happened. I think they also agree that the victim in this case, Lyntrell Heath, was killed on March 24th of 2006 and he died of multiple gunshot wounds and the area which he died.

I believe based on the testimony that was presented there were 3 different guns that were out there and there were probably 3 shooters. The question remains as to whether this defendant intended to commit first degree murder.

He by his own statement puts himself at the scene. He by his own statement puts a gun in his hand. He by his own statement says it was a 40 caliber I believe. And he by his own statements indicates he was firing.

This defendant's statement initially is that he was in this area and that he was answering a call of nature, to use the vernacular and minding his own business when he was out there and all of a sudden a shoot out broke out and he fired in self-defense.

The Court does not believe that's how it happened. This is somewhat of a plan. I do not believe that this was a second degree [murder]. I do not believe it was a second degree because of the actions of the defendant and also because of his statement."

¶ 26 Following the verdict, defendant's attorneys filed a post-trial motion, which was denied. During the hearing on the motion, defendant informed the court that he had his own *pro se* motion, in which he was raising allegations pertaining to ineffective assistance of trial counsel. The court continued defendant's motion so that he could discuss the effect of filing the motion with his privately-retained trial attorneys. At a subsequent court date, defendant's attorneys filed a motion to withdraw based on defendant's claim of ineffective assistance of counsel, which the circuit court granted. The court then reviewed defendant's *pro se* claims and made inquiries of both defendant and his trial attorneys in open court. After hearing from the parties, the court found defendant's ineffective assistance of counsel claims to be "spurious" and denied his motion. The court then appointed the public defender to represent defendant for sentencing.

¶ 27 At the sentencing hearing, the court heard from witnesses testifying in aggravation and mitigation. The court also heard arguments from both parties. After reviewing the aggravating and mitigating evidence, the court elected to sentence defendant to 75 years' imprisonment, which included a 25-year enhancement based on the court's finding that defendant personally discharged a firearm that resulted in Heath's death. This appeal followed.

¶ 28 ANALYSIS

¶ 29 Sufficiency of the Evidence

¶ 30 Defendant first challenges the sufficiency of the evidence. Defendant acknowledges that the "State presented firearms evidence that there were probably three shooters and that [defendant] fired one of the eight bullets that struck the decedent;" however, he argues that the State failed to prove that "the one gunshot wound he inflicted contributed to the decedent's death." Given the lack of testimony about where the bullet defendant fired was recovered from Heath's body, defendant argues that the State failed to prove him guilty of Heath's murder either as a principal or under an accountability theory.

¶ 31 The State responds that defendant's challenge to the sufficiency of the evidence is without merit, arguing that he was "proven guilty beyond a reasonable doubt where he admitted shooting at the victim and a bullet fired from defendant's gun was removed from the victim's body."

¶ 32 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court’s role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122

(2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007); *People v. Salazar*, 2014 Ill App (2d) 130047, ¶ 41.

¶ 33 "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 2006). One of the essential elements in any murder case is causation. *People v. Amigon*, 388 Ill. App. 3d 26, 33 (2009). Cause of death is a question for the trier of fact, and the trier of fact's factual findings will not be disturbed unless they are unreasonable, arbitrary or otherwise so unsatisfactory that there is a reasonable doubt as to the defendant's guilt. *People v. Gacho*, 122 Ill. 2d 221, 244 (1988); *People v. Krueger*, 260 Ill. App. 3d 841, 847 (1994). Although it is incumbent upon the State to prove that the defendant's actions caused the victim's death, it need not prove that the defendant's actions were the sole and immediate cause of death. *Gacho*, 122 Ill. 2d at 244; *Amigon*, 388 Ill. App. 3d at 33; see also *People v. Brackett*, 117 Ill. 2d 170, 176 (1987) ("It is not the law in this State that the defendant's act must be the sole and immediate cause of death"). Rather, it is the State's burden to prove "that the defendant's act was, beyond a reasonable doubt, *a contributing cause* to a death such that the death did not result from a source unconnected with the defendant's

act." (Emphasis added.) *People v. Brown*, 57 Ill. App. 3d 528, 531 (1978); see also *Amigon*, 388 Ill. App. 3d at 33.

¶ 34 In this case, defendant, by his own admission, was present at the scene of Heath's shooting. He was wearing a vest and carrying a .40 caliber semi-automatic handgun. Defendant further admitted that he discharged his weapon at the scene. Although defendant denied standing over Heath and shooting him, defendant acknowledged that he fired his weapon when he was within six to eight feet of Heath. Defendant also admitted that he ran from police when they arrived on the scene and that tried to dispose of his jacket, vest and gun before he was detained. The medical examiner's report established that Heath was shot eight times and that he died as result of the multiple gunshot wounds that he sustained. The medical examiner categorized the manner of death as homicide. During the autopsy, the medical examiner was able to recover ballistics evidence from Heath's body. Ballistics testing ultimately conclusively established that one of the bullet jackets recovered from Heath's body was fired from defendant's gun. Moreover, multiple shell casings and fired bullets recovered from the crime scene were tested and found to match defendant's gun. One of those bullets was recovered in the victim's clothing between his shirt and his jacket.

¶ 35 Notwithstanding the aforementioned evidence, defendant suggests that his conviction for first degree murder must be reversed because the State failed to establish that the "one gunshot wound" he inflicted on Heath caused or contributed to the victim's death. Defendant cites several cases from other jurisdictions that purportedly support his argument. See, *e.g.*, *Marvis v. State*, 3 S.W. 3d 68, 70-72 (Tex. Ct. App. 1999); *People v. Dlugash*, 263 N.E. 2d 1155 (N.Y. 1977), *Johnson v. State*, 236 Ind. 509 (Ind. 1957). Initially, we note that although one fired bullet jacket was recovered during Heath's autopsy and was matched to defendant's weapon, that

does not mean that defendant only inflicted one gunshot wound on Heath; rather it simply establishes that he shot Heath at least one time. Pursuant to the medical examiner's report, Heath was shot eight times and ballistics evidence from each of the gunshot wounds was not available or recovered. Ballistics evidence recovered at the scene, including multiple fired bullet jackets and cartridge casings, was subsequently matched to defendant's firearm. Moreover, a bullet fired from defendant's gun was recovered from the victim's clothing, between the shirt and jacket that he had been wearing. Notwithstanding the terminology employed by defendant to contest his conviction, we find his argument unavailing as it fails to accord with established *Illinois* case law, which he fails to cite or acknowledge. As set forth above, "[t]he acts of the defendant need not be the sole cause of death. As long as the defendant's acts contributed to the death of the victim, the defendant may be found guilty of murder." *Krueger*, 260 Ill. App. 3d at 848. More specifically, "the State was not required to prove that the bullet or bullets fired by defendant were the exact ones that caused [the victim's] death." *People v. Kaszuba*, 375 Ill. App. 3d 262, 268 (2007). Here, based on defendant's statement, ballistics evidence, and the medical examiner's findings, which we view in the light most favorable to the prosecution, we find that the State presented sufficient evidence to prove defendant guilty of Heath's murder as a principal. Accordingly, we need not consider defendant's alternative argument that the State failed to prove him guilty under an accountability theory.

¶ 36 Lesser Mitigated Offense of Second Degree Murder

¶ 37 Defendant, however, next argues in the alternative that his first degree murder conviction should be reduced to second degree murder because "he proved by a preponderance of the evidence that he acted upon an unreasonable belief in the need for self-defense."

¶ 38 The State responds that his conviction for first degree murder should be affirmed because the People disproved defendant's self-defense claim beyond a reasonable doubt.

¶ 39 Second degree murder is a lesser mitigated offense of first degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995); *People v. Toney*, 2011 IL App (1st) 090933, ¶ 47. That is, "second degree murder differs from first degree murder only in the presence of a mitigating factor, such as an alleged provocation or an unreasonable belief in justification." *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 53. Relevant for purposes of the instant appeal, a person commits second degree murder when he commits first degree murder and "at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2010); *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 84. Once the State has proved the elements of first degree murder beyond a reasonable doubt, the defendant bears the burden of proving this mitigating factor by the preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2010). "A proposition is proved by a preponderance of the evidence when the proposition is probably more true than not true." *People v. Love*, 404 Ill. App. 3d 784, 787 (2010). "In the context of a challenge to the sufficiency of the evidence to prove a mitigating factor, the test is whether, after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found that the mitigating factors were *not* present." *People v. Thompson*, 354 Ill. App. 3d 579, 587 (2004). Ultimately, a reviewing court's authority to reduce a conviction for first degree murder to second degree murder should be "cautiously exercised." *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1994).

¶ 40 In order to raise self-defense, "the defendant must establish some evidence of each of the following elements: (1) force was threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger exited which required the use of the force applied; and (6) his beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). The reasonableness of an individual's belief that the use of deadly force was necessary depends on the unique facts and circumstances of the case and is a matter for the trier of fact to decide. *People v. Hawkins*, 296 Ill. App. 3d 830, 836 (1998).

¶ 41 Here, defendant contends that his statement to police established by a preponderance of the evidence that he fired his weapon based upon his unreasonable belief in his need for self-defense. He argues that the State failed to present any evidence to disprove his account of what occurred, and therefore he should only have been found guilty of the lesser mitigated offense of second degree murder. We disagree. As a preliminary matter, we note that " ' [w]hether a killing is justified under the law of self-defense is a question of fact [citations], and the fact finder is not required to accept as true the defendant's evidence in support of that defense [citations.] Instead, the trier of fact is obliged to consider the probability or improbability of the evidence, the circumstances surrounding the event, and all of the witnesses' testimony.' " *People v. Garcia*, 407 Ill. App. 3d 195, 203-04 (2011) (quoting *People v. Huddleston*, 243 Ill. App. 3d 1012, 1018-19 (1993)). Here, the court specifically rejected defendant's self-defense claim, finding his account of the events that transpired to be improbable. In finding defendant guilty of first degree murder, the court was not persuaded by defendant's contention that he was in the area "minding his own business" and "answering a call of nature" when a sudden shoot-out occurred and that he simply fired his own weapon in self-defense. The court indicated that it "[did] not believe that's

how it happened;" rather, the court believed that there was "somewhat of a plan." We reiterate that "whether defendant acted in self-defense and, if not, whether the facts of the incident constitute first or second-degree murder, are questions to be determined by the trier of fact and this determination will not be disturbed on review unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt as to the defendant's guilt." *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 87.

¶ 42 We do not find the court's findings to be unreasonable; rather we agree that evidence does not show that defendant acted in accordance with a reasonable or unreasonable belief in the need for self-defense when he shot Heath. We agree with the circuit court that defendant's explanation for his presence at the scene—to urinate outside even though there was allegedly a "price on his head" –is improbable. Moreover, the fact that defendant brought his firearm and was wearing a vest points to premeditation rather than that he acted on the basis of an unreasonable need for self-defense. See, *e.g.*, *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 93 ("The fact that defendant purposefully brought his gun with him that evening points to premeditation and not a simple unreasonable belief he was acting in self-defense ***"). Similarly his flight from police his attempt to dispose of his evidence, namely his weapon, vest and jacket also fails to support his contention that he acted based on an unreasonable belief in the need for self-defense. See, *e.g., People v. Seiber,* 394 Ill. App. 3d 9, 12-13 (1979) (recognizing that flight from police and attempt to dispose of weapon could properly be considered evidence of the defendant's consciousness of guilt). In addition, defendant acknowledged that he never saw a weapon in Heath's hand and he changed his story multiple times to account for the ballistics evidence. We therefore reject defendant's argument that his conviction should be reduced to second degree murder.

¶ 43 *Krankel* Hearing

¶ 44 Defendant next contends that the circuit court erred when failed to appoint outside counsel to argue his *pro se* motion alleging ineffective assistance of trial counsel as required by the Illinois State Supreme Court's seminal ruling in *People v. Krankel*, 1012 Ill. 2d 181 (1984).

¶ 45 The State responds that the circuit "court conducted a proper preliminary inquiry into defendant's ineffective assistance of counsel claims as required by *Krankel*." The State maintains that the circuit court's decision not to appoint outside counsel was appropriate given that "the trial court thoroughly inquired into defendant's claims and correctly determined that defendant's attorneys had not neglected his case, and instead properly exercised trial strategy."

¶ 46 In *People v. Krankel*, 102 Ill. 2d 181, 189 (1984) our supreme court held that where a defendant files a *pro se* post-trial motion that sets forth a colorable claim that he has received ineffective assistance of counsel, new counsel should be appointed to represent the defendant before the court conducts a hearing on his ineffective assistance claim because an attorney should not be forced to argue in favor of his or her own ineffectiveness. However, post-*Krankel*, courts recognized that "a *per se* conflict of interest [does] not exist merely because a defense attorney's competence is questioned by his client during post-trial proceedings; rather, the underlying allegations of incompetence determine whether an actual conflict of interest exists.' " *People v. Perkins*, 408 Ill. App. 3d 752, 762 (2011) (quoting *People v. Davis*, 151 Ill. App. 3d 435, 443 (1986)). Accordingly, "[i]n interpreting *Krankel*, the following rule developed[:] New counsel is not automatically required in every case in which a defendant presents a *pro se* post-trial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or

pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68 (2003); see also *People v. Jolly*, 2014 IL 117142, ¶ 29. In *Moore*, the court identified three ways in which a trial court may conduct its examination of a defendant's *pro se* ineffective assistance claim: (1) by asking trial counsel to "explain the facts and circumstances surrounding the defendant's allegations"; (2) by engaging in a "brief discussion" with the defendant about the substance of his claim; or (3) by using its own "knowledge of defense counsel's performance at trial" and resolving the claim based on "the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79. "The procedure developed in *Krankel* is intended to fully address a defendant's *pro se* posttrial claims of ineffective assistance of counsel at the trial level, which would serve to potentially limit issues on appeal or, if such issues are raised on appeal, would provide a sufficient record for the reviewing court to consider those claims." *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 13 (citing *Jolly*, 2014 IL 117142, ¶¶ 29, 38). The circuit court's decision whether or not to appoint counsel after considering the merits of the defendant's *pro se* claims will not be reversed unless it is manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25; *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 47 In this case, following defendant's conviction, he filed a *pro se* motion containing multiple allegations[3] of ineffective assistance of counsel. In pertinent part, defendant alleged that his attorneys were ineffective for failing to interview four eye-witnesses who would have allegedly supported his self-defense claim: Shimeka Rogers, Richard Ivery, Jackie Montanez and

[3] Defendant's *pro se* motion contained 21 different allegations of ineffective assistance of counsel. On appeal, he merely argues that the court should have appointed different counsel to argue his contention that his trial attorneys were ineffective for failing to interview four witnesses. He raises no arguments concerning the other 20 other allegations of ineffective assistance of counsel contained in his *pro se* motion and therefore we need not consider them on appeal.

Melvin Delk. After granting his trial attorneys' motion to withdraw, the court conducted an inquiry into the basis for defendant's ineffective assistance of counsel claims. The court utilized the methods of inquiry outlined in *Moore* to assess those claims and permitted defendant to explain his motion and then posed inquiries to his trial attorneys. With respect to defendant's claim that his attorneys failed to interview and investigate the aforementioned four eyewitnesses, the following discussions were had in open court:

"THE COURT: And then in Point No. 10, you indicated, the Defendant that is, indicates that Attorney Walsh and Attorney Goldberg failed to interview crucial eyewitnesses that could have supported the Defendant's self-defense claim, and that you gave Attorney Walsh and Goldberg witness information, *** who were all, as you indicated, witnesses to the shooting on or about March 24th; and that you indicated that Attorney Walsh and Goldberg made no investigation and effort in obtaining testimony, and that had they found them, that they would be willing to testify and to repudiate the claim of first-degree murder, and Judge Walsh claimed that it was a plan. Is that what your allegation is there?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. My question is then to Attorneys Walsh and Goldberg, did you investigate those witnesses that the Defendant gave? Did he give you those names?

MR. WALSH: Judge, we were aware of these witnesses and we did investigate.

THE COURT: Okay.

THE DEFENDANT: I have affidavits in there from those witnesses that state that they never even talked to them, never had conversations with them.

THE COURT: All right. Well, I have had an opportunity to look at those affidavits also, and the affidavits that I have regarding She[m]ika Rogers, Richard Ivery, and also it says Alvin Delk –

THE DEFENDANT: It's one from Melvin Delk.

THE COURT: Beg your pardon?

THE DEFENDANT: There's one for Melvin Delk as well.

THE COURT: But that's a different one. That's a statement of facts concerning the People versus Rogers. It's not in the same format as the ones that were for the three people that I just spoke of, correct?

THE DEFENDANT: All right.

THE COURT: All right. Now as to each one of those people, they indicate that they were at the scene, and that they put you at the scene. They say that there were shots that were fired and none of them indicate who was the shooter at any time.

THE DEFENDANT: And She[m]ika say I saw Derrick jump out of a car and start shooting;[4] and Richard Ivery, he saying that he noticed a black truck making a U-turn with someone in a black truck and someone in another car was shooting at each other.

THE COURT: Right. And so the point is as to whether those people were talked to and whether there was a discussion.

THE DEFENDANT: There was—

THE COURT: Just a minute, sir. Don't interrupt me. I will give you an opportunity to speak. You have to give me the same courtesy, understand? So the question is as to whether those individuals were investigated, and as to what their testimony may or may

[4] Shamika does not identify any shooters in her affidavit. Her affidavit does not contain any references to the name "Derrick." She simply states that she "saw guys jump out of a car and start shooting."

not add to the trial. Mr. Walsh, Mr. Goldberg, did you have an opportunity to investigate as to these potential witnesses?

MR. GOLDBERG: Yes, as far as all four of the witnesses, all their statements were reviewed. I believe the gentlemen who came in from out of state was interviewed by me when I first learned of his name on the telephone. I spoke to him again in court in the presence of Mr. Walsh. He had given me facts again that were inconsistent with the theory of defense that we were pursuing. As far as the other individuals are concerned, their statements were all recorded. We reviewed all their statements, and determinations were made that the use of those witnesses at the time of trial could open the flood gates for evidence that would be contrary to theories that we were submitting to the Court, and they were not called for that reason.

THE COURT: All right. So it was—go ahead.

MR. WALSH: I would agree with what Mr. Goldberg said, and also I met with Mr. Melvin Delk in my office prior to the commencement of the trial. He had made certain statements to me that when we talked with him upstairs in the building, prior to the Defendant's case in chief, where he contradicted what he had told me. He had told me that his—that Alvin probably would not have been a good witness because of certain issues that he had about substance abuse, and Mr. Goldberg and I discussed these, and discussed with Mr. Rogers why we weren't calling those witnesses.

THE COURT: All right. So it was a matter of trial strategy as far as after your investigation regarding these witnesses that you chose not to call them, is that correct?

MR. GOLDBERG: Yes, your Honor.

MR. WALSH: That's correct.

***

THE COURT: All right. So Mr. Walsh and Mr. Goldberg have indicated that they did investigate these witnesses, and I do remember as to Mr. Melvin Delk, there were some conversations, and they were on the record actually that the Court spread of record because Mr. Delk called the Court, specifically me, and told me that he was having some issues about transportation. He did receive the subpoena, so Mr. Walsh did subpoena him to come to court and did tell him he needed to be here. And Mr. Walsh did come on the case later, and so he had an opportunity to talk to this witness, and Mr. Goldberg has indicated he also did this investigation too. So the point of the matter is that they did look into it, and it was a matter of trial strategy as to why they did not call him.

*** I observed these attorneys' conduct during the course of the trial. *** At no time did I find the conduct of these attorneys ineffective. At no time did I find anything that they did to be improper or unusual. They conducted themselves properly at all times, and zealously advocated on behalf of the Defendant in this case, and therefore, I find your motion to be spurious and I am denying your motion for ineffective assistance of counsel."

¶ 48 It is evident from the record that the circuit court conducted a detailed and careful inquiry into defendant's ineffective assistance of counsel claim. It is well-settled that decisions concerning what witnesses to call are considered to be matters of trial strategy that are immune from ineffective assistance of counsel claims. *People v. Chapman*, 194 Ill. 2d 186, 230 (2000); *McCarter*, 385 Ill. App. 3d at 942. Although defendant, citing *People v. Truly*, 230 Ill. App. 3d 948 (1992), is correct that counsel's failure to call alibi witnesses will not be deemed a matter of trial strategy where counsel completely fails to investigate the potential witnesses, that is not the

case here. In response to inquiries posed by the court, defendant's attorneys indicated that they were aware of the witnesses defendant identified and "did investigate." Attorney Goldberg stated that "as for all four witnesses, all of their statements were reviewed." Based upon their review of the statements, defendant's attorneys made determinations that "the use of the witnesses at the time of trial could open the flood gates for evidence that would be contrary to theories that we were submitting to the Court." With respect to one of those witnesses, Melvin Delk, defendant's trial attorneys informed the court that they had spoken to Delk and initially intended on calling him, but changed their minds when he provided them with contradictory statements. Based on the responses that the attorneys provided to its own inquiries, the circuit court concluded that that the decision not to call the witnesses constituted trial strategy and did not warrant the appointment of outside counsel. The court further noted that the affidavits defendant submitted in support of his *pro se* motion did not help him since they "place[d] [him] at the scene" and did not identify "who the shooter was at any time." Moreover, the court emphasized that it had observed defendant's attorneys throughout the trial and found them to be zealous advocates. In light of the foregoing, we do not find the circuit court's decision to be manifestly erroneous. See *Chapman*, 194 Ill. 2d at 230; *McCarter*, 385 Ill. App. 3d at 942.

¶ 49 Sentence

¶ 50 Defendant next challenges his 75-year sentence. He first argues that the circuit court erred in imposing the 25-year firearm enhancement because there is no evidence that he personally proximately caused Heath's death. He also argues that his sentence is excessive in light of his non-violent criminal background, young age, and family ties and that the court relied on facts not in evidence to impose his excessive sentence.

¶ 51 The State responds that defendant's challenge to his sentence is without merit because "the trial court considered only proper sentencing factors before sentencing defendant to 50 years with an additional 25 years because he personally discharged a weapon, and the trial court considered the factors in mitigation before imposing a sentence that is within the statutory limits."

¶ 52 The Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, §11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To find the proper balance, the trial court must consider a number of aggravating and mitigating factors including: "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). Although a defendant's rehabilitative potential must be considered, that factor " 'is not entitled to greater weight than the seriousness of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 214 (2010) (quoting *People v. Coleman*, 166 Ill. 2d 247, 261 (1995)). Moreover, because a trial court need not explicitly analyze each relevant factor or articulate the basis for the sentence imposed, when mitigating evidence is presented before the trial court, it is presumed that the court considered that evidence in imposing the defendant's sentence. *People v. Averett*, 381 Ill. App. 3d 1001, 1021 (2008); *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). Ultimately, because the trial court is in the best position to weigh these factors, the sentence that the trial court imposes is entitled to great deference and will not be reversed absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). Indeed, a reviewing court will

not reweigh the factors in reviewing a defendant's sentence and may not substitute its judgment for the trial court merely because it could or would have weighed the factors differently. *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007). Moreover when a sentence falls within the statutory guidelines, it is presumed to be proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010); *Ramos*, 353 Ill. App. 3d at 137.

¶ 53 At defendant's sentencing hearing, the circuit court heard evidence presented in both aggravation and mitigation. Monica Heath, the victim's wife and mother of his son, provided victim impact testimony. She testified that the loss of Heath affected her and her son "tremendously" and stated that they had "suffered a great deal" since his death. She classified Heath as her "best friend," "back bone," "provider," "protector," and a "role model" for their son. Glenn Armstead, Heath's cousin, also testified in aggravation. He testified that since Heath's death, his "family has struggled to regain stability." Armstead further testified that he has suffered from depression and emotional problems since his cousin was murdered because he "really miss[ed] [Heath] dearly." Heath's aunt, Barbara Armstead, reiterated that Heath's death "caused [her] family deep grief, sadness, anger and many sleepless nights." In particular, her sister, Heath's mother, has been "in pain every day since [his] murder." Barbara requested the court to impose the maximum sentence allowed on defendant because he "destroyed" her family. In addition to the aforementioned live testimony, the State presented the court with a letter completed by Heath's sister, Stephanie Armstead, in which she described the extent of the "pain" that her brother's murder caused her family and reiterated her aunt's request that the court impose the maximum sentence allowed on defendant.

¶ 54 Defendant, in turn, had three witnesses who testified on his behalf and offered mitigating evidence. Shirley Rogers, defendant's grandmother, testified that she helped to raise him after his parents separated. Defendant attended Sunday school regularly and he was an "excellent student in school," who earned a place on the honor roll. Rogers further testified that defendant has two young daughters and classified him as a "good father." Rogers asked the court to "have mercy" on her grandson when imposing his sentence so that he would be able to have a relationship with his daughters. Sonya Davis testified that she grew up with defendant in the same neighborhood and that he "was always there for [her.]" Davis confirmed that defendant was a "wonderful father" to his daughters. Davis told the court that defendant had a "good heart" and requested the court to spare him so that he could see his children and be there for them as they grow up. Brittany Douglas testified that defendant had been a friend of her mother's. Douglas explained that approximately six years ago, her mother passed away and defendant helped her cope with her loss and attended grief sessions with her. Defendant also gave her advice as she grew up and encouraged her to stay in school. In addition to presenting the aforementioned live witnesses, defendant offered three letters written on his behalf. The letters were authored by defendant's father and his two daughters. Defendant's father requested mercy and asked the court to give his son "another chance at life at a later day to see his children." Defendant's daughters each indicated that they loved and missed their father and wanted him home with them.

¶ 55 After hearing the evidence, the court made the following statements in open court:

> "All right. The court has had an opportunity to consider all the statutory factors in aggravation and mitigation that are laid out in 730 ILCS 5/5-5-3.1 and 3.2 mitigation and aggravation respectively and to apply the ones that are appropriate for this case.

The court found in this case the defendant to be guilty of Counts One through Six, which were the first degree murder counts and also Count Nine, the U.U.W. by felon for the previous conviction that was listed in the indictment. The court also found that this defendant personally discharged the firearm that caused the death of the victim in this case.

I have had an opportunity to consider all of the impact statements, the testimony that was presented today and also the letters that were presented to the court too and to consider these arguments that were presented by both attorneys. One of the things that's most striking about this case is also one of the most disturbing things about this case in that this victim from all the evidence that was presented was an unarmed person, that this defendant was out there on the street on that day and the court did not find and the court is not considering that he was wearing a bulletproof vest as the court did not find that the State had met their burden as to that but the fact remains that he was wearing a vest, albeit not a bulletproof vest and again I reiterate the court is not considering that in its sentence, that this defendant did have a loaded firearm and that this defendant was on the scene when this victim was shot and killed.

The shell casings show that this defendant was on the scene and within close proximity of this victim. The defendant's own statements put him on the scene with a .40 caliber in his hand and firing and also indicates that the victim did not have a weapon.

I do not believe, as I said at the trial, that this was self-defense and that is why the court did not find the defendant guilty of the lesser charge. That is one of the most disturbing parts of the facts of this case but what is also disturbing is the fact that this defendant has come from such a loving and supportive family and friends circle. He

clearly has had people who have cared about him his entire life, people who have looked out for him, people who definitely have relied upon him and basically he's betrayed all of them by his actions. And I understand that people are entitled to chances in life but this is not a situation that deserves a second chance. He may have rehabilitative potential and that is something that would have to be borne out in the years to come to see what happens but I believe this sentence in this case should not be the minimum sentence. I also do not believe that this is a case that should sentence the defendant to the maximum of life in this case.

So this court is going to sentence the defendant as follows: As to Counts One through Six, which are the first degree murder charges and as to Count Nine they are going to merge for sentencing purposes. There will be a sentence as to the murder charge, which we know that the sentencing range is 20 to 60, and as to the personally discharged the minimum is 25 years. The court is going to sentence the defendant as follows: To 50 years in the Illinois Department of Corrections, plus 25 for the personally discharging of the firearm. The defendant will also be serving three years mandatory supervised release."

¶ 56 We first address defendant's argument regarding the applicability of the 25-year firearm enhancement. The penalty for first degree murder is a term of imprisonment that is not less than 20 years and not more than 60 years. 730 ILCS 5/5-4.5-20(a) (West 2010). In addition, a 25-year enhancement may be added to the sentence for first degree murder if the State proves beyond a reasonable doubt that the defendant personally discharged a firearm that proximately caused the victim's death. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West); *Kaszuba*, 375 Ill. App. 3d at 267 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Specifically, the pertinent

firearm enhancement provision contained in the Illinois Unified Code of Corrections provides as follows:

> "(a) Except as otherwise provided in the statute defining the offense or in Article 4.5 of Chapter V, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:
>
> (1) for first degree murder, ***
>
> (d)(iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(d)(iii) (West 2010).

¶ 57 In support of his argument that the circuit court erred in imposing the firearm enhancement, defendant reiterates his aforementioned argument that the State failed to prove that bullet or bullets he fired were the specific shots that actually resulted in Heath's death, and thus the enhancement is inapplicable. Defendant's argument, however, in unavailing. See, *e.g.*, *Kaszuba*, 375 Ill. App. 3d at 268 (holding that the State was not required to prove that the bullet or bullets fired by the defendant were the exact ones to cause the victim's death for the 25-year enhancement to apply). Pursuant to the statute, the firearm enhancement is applicable where the defendant "proximately caused" the victim's death. 730 ILCS 5/5-8-1(d)(iii) (West 2010). "A defendant's criminal acts are the proximate cause of another's death when the acts contribute to that person's death and the death is not caused by an intervening event unrelated to the defendant's acts." *Kaszuba*, 375 Ill. App. 3d at 268 (citing *People v. Dekens*, 182 Ill. 2d 247, 260 (1998)). Here, the State presented sufficient evidence that defendant personally discharged a

firearm that proximately caused Heath's death. As set forth above, defendant admitted to discharging his weapon in Heath's direction and a bullet from his firearm was recovered from Heath's body during the autopsy. The medical examiner opined that Heath died as a result of the multiple gunshot wounds that he sustained and classified his death as a homicide. Therefore, the 25-year sentencing enhancement was appropriate. *Kaszuba*, 375 Ill. App. 3d at 268.

¶ 58 Defendant, however, nonetheless contends that remand for resentencing is required because the court relied on improper factors and failed to consider significant mitigating evidence when imposing his sentence. Specifically, he disputes the propriety of the court's statements concerning the fact that he was wearing a vest as well as the fact that the ballistics evidence showed that defendant was within "close proximity of the victim." We disagree that such statements were improper given that the court should consider "the nature and circumstances of the crime" when imposing a sentence. *Maldonado*, 240 Ill. App. 3d at 485-86. We specifically disagree that the court's comment that the shell casings established that defendant was in "close proximity" to the victim was an improper inference based on the evidence and note that defendant's own statement placed him within six to eight feet of the victim during the shooting. We are similarly unpersuaded that the court failed to give proper weight to his rehabilitative potential. The court specifically referenced the mitigating evidence defendant presented and concluded that it did not believe that the maximum sentence was appropriate; rather, the court elected to impose a lesser sentence within the permissible statutory range. Ultimately, we find that defendant has failed to establish that his sentence was excessive and an abuse of the court's discretion. Accordingly, defendant's sentence is affirmed.

¶ 59 CONCLUSION

¶ 60 The judgment of the circuit court is affirmed.

¶ 61 Affirmed.