SECOND DIVISION
March 31, 2014

No. 1-12-0002

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. 10 CR 1857
	)	
SERGIO MARTINEZ,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

O R D E R

HELD: Judgment entered on defendant's conviction of first degree murder affirmed over his claims that the State failed to disprove self-defense, that the trial court erroneously instructed the jury, that the State made improper closing remarks, and that the trial court abused its sentencing discretion.

¶ 1 Following a jury trial, defendant Sergio Martinez was found guilty of first degree murder, then sentenced to a term of 60 years. On appeal, defendant contends that: (1) the State failed to

disprove his claim of self-defense; (2) the trial court erred in instructing the jury about limitations on the use of force in self-defense by an initial aggressor; (3) the trial court erred in failing to instruct the jury that a non-aggressor has no duty to retreat before using force in self-defense; (4) the State made certain remarks in closing argument which were not based on evidence; and (5) the trial court abused its sentencing discretion. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On December 18, 2009, defendant shot and killed Christopher Rivera from the driver's seat of an automobile. The defense theory was that he acted in self-defense to protect himself and his passengers because Christopher was firing a gun at the car. The following testimony was presented at trial.

¶ 4 Isaac Sanchez testified that on December 18, 2009, he was at home in Berwyn with his mother, his brother's friend Niko, and his two younger brothers, Christopher and Jonathan Rivera. Christopher was preparing for his first rap performance in Melrose Park. About 8 p.m., Christopher received a call on his cell phone from defendant and began arguing with him. The call ended within a minute, then Christopher put on a "hoodie," yelled out "Sergio," and "darted" out the door. Isaac and Jonathan followed Christopher. Isaac testified that he did not go outside with a BB gun or any other weapon, nor did he see Christopher leave the house with a weapon.

¶ 5 Once outside, Isaac saw Christopher about 15 feet ahead of him, walking across the street towards Cuyler Avenue. He saw defendant in the driver's seat of a black Mitsubishi Lancer that belonged to Ysole Krol. Isaac testified that the car was moving "really slowly" and that defendant and two males in the back seat had their heads out the windows and were "inviting," by waving and yelling, "come on, come on." As Christopher ran after the moving car, Isaac saw

a flash from the driver's side and heard a gunshot, then saw Christopher immediately fall face-first to the ground. Defendant "floored" the car and drove off down Cuyler Avenue. Isaac turned Christopher over, saw that he had been shot in the head, dragged him to the curb, and went to get his mother. Isaac testified that he never saw Christopher throw anything at the car or threaten the people in the car.

¶ 6 Isaac testified that he had known defendant for about two years prior to the date of the shooting. Defendant had been a friend and once lived across the street, but neither Isaac nor Christopher considered him a friend on the evening of the shooting. Isaac testified that defendant lived in Chicago with Ysole.

¶ 7 On cross-examination, Isaac stated that Christopher had said "Sergio's outside" before he ran out the door. Isaac stated that he did not throw a brick at defendant's car, that he was not aware of any BB guns in the house, and that he never saw Christopher raise his arm and fire a "pistol-looking" object at the car. He also stated that Christopher was about 20 feet away from the trunk of defendant's car when he was shot. He further stated that he did not see a gun or a wrench near Christopher's body.

¶ 8 Jonathan Rivera, brother of the victim, testified that he was home on the evening of the incident with his family and his friend Niko. He and Niko were watching television, and Christopher was getting ready for his rap performance later in the night. Jonathan heard Christopher have a 45-second "confrontation" on his cell phone. Then, about five minutes later, Christopher received another call and rushed out the front door "like he was going for a confrontation." Isaac followed Christopher out the door, and Jonathan followed them.

¶ 9 Jonathan observed Christopher across the street walking down Cuyler Avenue towards a car owned by Ysole. Jonathan did not recognize anybody in Ysole’s car. He saw the driver

"egging" them on and "luring" them towards the car. The driver put his hand out the window one time and the car was "coasting maybe like around 5 miles per hour, but it would slow up a little bit *** and go back up a little bit." Christopher was about four car-lengths behind the moving car. When the car eventually stopped, Jonathan saw defendant reach out the window. He then saw a flash; Christopher collapsed; and the car quickly drove off. Jonathan testified that neither he, nor his brothers, nor Niko threw anything at the car, and that neither he nor his "brother" had a BB gun that night.

¶ 10 On cross-examination, Jonathan stated that he did not hear anyone in the car saying, "come on." He also stated that neither he nor his two brothers fired a BB gun at defendant's car. Jonathan did not see either a gun or a wrench around Christopher's body.

¶ 11 Berwyn police officer Richard Novotny testified that about 8 p.m. on December 18, 2009, he and his partner responded to the area of 26th Street and Cuyler Avenue after receiving a call of a pedestrian struck by a vehicle, a possible fight, and shots fired. They interviewed civilians on the scene, and Officer Novotny received a description of the vehicle involved. He and a team of officers arrived at 3445 South Claremont Avenue, in Chicago, found the garage open, and discovered the black Mitsubishi fitting the vehicle description. After obtaining a signed "search waiver form" from Rosa Krol, the homeowner, the police searched the garage and had the vehicle towed to the Berwyn Police Department.

¶ 12 On cross-examination, Officer Novotny stated that he observed a BB gun in the street when he arrived at the scene of the crime. He also stated that after the black Mitsubishi had been towed to the Berwyn Police Department, he observed a "small scuff mark on the rear left pillar between the rear window and the left driver's rear window."

¶ 13 Joshua Bzdusek testified that on December 18, 2009, he lived in Cicero and was friends with defendant and defendant's brother, Jose Martinez. That evening, defendant picked Joshua up from his house and drove westbound on 26th Street. Joshua testified that he sat behind Ysole, who was in the front passenger's seat, and that Jose sat in the rear-middle seat. Sometime before Ridgeland Avenue, Joshua saw Isaac and Jonathan. Joshua testified that he had been friends with Christopher, Isaac, and Jonathan, but was no longer friends with them on that date.

¶ 14 Joshua testified that defendant drove to a gas station and put air into the tires. While there, defendant also made a phone call and firmly told the person on the other end of the line, "I want to pick up my money." Defendant subsequently pulled out of the gas station, drove to the Rivera's house, and parked on 26th Street and Cuyler Avenue. At some point, defendant made a right turn onto Cuyler Avenue, and Joshua saw Christopher, Isaac, and Jonathan running towards the car. Christopher had his hand pointed out, and Joshua assumed that he had a gun, though he did not actually see the gun. Joshua first heard what he thought was a brick hit the back of the car on the driver's side. He then heard a "pop, pop, pop," and told defendant, "let's leave already." However, a car had pulled out from an alley in front of defendant, and defendant could not drive away because it was a one-way street. Joshua heard something hit the back of the car. He saw that Christopher was 20 feet behind the car. Defendant asked Ysole to pass him the gun, and then he fired one shot. Joshua then saw someone start to fall, and he closed his eyes and ducked. He testified that the car was no longer blocked when defendant fired the gun and that the gunshot fired by defendant was much louder than the "pop, pop, pop" that he had heard earlier. After the shooting, defendant "took off." The occupants of the vehicle discussed whether Christopher's gun was a fake, but Joshua never heard defendant say that Christopher's gun was a fake. They eventually drove to Ysole's house, and defendant then left with the gun.

¶ 15 The next day, two Berwyn police detectives picked up Joshua and took him to the Berwyn Police Department. Joshua spoke with an assistant State's Attorney (ASA) and gave a statement, which he identified in court. Joshua testified that he "briefly" looked over the statement and signed it, but was scared. He acknowledged telling the ASA the following. On the night in question, defendant was stopped at a red light when he pointed at someone walking out of the Marathon gas station at 26th Street and Ridgeland Avenue and said to Ysole, "That's the mother fucker. That's Chris." Defendant drove to 26th Street by Christopher's house, took out his cell phone, and yelled into the phone, "You ain't on nothing. I saw you leaving the Marathon gas station, bitch." Joshua explained that "you ain't on nothing" meant that Christopher "didn't have the guts to come out and fight." Defendant drove around the corner onto Cuyler Avenue and was "creeping forward" when "the guys" were running up behind him. Defendant asked Ysole for the gun, and Ysole handed it to him. Joshua saw that one of the three individuals running towards the car had something in his hands, and he heard "popping." One of them also threw something at the car, which caused a "loud thud." Defendant yelled, "what the fuck," and slammed on his brakes. He then reached into his lap, picked up the gun, leaned out the window, and fired one shot in the direction of the three individuals. One of them fell to the ground, and defendant "sped off." As they were driving away, defendant said, "Did you see that? They tried pulling some shit on me." He then said, "That was a fake gun," and Jose responded, "yeah, that thing was rubber." Defendant agreed, saying, "yeah." Joshua never saw any of the individuals with a gun. He subsequently heard defendant make some phone calls and tell someone, "I think that I'm in trouble. I just shot this dude in the face. Where can I meet you? I think that I'm going to jail. I know it." Ysole then dropped defendant off in back of "Crab's

house," and Joshua saw someone sitting in a black car, whom the defendant identified as "Spooks."

¶ 16 Joshua further acknowledged testifying to a similar version of the incident before the grand jury. In his grand jury testimony, Joshua stated that defendant had parked across the street from Christopher's house, called him, and began "talking smack," saying that "you ain't on nothing. You're a pussy. I saw you leaving the Marathon gas station." He then stated that when Christopher and his brothers came out of the house, defendant turned right onto Cuyler Avenue and began "creeping real slow to see what they would do." When the brothers ran up behind the car and threw a brick, defendant said, "what the fuck" and told Ysole to hand him the gun. Defendant then stopped the car, leaned out the window, and fired one shot at Christopher, who fell straight to the ground. As defendant was driving away, he said that Christopher had pulled a fake rubber gun on him, and Jose agreed that it was a fake. Defendant then made a phone call to tell his friends that he had shot someone and was going to jail. He asked to meet with them and later exited the car with the gun and entered a black four-door vehicle.

¶ 17 At trial, Joshua testified that he did not tell the whole truth to the grand jury, that some of it was a lie, and that he was telling the truth at trial. He also testified that he is still friends with Jose and the rest of the Martinez family and that he had spoken with members of the Martinez family about the events in question.

¶ 18 On cross-examination, Joshua stated that he saw Isaac throw a "bricklike" object at the car and saw something "dark" in Christopher's hands. He heard the "loud thud," and then heard loud "popping noises like shots" and what sounded like hail striking the car. He ducked because he was scared for his life and thought they were gunshots. Joshua stated that Christopher was

about 30 feet away from the trunk of the car when he was shot. Also, the conversation about Christopher's gun being a fake occurred about 30 seconds to 1 minute after the shooting.

¶ 19 Joshua explained that he was scared when he gave his statement and that he did not give the ASA all the details. He stated that before testifying in front of the grand jury, the ASA had told him to testify in the same manner as he had in his statement. Joshua denied that he, Jose, or defendant leaned out the window and made gestures to Christopher, Isaac, or Jonathan.

¶ 20 Jose Martinez, defendant's brother, testified that defendant and Ysole picked up Joshua and him and drove to Berwyn. They eventually arrived at a Marathon gas station in the area of 26th Street and Ridgeland Avenue. Jose saw Christopher walking across the street to his house. Jose testified that he and Christopher used to be friends, but were not anymore. Defendant pumped air into his tires and made a phone call to Christopher that lasted less than a minute. Defendant's demeanor was "normal," and he told Christopher, "I just saw you. You need to pay me my money."

¶ 21 Jose testified that defendant subsequently parked on the corner of 26th Street and Cuyler Avenue facing westbound. Jose saw Christopher, Isaac, and Jonathan come outside, and one of them threw something. Ysole told defendant, "Let's get the hell out of here," and defendant turned right onto Cuyler Avenue, but could not drive off because a car pulled in front of him from an alley. Christopher, Isaac, and Jonathan ran towards the car, and Christopher was holding up what appeared to be a gun. Jose was looking back and heard a "pop, pop, pop" from Christopher's gun followed by the sound of hail hitting the car. He did not see anything in Isaac's or Jonathan's hands. He then ducked down in the car. After something hit the car, defendant and Ysole said, "what the fuck," and defendant asked Ysole for the gun. Defendant was driving about 10 miles per hour, but could not drive away because the car was still in front of them.

About 10 seconds later, defendant shot the gun out the window. The car in front moved, defendant drove away, and Jose went to Ysole's house where the car was placed in the garage.

¶ 22 Jose testified that he was subsequently taken to the Berwyn police department and that his mother was present because he was a minor. He initially spoke with Berwyn police detectives, then spoke with ASA Tracy Senica and gave a written statement. In his statement, Jose represented that he saw one of the individuals who was running toward the car point what appeared to be a gun and shoot at the car, and defendant said that the gun was fake because no bullets hit the car. A few seconds later, something hit the back of the car, and Jose heard a "loud thud," which did not sound like a gunshot. Defendant and Ysole were angry because the car was damaged, and Jose put his head down.

¶ 23 Jose testified that he did not tell the ASA that he saw Christopher with a gun, that he now assumes Christopher had a gun, and that he did not see what object hit the back of the car. He also testified that the only stop the group made before Ysole's house was to let defendant off at his friend's house and that he is "pretty sure" defendant took the gun with him.

¶ 24 On cross-examination, Jose stated that the conversation about Christopher's fake gun took place about one minute after the shooting and that the reason they thought it was fake was because no one was struck and the windows did not break. Jose also stated that he did not see anything in the hands of Christopher's brothers. Jose stated that no one leaned out of the car and tried to lure Christopher and his brothers towards the car.

¶ 25 Berwyn police officer Michelle Stewart testified that she is an evidence technician for the Berwyn Police Department. About 8 p.m. on December 18, 2009, Officer Stewart responded to a call of shots fired in the 2500 block of Cuyler Avenue. When she arrived, she observed a male victim lying in the street, secured the scene, and canvassed the area for evidence. Officer

Stewart discovered a BB gun in the street about 15 yards north of the victim; a black plastic grip for a BB gun also in the street about 5 to 7 feet north of the victim; a nine-millimeter Luger shell casing on the parkway north of the body; and a wrench about 3 to 4 feet north of the victim on the parkway. She also discovered a two-and-a-half inch to three-inch long piece of black plastic under the victim's body. She did not see any weapons in the victim's hands or on his clothing.

¶ 26 Berwyn police detective Gavin Zarbock testified that about 8 p.m. on December 18, 2009, he was dispatched to the 2500 block of Cuyler Avenue in regard to shots fired. He observed Christopher lying in the street near the west curb of Cuyler Avenue. Detective Zarbock interviewed Jonathan and Isaac and met with Mivian Sanchez, Christopher's mother. Jonathan and Isaac immediately identified defendant as Christopher's shooter.

¶ 27 Detective Zarbock interviewed Joshua and Jose at the Berwyn police department the next day. Jose told him that three or four individuals had run up to their car and that one of the individuals had a gun in his hand. Jose saw a flash from the gun, but nothing hit the car. Jose said that defendant remarked that the gun must have been a fake because no bullets hit the car. Jose then said that he heard a "thud" hitting the vehicle, that he put his head down, and that he heard a single gunshot.

¶ 28 On cross-examination, Detective Zarbock stated that the black piece of plastic recovered from the scene was only a few feet away from a pool of blood that was separate from the body in the middle of the street. He also stated that the BB gun was "much farther away" from the pool of blood and "much farther" from the handle.

¶ 29 The parties stipulated that Susan Johnson, a T-Mobile employee, would testify that she obtained a report of incoming and outgoing calls to the phone number associated with Christopher's cell phone. She would testify that about 7:48 p.m. on December 18, 2009, an

incoming call was made to that number from the phone number associated with defendant's cell phone and that the call lasted less than one minute.

¶ 30 Scott Rochowicz, a forensic scientist for the Illinois State Police, testified as an expert in trace evidence. Rochowicz examined the BB gun and wrench recovered from the crime scene, but did not find any trace evidence. Rochowicz testified that a BB gun does not discharge the gunshot residue for which he tests.

¶ 31 Dr. Hilary McElligott, an assistant Cook County medical examiner, testified as an expert in the field of forensic pathology. Dr. McElligott testified that she performed Christopher's autopsy on December 19, 2009. She opined that cause of death was a gunshot wound to the head and that the manner of death was homicide.

¶ 32 ASA Sean O'Callaghan testified that on the evening of December 19, 2009, he was dispatched to the Berwyn Police Department where he spoke with Joshua in the presence of another detective. ASA O'Callaghan testified that Joshua was "scared," but cooperative, and did not seem confused or unable to understand what he was being told. He did not read Joshua his *Miranda* rights because Joshua was being treated as a witness at the time. Joshua agreed to memorialize his statement in typewritten form and signed each page of the statement.

¶ 33 ASA Tracy Senica testified that on the evening of December 19, 2009, she spoke with Jose at the Berwyn Police Department with his mother present. She testified that Jose was "calm and cooperative" and answered all of her questions. ASA Senica typed up a statement given by Jose. She identified the statement and noted that each page was signed by Jose and his mother.

¶ 34 The State then rested, and defendant made a motion for a directed verdict. The court denied the motion.

¶ 35 The defense then put on its witnesses. Detective Zarbock testified that on December 19, 2009, he interviewed Isaac and Jonathan at the Berwyn Police Department. Both gave handwritten statements, and Detective Zarbock testified that neither Isaac nor Jonathan told him that the back seat passengers were making hand gestures towards the brothers, or that the black vehicle was stopping and going. On cross-examination, Detective Zarbock stated that Jonathan told him that defendant was yelling and making gestures from the vehicle to lure Christopher over.

¶ 36 Defendant then testified on his behalf. He stated that he was "close friends" with Christopher and, at one point, lived across the street from him for about six to eight months in Berwyn. The two spoke over the phone on the night before the shooting. During their conversation, defendant told Christopher that he was ready to go to a studio to finish a song. He also asked Christopher if was going to repay a $250 loan that defendant made to him in the near future. They agreed that Christopher was going to pay him some of the money by the weekend.

¶ 37 Defendant testified that about 6 p.m. on December 18, 2009, he and his girlfriend Ysole dropped off his daughter at his mother's house in Cicero. They then picked up Jose and Joshua from Joshua's house in Cicero a little after 7 p.m. Defendant testified that he was driving a black 2009 Mitsubishi Lancer and that Ysole was in the front passenger seat. Jose and Joshua were in the back seats, in the middle and behind Ysole, respectively.

¶ 38 Defendant drove west down 26th Street toward the North Riverside Mall where he was going to pick up a Christmas gift. He thought he saw either Jonathan or Isaac while stopped at a red light near 26th Street and Highland Avenue. However, he ultimately drove by without saying anything and pulled into a gas station at Ridgeland Avenue to pump air into his tires.

Defendant testified that he was friends with Jonathan, but not Isaac because "he was trying to really get with" Ysole.

¶ 39 Defendant testified that he called Christopher's cell phone while he was pumping air into his tires. He asked Christopher if he had any money because he was going to the mall to purchase a Christmas gift. Christopher told him that he would have it on the weekend, but defendant told him that he needed the money for Christmas. Defendant testified that Christopher then said, "Well, meet me downstairs in front. Don't keep me waiting." Defendant then headed back east on 26th Street and drove by Christopher's home, but no one was outside and there was no parking in front. He then pulled into a parking lot, made a U-turn, and parked on the corner of 26th Street and Cuyler Avenue.

¶ 40 Defendant waited about one minute and then called Christopher two times with no answer. When he was about to call a third time, he saw Isaac and Jonathan on the corner "speed walking toward the vehicle," and Isaac had a brick in his hand. He looked at Ysole, and she told him to "just leave." He put the car in drive and was turning right onto Cuyler Avenue when Isaac threw the brick, which did not hit the car. Defendant testified that as he was making a right turn onto Cuyler Avenue, he saw Christopher running towards the car "with his left arm reaching across the right side of his waist." He testified that Christopher pulled out a gun when he was about 10 feet away. Defendant continued making his turn while looking in his mirror. He then heard a car honk twice and come out of an alley on Cuyler Avenue, requiring him to stop. At that point, defendant heard "multiple pops" and "rattling hit the back of the car," which he thought were gunshots. The car from the alley "took off," and defendant followed behind while watching in his mirror as Christopher was behind, running towards the car.

¶ 41 Defendant testified that he heard a "big thud" hit the car and said, "What the fuck?" He then told Ysole, "Open the glove box and give me the gun." Ysole, however, "froze" after opening the glove box. Defendant grabbed the gun, heard more "pops," then stuck his arm out the window and fired one shot without looking back. It was as they were driving off that he and his brother decided that the gun may have been a fake because there were no shattered windows. Defendant testified that he was eventually dropped off at a friend's house and that he threw his gun away in a garbage can.

¶ 42 Defendant testified that no one in the car put their hands out the window to lure the Rivera brothers towards them and that no one yelled any taunts either. He also testified that he saw Jose and Joshua ducking right before the shooting. Defendant bought the gun used to kill Christopher for his own safety because he had begun rapping and did not want anyone robbing him. He testified that he had not been planning on seeing Christopher on the night in question and did not go to his house with the intention of killing him. Defendant testified that he fired a shot outside the car because he feared for his safety and was defending himself and the other occupants of the vehicle.

¶ 43 On cross-examination, defendant denied making any confrontational remarks to Christopher during his telephone call from the gas station or from the window of his car while he was driving near Christopher's house. Defendant denied seeing Christopher on the street prior to making the phone call to ask for the money that was owed. He admitted that he kept a loaded gun in the glove compartment of the car he was driving, which was owned by Ysole. He answered affirmatively when asked if he had kept his head down when he fired the gun, and stated that it was the first time he had ever used the gun. He also stated that the individual

identified as "Mr. Spooks" drove him to a garbage can at the back of a house, where he discarded the gun and got back into the car.

¶ 44 The defense rested. During closing argument, the State argued that the object that hit defendant's car was the BB gun, stating:

> "The next thing that you should consider as substantive evidence is that the defendant at this particular time, Sergio Martinez, hears something hit the car. Use the reasonable inferences to be drawn. You know what hit that car, Ladies and Gentlemen of the Jury, the BB gun hit the car. And you know how it hit the car, we know why it hit the car, because the BB gun was found 15 yards up in front. It hit the car, it broke, it skidded off, and we know how it broke, because the handle was laying in the street a few feet forward, and the follower, the thing like a Pez dispenser which pushes the BB's up so they could be fired, this was laying next to him. There was a trail; follower, handle of the gun, gun down the street. There was no brick. There was no evidence of that."

In rebuttal, the State also made the following remarks over the defense's objection:

> "Let's go to young Joshua Bzdusek, right over here (indicating), folks. He knows Sergio Martinez, this defendant, he knows Jose, he knows the whole Martinez family, folks, and he lives in Dwight now, it's about an hour and a half from here, and I'd hate to be his life insurance agent now."

The jury ultimately found defendant guilty of first degree murder. It also found that during the commission of the offense, defendant personally discharged a firearm that proximately caused death to another person.

¶ 45 Defendant's motion for a new trial was denied. At sentencing, the State presented a victim impact statement from Christopher's mother and argued that Christopher had been lured out of his house and "killed in cold blood on the street." In mitigation, defense counsel presented testimony from defendant's father and mother. He then argued, *inter alia*, that defendant was only 19 years old at the time of the incident, that he was employed at a scrap metal company, that he had a child, that he had received his GED from Morton College, and that the murder was not gang-related. In allocution, defendant acknowledged that he made a mistake, apologized to the Rivera and Sanchez family, and requested the minimum sentence. The trial court sentenced defendant to a term of 60 years, noting that defendant had "lured Christopher out of the house" and that "there has to be a deterrent to other people, to other members of this society that they cannot go around shooting people." This appeal followed.

¶ 46 ANALYSIS

¶ 47 Defendant first contends that the State failed to disprove his claim of self-defense beyond a reasonable doubt. "One of the recognized justifications to first degree murder is the affirmative defense of self-defense." *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). Once a defendant raises self-defense, it is the State's burden to prove beyond a reasonable doubt that defendant did not act in self-defense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004). "The elements of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that

required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *Lee*, 213 Ill. 2d at 225 (citing 720 ILCS 5/7-1 (West 1998)). "If the State negates any one of these elements, the defendant's claim of self-defense must fail." *Lee*, 213 Ill. 2d at 225.

¶ 48 In this case, defendant claims that the evidence established that Christopher was the initial aggressor; that he and his passengers faced an imminent threat of unlawful force from Christopher; and that he subjectively and reasonably believed that he needed to respond to the threat with deadly force. "It is the responsibility of the trier of fact to determine the credibility of witnesses, to weigh their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence." *People v. Williams*, 193 Ill. 2d 306, 338 (2000). "The relevant standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found, beyond a reasonable doubt, that defendant did not act in self-defense." *Lee*, 213 Ill. 2d at 225.

¶ 49 Here, viewed in the light most favorable to the State, the evidence established that on the evening of December 18, 2009, defendant drove to Christopher Rivera's house with a loaded weapon and called his cell phone from outside, saying, "you ain't on nothing. You're a pussy. I saw you leaving the Marathon gas station." He then turned onto Cuyler Avenue when Christopher and his brothers came out of the house, drove very slowly, and lured Christopher over by waving out the window, saying, "come on, come on." This conduct was clearly sufficient to establish defendant as the initial aggressor. *People v. De Oca*, 238 Ill. App. 3d 362, 367 (1992) (noting that "even the mere utterance of words" may qualify a defendant as the initial aggressor). Moreover, even assuming Christopher fired a BB gun at defendant's car, the evidence showed that defendant never actually believed an imminent danger existed that required

the use of deadly force. Joshua testified before the grand jury that defendant had exclaimed "what the fuck" after a brick hit the car and that he then *stopped* the vehicle to shoot Christopher, suggesting, if anything, that the shooting was motivated by anger rather than fear. While driving away after the shooting, defendant even talked to Joshua and Jose about Christopher's gun being a fake. Although defendant claims that this revelation about the fake gun occurred after a time of reflection, the evidence showed that defendant made this statement within one minute after he shot at the victim and fled the scene of the crime. Even if defendant could establish that everyone in the car faced an imminent threat of harm, a jury could have concluded, given the evidence at trial, that defendant did not reasonably believe that the only way to avoid the threat was to retrieve a loaded gun while the car was moving forward and to shoot out the window. Defendant's contention that deadly force was reasonable or instinctual is belied by the fact that the other passengers, Joshua and Jose, "ducked" or "hunched" down into their seats as soon as they felt threatened by something harmful, whether they perceived it was a brick or a gunshot. Under the circumstances, we conclude that a rational jury could have found, beyond a reasonable doubt, that defendant did not act in self-defense. *Lee*, 213 Ill. 2d at 225.

¶ 50 Defendant alternatively argues that his conviction should be reduced to second degree murder because the evidence showed that he subjectively believed that he was acting in self-defense. We disagree. It is well settled that "[w]here *** a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby." *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). Here, after being given adequate time to consider and to choose to submit a jury instruction on second degree murder, defendant specifically informed the trial court that he did not want the jury instructed on second degree murder. As the record reflects, the trial court took every step to inform defendant of his right to the instruction:

"THE COURT: I just want to ask him specifically. Mr. Martinez, do you want to stand up, please. You understand that you have the right to an instruction on second-degree murder in this case. Do you understand that?

DEFENDANT MARTINEZ: Yes, Judge.

THE COURT: And you have discussed the matter with your attorney; is that correct?

DEFENDANT MARTINEZ: Yes, Judge.

THE COURT: And you have decided that you do not want the second-degree murder instruction given?

DEFENDANT MARTINEZ: Yes, Judge.

THE COURT: And in making that decision, although you have discussed it with your attorney, it has to be your decision as well. So what I want to know from you is it you decision not to have a second- degree murder instruction?

DEFENDANT MARTINEZ: Yes, Judge.

THE COURT: And in making that decision, you weren't threatened in any way or promised any outcome in this case?

DEFENDANT MARTINEZ: No, Judge.

To now consider defendant's claim that he was guilty only of that offense would simply "offend all notions of fair play." See *Villarreal*, 198 Ill. 2d at 227 (noting that "[t]o allow defendant to object, on appeal, to the very verdict forms he *requested* at trial, would offend all notions of fair

play"). We reject defendant's reliance on *People v. Hawkins*, 296 Ill. App. 3d 830 (1998), as there was no indication in that case that the defendant declined a second degree murder instruction. Defendant also asks that this court reduce his conviction to that of second degree murder pursuant to Supreme Rule 615(b)(3). Ill. S.Ct. R. 615(b)(3). Rule 615(b)(3) provides that "[o]n appeal, the reviewing court may reduce the degree of the offense of which the appellant was convicted." We decline the invitation to reduce the conviction to second degree murder, particularly when defendant himself rejected the instruction that would be most properly presented to the fact finder after weighing the credibility of the witnesses.

¶ 51 Defendant next contends that the trial court erroneously instructed the jury. He claims that there was no evidence presented at trial that he was the initial aggressor so as to justify giving Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 and 24-25.11 (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos. 24-25.09 and 24-25.11). He further claims that there was no evidence that he provoked a forceful response from Christopher as an excuse to shoot him so as to justify giving IPI Criminal 4th No. 24-25.11.

¶ 52 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). "There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine which issues are raised by the evidence and whether an instruction should be given." *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). "The question of whether sufficient evidence exists in

the record to support the giving of a jury instruction is a question of law subject to *de novo* review." *People v. Washington*, 2012 IL 110283, ¶ 19.[1]

¶ 53 Here, the trial court instructed the jury with a modified version of IPI Criminal 4th No. 24-25.09, which read:

> "A person who initially provokes the use of force against himself is justified in the use of fo*rce only if the for*ce used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or gr*eat bodily har*m to the other person."

It also instructed the jury with IPI Criminal 4th No. 24-25.11, which states: "A person is not justified in the use of force if he initially provokes *the us*e of force *against himself with* the intent to use that force as an excuse to inflict bodily harm upon the other person."

¶ 54 We have already found that the State presented sufficient evidence to establish defendant as the initial aggressor where defendant drove to Christopher's house, called him on the phone to taunt him, and drove his car slowly down the street while waving Christopher towards him, saying, "come on, come on." See *De Oca*, 238 Ill. App. 3d at 367. We also find, however, that the State's evidence supported an instruction that defendant provoked the use of force with the intent to use that force as an excuse to shoot Christopher. The State established that defendant drove to Christopher's house with a loaded gun on the night in question. He then called Christopher on his cell phone and referred to him as a "bitch" and a "pussy," while stating "You

[1] We recognize that the supreme court has also stated that "[t]he giving of jury instructions is a matter within the sound discretion of the trial court." *People v. Jones*, 219 Ill. 2d 1, 31 (2006). However, under either standard, we reach the same result.

ain't on nothing," meaning Christopher "didn't have the guts to come out and fight." When Christopher subsequently did come outside, defendant proceeded to lure him towards the car with hand gestures and words. He then shot Christopher through the head as he was approaching the vehicle. Despite the conflicting evidence over what prompted defendant to shoot Christopher, we find that the above evidence could support a finding that defendant was provoking force against himself as an excuse to inflict bodily harm upon Christopher. The trial court was thus justified in instructing the jury with IPI Criminal 4th No. 24-25.11. *Mohr*, 228 Ill. 2d at 65.

¶ 55 Defendant disputes our finding that he was the initial aggressor. He acknowledges that this court has held that mere words can be enough to qualify a defendant as an initial aggressor (*People v. Dunlap*, 315 Ill. App. 3d 1017 (2000), *People v. Tucker*, 176 Ill. App. 3d 209 (1988), and *People v. Crue*, 47 Ill. App. 3d 771 (1977)), but claims those cases involved defendants who "explicitly threatened the victim or invited the victim to engage in a fight" while in the victim's presence, whereas he "only" made a phone call to Christopher. We are not persuaded by this distinction. Defendant overlooks the fact that he called Christopher from across the street. More importantly, the evidence established that defendant did not "only" make a phone call. He also pulled around the corner when Christopher came out of his apartment and lured Christopher towards the car with words and gestures. Under the circumstances, we find no merit to defendant's argument.

¶ 56 Defendant's attempt to compare the instant case to *People v. Slaughter*, 84 Ill. App. 3d 1103 (1980) is without merit. In *Slaughter*, the reviewing court found that the same jury instructions at issue here were erroneously given where defendant "did not invite [the victim] to 'come on' " and "[t]here was no testimony that defendant's words were directed toward [the

victim]." *Slaughter*, 84 Ill. App. 3d at 1111-12. Clearly, *Slaughter* is distinguishable given that defendant in this case did invite the victim to "come on" and directed his words at him.

¶ 57 Defendant next contends that he was denied a fair trial where the jury was not instructed with Illinois Pattern Jury Instructions, Criminal, No. 24-25.09X (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos. 24-25.09X), which states: "A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." Although defendant acknowledges that he has forfeited this issue by failing to request that the instruction be given, or object to its not being given (see *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007)), he nonetheless requests this court to review his claim for plain error.

¶ 58 The plain error doctrine is a narrow and limited exception to the general rule of procedural default. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He must then show either (1) that the evidence was closely balanced, or (2) that the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Naylor*, 229 Ill. 2d at 593. Under both prongs, defendant bears the burden of persuasion. *Naylor*, 229 Ill. 2d at 593. "If the defendant fails to meet his burden, the procedural default will be honored." *Hillier*, 237 Ill. 2d at 545.

¶ 59 Defendant claims that the trial court erred in failing to instruct the jury, *sua sponte*, with IPI Criminal 4th No. 24-25.09X. He argues that because "the trial court is responsible for fully instructing the jury on the elements of the offense" (*People v. Delgado*, 376 Ill. App. 3d 307, 314 (2007)), and lack of justification is an element of first degree murder, the trial court was responsible for fully instructing the jury on self-defense. He additionally notes that the

committee comment to the rule states that "[i]n appropriate cases, both instruction 24-25.09 and 24-25.09X should be given," and he argues that this is such a case because he presented "significant evidence" that he was not the initial aggressor.

¶ 60 "It is the parties' responsibility to prepare jury instructions and tender those instructions to the trial court." *Alexander*, 408 Ill. App. 3d at 1001 (citing *People v. Underwood*, 72 Ill. 2d 124, 129 (1978)). " 'Generally, the trial court is under no obligation either to give jury instructions not requested by counsel or to rewrite instructions tendered by counsel.' " *Alexander*, 408 Ill. App. 3d at 1001 (citing *Underwood*, 72 Ill. 2d at 129).

¶ 61 Here, the record shows that the trial court fully instructed the jury on the elements of the offense of first degree murder, as required. The record also shows that the court instructed the jury on the affirmative defense of self-defense. Although defendant claims that the trial court had an additional duty to *sua sponte* instruct the jury that a non-initial aggressor has no duty to retreat, this court has recognized that a trial court "has no duty in a criminal case to give instruction on its own initiative concerning the defendant's theory of the case." *People v. Porterfield*, 131 Ill. App. 2d 167, 174 (1971). Furthermore, there is absolutely no requirement that IPI Criminal 4th No. 24-25.09X must be given whenever IPI Criminal 4th No. 24-25.09 is given. *Alexander*, 408 Ill. App. 3d at 1002. Under the circumstances, we find no clear or obvious error where the trial court failed to *sua sponte* instruct the jury with IPI Criminal 4th No. 24-25.09X. Defendant has thus failed to meet his burden of establishing plain error, and his procedural default must be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 62 Defendant alternatively argues that his trial counsel was ineffective for failing to submit IPI Criminal 4th No. 24-25.09X or to object to its omission. To establish ineffective assistance of counsel, defendant must first show that counsel’s performance was deficient, *i.e.*, it fell below

an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. "A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." *People v. Palmer*, 162 Ill. 2d 465, 475 (1994) (citing *Strickland*, 466 U.S. at 687).

¶ 63 Here, defendant claims that he was prejudiced by the absence of an instruction stating that a non-aggressor has no duty to attempt to escape danger. We disagree. In the case at bar, the jury was presented with two different versions of the events on the night in question. The first was introduced through the trial testimonies of Isaac and Jonathan and involved Christopher being lured to defendant's car where he was shot by defendant absent any provocation. The second was introduced through the testimony of Joshua, Jose, and defendant, and involved Christopher approaching defendant's car and firing a gun at it. In this version, defendant could not escape the alleged danger because a car had pulled in front of him and blocked his path forward, requiring him to shoot at Christopher in self-defense. The defense elected, as its strategy, to argue the latter of these scenarios at trial. Defense counsel argued in closing that "there's a lot of questioning about, well, did [defendant] try and drive around the car that was in front of the vehicle? This was a one-way street, there's cars on both sides, couldn't get around it." He also argued that defendant attempted to escape, stating: "[Defendant's] driving, he's driving away, being attacked, turns around to protect himself." Although defendant claims that an instruction stating that a non-aggressor has no duty to attempt to escape danger was "critical" to the defense, we find that such an instruction would have had no effect on the verdict where it

was entirely inconsistent with the version of events relied on by the defense, *i.e.*, that defendant literally could not escape, but was attempting to anyways. Defendant has thus failed to establish that he suffered prejudice (*Strickland*, 466 U.S. at 687, 694), and his ineffectiveness claim must be rejected as a result (*Palmer*, 162 Ill. 2d at 475).

¶ 64 Defendant next challenges certain remarks made by the State in closing argument. He acknowledges that he has forfeited his objections to the remarks in question by failing to cite them in his motion for a new trial (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but nonetheless requests that we review for plain error.

¶ 65 We note that the State generally has wide latitude in the content of its closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). Indeed, the State may comment on the evidence and any fair and reasonable inferences to be drawn, even when those inferences reflect negatively on defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). We consider the closing argument as a whole instead of focusing on a selected phrase or remark. *Perry*, 224 Ill. 2d at 347. We will only find reversible error "if a defendant can identify remarks of the prosecutor that were both improper and so prejudicial that real justice was denied or that the verdict of the jury may have resulted from the error." (Internal quotation marks omitted.) *People v. Evans*, 209 Ill. 2d 194, 225 (2004).

¶ 66 Defendant first objects to the State's argument that the piece of plastic found under Christopher's body was the "follower" of the BB gun, *i.e.*, "the thing like a Pez dispenser which pushes the BB's up so they could be fired." Although defendant correctly notes that there was no testimony establishing the State's assertion that the black piece of plastic was the "follower," we find nothing improper or prejudicial in the State's remark. The crux of the State's argument was that it was reasonable for the jury to infer that the BB gun hit defendant's car where it was found

a distance away from Christopher's body, with the handle and a piece of plastic broken off. We find nothing improper about the State arguing that the piece of plastic found under Christopher's body had broken off from the gun, especially where the jury was given a photograph of the piece to determine its character. We also note that the State's description of the piece of plastic as the "follower" was merely incidental and caused no prejudice to defendant. We thus find no clear or obvious error.

¶ 67 Turning to the other challenged remark, defendant claims that the State's comment in rebuttal, "I'd hate to be [Joshua's] life insurance agent now," was improper because the State presented no evidence that defendant had threatened Joshua. "It is improper *** for the State to suggest that a witness was afraid to testify because the defendant threatened or intimidated him when that argument is not based on evidence produced at trial." *People v. Cox*, 377 Ill. App. 3d 690, 707 (2007). We do not find, however, that defendant suffered significant prejudice as a result of the State's remark.

¶ 68 In *People v. Walker*, the State argued in closing that a witness testified against defendant at the risk of his own life despite any evidence that the witness had been threatened. *People v. Walker*, 230 Ill. App. 3d 377, 399 (1992). This court acknowledged the impropriety of the State's arguments, but did not consider them prejudicial because "they were not highlighted, not repeated, or otherwise emphasized. *Walker*, 230 Ill. App. 3d at 400. This court further found that "any prejudicial impact was minimized by the fact that [the witness'] fright was not attributed to defendant." *Walker*, 230 Ill. App. 3d at 400. Here, similar to *Walker*, the State's remark implying an actual threat to Joshua was not highlighted, repeated, or otherwise emphasized. Furthermore, any prejudicial impact was minimized by the fact that the suggested danger to Joshua was not specifically attributed to defendant. Under the circumstances, we

cannot say that defendant was so prejudiced by the State's isolated remark that the verdict of the jury can be called into question. *Evans*, 209 Ill. 2d at 225.

¶ 69 Defendant has cited *People v. Mullen*, 141 Ill. 2d 394 (1990) and *People v. Johnson*, 202 Ill. App. 3d 417 (1990), in support of his claim. In *Mullen*, the trial court excluded evidence of a witness' reasons for initially refusing to testify. *Mullen*, 141 Ill. 2d at 404. The State nonetheless argued in rebuttal that the witness was reluctant to testify because he was afraid of defendant shooting him in the back. *Mullen*, 141 Ill. 2d at 405. The supreme court found that the State's rebuttal argument constituted plain error requiring reversal because: (1) the evidence was "closely balanced and littered with discrepancies"; (2) the State emphasized the excluded evidence by characterizing it as " 'perhaps one of the most power things in this case' "; and (3) the State exhibited a "blatant disregard as to proper argument and the orders of the trial court." *Mullen*, 141 Ill. 2d at 407-08.

¶ 70 In *Johnson*, the State made a number of improper remarks during closing argument, including one which suggested that "persons who identified the defendant to the police did not testify because of fear, implicitly of the defendant." *Johnson*, 202 Ill. App. 3d 424. This court ultimately found that defendant was denied a fair trial based on the cumulative effect of the State's improper closing remarks and the erroneous admission of hearsay evidence. *Johnson*, 202 Ill. App. 3d 426.

¶ 71 Here, unlike *Mullen*, the State did not blatantly disregard an order of the trial court in making the remark in question and it did not emphasize the remark to the jury. Also, unlike *Johnson*, there were no additional errors that cumulatively denied defendant a fair trial. *Mullen* and *Johnson* are clearly distinguishable from the instant case. We therefore find that defendant

has failed to show that a clear or obvious error occurred and honor the procedural default of this claim. *Hillier*, 237 Ill. 2d at 545.

¶ 72 Defendant lastly contends that the trial court abused its discretion in sentencing him to 60 years for first degree murder. The State responds that defendant's sentence was appropriate where the court considered the necessary factors and imposed a sentence within the proper guidelines.

¶ 73 "[A] reviewing court may not modify a defendant's sentence absent an abuse of discretion." *People v. Snyder*, 2011 IL 111382, ¶ 36. Such an abuse will be found only where "the sentence is greatly at variance with the spirit and purpose of the law[] or manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *Snyder*, 2011 IL 111382, ¶ 36. "A sentence will not be found disproportionate where it is commensurate with the seriousness of the crime and adequate consideration was given to any relevant mitigating circumstances, including the rehabilitative potential of defendant." *People v. Harris*, 2013 IL App (1st) 120498, ¶ 41 (citing *People v. Perez*, 108 Ill. 2d 70, 93 (1985)).

¶ 74 Defendant claims that the trial court failed to consider a significant amount of mitigating evidence when imposing sentence, including his strong family ties, employment, youth, lack of criminal history, and expression of remorse. A trial court is presumed to have considered any evidence of mitigation before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). Here, the record shows that the trial court was provided with a copy of defendant's presentence investigation report at sentencing, which included his age, familial status, employment history, and criminal history. The court then heard testimony from defendant's mother and father, defense counsel's arguments in mitigation, and defendant's expression of remorse in allocution. There is no indication in the record that the court failed to consider the evidence presented in

mitigation. Therefore, we have no authority to reweigh the factors involved in the court's sentencing decision. *People v. Alexander*, 239 Ill. 2d 205, 214 (2010).

¶ 75 Defendant's first degree murder conviction made him eligible for a sentence of between 20 and 60 years. 730 ILCS 5/5-4.5-20(a)(1) (West 2008). He was also subject to an enhancement of 25 years to natural life for personally discharging a firearm during the commission of the offense that proximately caused death to another person. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). The trial court sentenced defendant to a term of 60 years. This sentence was clearly within the guidelines and neither at variance with the spirit and purpose of the law, nor manifestly disproportionate to the offense. Accordingly, we find no abuse of sentencing discretion and affirm the sentence imposed. *Snyder*, 2011 IL 111382, ¶ 36.

¶ 76 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 77 Affirmed.