FOURTH DIVISION
June 19, 2014

1-12-0956

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. 06 CR 19534
	)	
JOVAN LOPEZ,	)	Honorable
	)	James L. Rhodes,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence for first degree murder are affirmed. The trial court did not err in admitting other crimes evidence of a prior event that was inextricably intertwined with the charged offense. The admission of opinion testimony by a lay witness was harmless beyond a reasonable doubt, and the court did not erroneously admit hearsay. The State's closing argument did not reference inadmissible evidence; and the evidence was sufficient to convict defendant of first degree murder despite his claims of self defense and mutual combat. The use of a firearm enhancement to defendant's sentence does not violate the Second Amendment to the United States Constitution.

¶ 2 After a bench trial, Jovan Lopez was convicted of first degree murder for shooting and killing Quione Emery. The shooting occurred during an altercation involving defendant's younger brother in which the deceased wielded a baseball bat. Defendant shot Quione Emery multiple times, allegedly as the deceased was about to strike defendant's younger brother with the baseball bat for a second time. The State also charged defendant's brother, Daniel Lopez, with various offenses rising out of the altercation, but the trial court found Daniel Lopez not guilty on all counts. Defendant asks this court to either reverse his conviction for first degree murder outright, reverse the conviction and remand for a new trial in which the trier of fact does not consider the evidence that was erroneously admitted in his first trial, or reduce his conviction to second degree murder based on defense of his brother or serious provocation. Alternatively, defendant asks this court to vacate his sentence for first degree murder and remand for a new sentencing hearing on that offense on the grounds that the mandatory sentence enhancement for personally discharging a firearm resulting in death during the commission of the offense violates his Second Amendment rights.

¶ 3 We conclude the State properly adduced sufficient evidence to sustain defendant's conviction for first degree murder and that the sentencing enhancement does not violate the Second Amendment to the United States Constitution. Accordingly, we affirm defendant's conviction and sentence.

¶ 4 I. BACKGROUND

¶ 5 According to the State, the events that led to Quione Emery's murder on July 23, 2006 actually began the day before. The events of July 22, 2006 were the subject of a motion *in*

limine by the State to admit evidence of other crimes. Defendant agues the trial court committed reversible error in subsequent rulings it made on that pretrial matter. We set forth the pertinent facts adduced at trial first, to provide a context for defendant's argument regarding pretrial matters.

¶ 6 Lynell Young testified that on July 22, 2006 he was visiting the home of Quione Emery, the deceased, and Quasheena Emery, Quione's sister who was also living in the residence at that time. Young testified he observed two men he described as "Mexicans" in Quione Emery's backyard. Young recognized one of the men as a person he knew by the name Firecracker. Young did not know the name of the second man. In court, Young identified defendant as the second man who was in Quione Emery's backyard on July 22, 2006.

¶ 7 Young asked the men to leave. Firecracker told Young they did not have to leave. Young reentered the home and spoke to Robert Quinn. Quinn was Quasheena Emery's boyfriend. Young and Quinn returned to the backyard to again talk to Firecracker. At the time, only Firecracker and defendant were in the yard. Quinn began to talk to Firecracker when an unknown number of Hispanic males joined Firecracker and defendant in Quione Emery's backyard and encircled Young and Quinn. Young testified that Firecracker punched him in the jaw, Young then hit Firecracker, and defendant began to come at Young. Young testified at that point the rest of the men began to attack him. Young could not identify which of the other men struck him. Young was on the ground attempting to fight off the men attacking him when he saw Quione Emery exit the home with a baseball bat in his hands. At that point, all of the men fled. Quasheena Emery called police. Young testified

that he spoke to police and told them what happened. Police drove around the area, did not locate anyone, and eventually left. Young did not see defendant again that day.

¶ 8 Young also testified about the events of July 23, 2006. Young left the Emery residence in the morning and was walking back that evening. As Young was walking back to the Emery residence, he saw Firecracker and others sitting on the porch of an abandoned house approximately 3 houses away from the deceased's home. Young continued to the Emery residence without addressing Firecracker. When Young arrived at the Emery residence, he informed everyone present that the men who attacked him were outside. Quione, his sister Quasheena, his brother Quentin, Robert Quinn and Quentin's girlfriend were all present. Young testified that Quentin Emery wanted to talk to Firecracker to ask why Young was attacked. Quentin asked Young to accompany him to talk to Firecracker. Young testified that as they approached Firecracker, they noticed two groups of Hispanic males on opposite corners of the street. Defendant was with Firecracker at the abandoned house. Young testified that as he and Quentin left Firecracker and defendant, defendant said "y'all can get it again." Young testified neither he or Quentin was armed and they began to return to the Emery residence.

¶ 9 Young testified he and Quentin continued walking when the men from the corner came toward them. The men "charged" Young and Quentin and a fight began in the driveway area of the Emery residence. Defendant was not among the men who initially charged Young and Quentin. Defendant did not throw the first punch and, according to Young, neither did defendant's brother; another male Hispanic threw the first punch at Quentin. Quione Emery and Robert Quinn exited the house. Quione had a bat in his hands.

Young testified he saw Quione move toward defendant. He did not see Quione swing the bat at anyone. Young did not see anything else before he heard a gunshot. After he heard the gunshot, Young testified he saw Quione drop to the ground and get back up and saw defendant shoot Quione again. Young did not see a bat in Quione's hands when Quione dropped or when he attempted to stand. Young heard two more gunshots after the first shot. Defendant fled. Young testified he then saw defendant's brother take the bat and strike Quione on the back of the head with the bat as Quione lay in the grass after being shot. Then defendant's brother ran away as well.

¶ 10 Quentin Emery testified that on the day of the shooting, Young came to the Emery home and spoke to him. As a result of that conversation, Quentin left the house to talk to "the Latin Kings down the street" to attempt to "stop the fighting" that had occurred the day before. Young "wanted something done about it." Quentin wanted to end the situation "before it escalated to something bigger." Quentin explained that he and Firecracker were "social together *** talked from time to time, so I thought I could talk to him to stop all of it." Quentin went to talk to Firecracker accompanied by Young. As he and Young were walking to talk to Firecracker, Quentin observed a group of 4 or 5 Hispanic males on the northwest corner and another group of 4 Hispanic males on the southeast corner of the street. Quentin testified they walked past the group of men to Firecracker's location, which was about one house away from the corner. As Quentin spoke to Firecracker about the situation some of the men Quentin and Young had walked past started coming up behind them. Firecracker called for someone named Jesus, and two other men (not from the groups on the corners) came up to them as well, one of whom Quentin presumed to be Jesus and the other

whom defendant described similarly to the way Young described defendant. Quentin continued to try to talk to Firecracker when defendant, who was in the group with Quentin, Young, and Firecracker, said "whatever happen, happen. You wanna take it further, we can; this our hood."[1] That statement terminated the conversation and Quentin and Young started walking back to the Emery residence.

¶ 11 Quentin testified that when the two of them arrived next to the house, Young told him to turn around and Quentin saw 8 or 9 Hispanic men in two groups charging them. Quentin testified defendant was among them. At that point, defendant's brother came up fast on Quentin, pulling up his pants before attempting to hit Quentin. Quentin specified that after pulling up his pants (because they were sagging), defendant's brother made a motion like he (defendant's brother) was going to hit Quentin. Quentin agreed that in neither his handwritten statement nor his testimony before the grand jury did Quentin state that defendant's brother made a movement like he was going to hit Quentin, only that defendant's brother was pulling up his pants initiating a fight. Quentin testified that "[i]n the neighborhoods up in Chicago Heights, when you see [defendant's brother's action] you know it's about to be something," specifically a punch. Quentin testified he was able to hit defendant's brother first and then the situation became an "all-out brawl." Quentin testified

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[1] On appeal defendant contends that Quentin amended his testimony as to this statement by placing defendant's words in the past tense. That is, defendant claims that on cross-examination, Quentin testified that defendant said "whatever happened, happened" and argues that this was an attempt by defendant to place events in the past and move on. Our review of the record reveals that defense counsel twice asked Quentin if defendant said "whatever happened, happened" and Quentin simply agreed with defense counsel's phrasing of defendant's statement.

that Young was fighting 4 men and he was doing the same. Everyone in the residence, including Quione, came out of the house. Quione and Robert Quinn started running toward Quentin and Young. Quentin could not see whether Quione had anything in his hands. He did not see a bat and did not see Quione hit anyone with a bat. As Quione was running toward them, apparently to help in the fight, Quentin testified he heard a male voice say "back up, back up." Quentin could not identify the speaker but it was not Young, Quinn, or Quione. He saw all of the Hispanic males back up at that point. Quentin looked to the side of Quione and saw defendant with a handgun about 10 feet away from Quione, with the gun pointed toward Quione, Quasheena, Quinn, and Quentin's girlfriend. Quentin testified that defendant started firing the gun and Quentin began to run toward defendant. Quentin heard six shots. He did not see his brother go down. Defendant turned and ran, so Quentin turned and ran back toward his house. Quentin saw Young running and left the side of the house to follow when he saw Quione lying on the ground with a gunshot wound.

¶ 12 Ivan David Mendez testified that near the time of the shooting he was outside a friend's home, Jesus Quinones, when he saw defendant outside and further up the street. At some point Mendez saw defendant and Jesus exchange words but he could not hear what was said. He then saw Jesus go inside defendant's home. Before Jesus went into the house, defendant said "go get that." After Jesus came out of the house, he (Jesus) walked over to defendant. Mendez gave a statement in which he said that after Jesus came out of the house, he handed something to defendant and the two of them went to where a bunch of guys were standing across the street. Mendez saw two African-American men walk to where the bunch of guys was standing and talk to them. Those two men left the conversation and walked in

the opposite direction from where Mendez was watching, back in the direction from which they had come. Mendez saw the group that was across the street from him follow the two African-American men, and then a fight broke out. Mendez testified defendant and defendant's brother were involved in the fight. Mendez told an assistant state's attorney in his written statement that he remembered seeing defendant's brother swinging at one of the African-American men then stumble as if he (defendant's brother) had been hit.

¶ 13 Mendez testified that he saw defendant shooting at an African-American man. Mendez agreed that the man defendant was shooting at was trying to run away but was hit by one of defendant's shots and fell to the ground, whereupon, Mendez said in his statement, defendant continued to fire at the man on the ground while advancing toward him. On cross-examination, Mendez testified he saw a man exit a house with a baseball bat and strike defendant's brother in the head with the bat. Mendez testified he saw that man standing over defendant's brother appearing to be about to strike him again. The man was about to strike defendant's brother again just before shots were fired. The man just went down, and all of the shots came at once; no one chased him down and started shooting at the man with the bat. Mendez further testified on cross-examination that the man still had a baseball bat in his hands when he was shot. Mendez said that the statement he gave to the assistant state's attorney was "just what they wanted [him] to say" and he signed off on it, but he did not really remember telling the assistant state's attorney those things, but he later agreed that his statement to the assistant state's attorney was the truth about what he remembered happening on the night of the shooting.

¶ 14 The trial court tried defendant's brother, Daniel Lopez, jointly. Daniel testified on his own behalf in his case, and defendant adopted that testimony in his case. Daniel testified that on the night of the shooting, he had been playing cards at another brother's house and afterwards he went for a walk by himself. Defendant was playing cards with them. Danny testified that the last time he saw his brother that night was when they were playing cards. Danny observed a "couple of guys on the corners" who he described as male Hispanics. He did not see Firecracker, Jesus, or Mendez in the area that night, although he knew each of those men. Daniel testified that as he was walking he was approached by two African-American men and was struck in the head with a baseball bat. He did not see where the two men came from and only one of them had a bat. Before he was hit, he had not been talking to anyone and was not in a group with anyone else. When Danny was hit by the bat he fell to the ground. He testified that his vision was "getting blurry" but he tried to get up and saw individuals standing over him about to hit him again. Danny identified a photograph of Quione as the person who was holding the bat. At that point he heard gunfire. Danny was still on the ground in the process of standing up when he heard the shots. He did not see who fired the gun. He heard 4 to 5 shots then he got up and ran.

¶ 15 Daniel testified that after composing himself in an alley a few blocks from where he was hit, he went home. His mother was present, but he told no one what happened and did not call police. He did not tell anyone until approximately a week later, when he told defendant. Daniel testified that defendant asked Daniel if Daniel recognized anyone and where it happened, but nothing further.

¶ 16 Following closing arguments the trial court found defendant not guilty of mob action and guilty of first degree murder. The court sentenced defendant to imprisonment for 45 years which included a mandatory 25-year sentence enhancement for personally discharging a firearm resulting in the death of another during the commission of the offense.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 This appeal challenges certain of the trial court's evidentiary rulings, the sufficiency of the State's evidence, and the constitutionality of the sentencing statute. Defendant argues the trial court could not reconsider the State's motion *in limine* to admit evidence of the events of July 22, 2006 and even if it could, that evidence is inadmissible. Defendant argues the State failed to adduce sufficient evidence to overcome his claims of self-defense or serious provocation. Finally, defendant argues the statute under which the trial court sentenced him to an additional 25 years' imprisonment is unconstitutional. Because no single issue is dispositive of defendant's appeal, we address each in turn.

¶ 20 A. Evidentiary Rulings

¶ 21 Defendant raises two arguments with respect to the admission of evidence of the events of July 22, 2006. First, defendant argues that after remand from this court from the State's interlocutory appeal of the denial of its motion *in limine* to admit the evidence, the trial court lacked authority to issue a contrary decision because doing so was barred by the doctrine of law of the case, *res judicata*, or the "*Taylor* rule." Second, defendant argues that in any event, the admission of evidence of the events of July 22, 2006 denied him a fair trial because the other crimes evidence was not admissible for any valid purpose. Finally,

defendant argues that the trial court committed reversible error in allowing the State to adduce improper opinion testimony from a lay witness and a hearsay conversation between defendant and his brother.

¶ 22 1. Admissibility of Evidence of the July 22, 2006 Events

¶ 23 The State filed a motion *in limine* to admit other crimes evidence related to the events of July 22, 2006. The trial court denied the State's motion, finding that "on balance the prejudicial effect does outweigh the probative value." The State asked the court for clarification on the ruling and asked if the court would preclude its witnesses from saying why they went down the street to talk to Firecracker and the others. The State expressed its understanding of the court's ruling at that time to be that the witnesses "would not be able to bring up the fact that there was an incident the day before in which they were attacked." The court responded as follows:

> "Counsel, you'd have to present, I think, a precise offer of proof as to what exactly--I'm not saying nothing can get in, but I'm not going to allow that incident of the 22nd to be litigated as a separate pretrial. If there are--there is some innocuous reference to some interface between the parties that explains why they are going down there, without getting into the prejudicial value, I'm not precluding the fact that I might let some evidence in. But I'm not going to let the State put on the entire events of the 22nd, because I think it is too prejudicial, and it's not necessary for the State to prove its case."

¶ 24 The State appealed the trial court's ruling on its motion *in limine*. This court dismissed the appeal for lack of jurisdiction. This court held that it lacked jurisdiction under Illinois Supreme Court Rule 604(a)(1) (Ill. Sup. Ct. R. 604(a)(1) (eff. July 1, 2006)) because the trial court's order did not prevent information from being presented to the fact finder. This court found that the trial court's order on the State's motion *in limine* "had the substantive effect of controlling how the evidence could be presented, but did not bar it completely." This court noted that the trial court "clearly stated that it was not prohibiting the State from introducing any evidence relating to the altercation on July 22." This court construed the trial court's order to properly allow the introduction of evidence of the altercation but also to properly prohibit characterizing the altercation as a crime.

¶ 25 After the appeal was dismissed, the matter was returned to the trial court and assigned to a different trial judge. The State then filed a motion titled "Motion to Allow Evidence Pursuant to Appellate Court Ruling" (Motion to Allow). The State's Motion to Allow argued that a plain reading of this court's order "allows the State to introduce the incident that occurred on July 22nd but bars it from being characterized as a crime." The State asked the trial court to "allow the State to introduce the July 22, 2006 attack on Lynell Young consistent with the findings of the 1st District Appellate Court." Defendant filed a written response arguing that the State misstated this court's decision and that this court indicated that introduction of evidence of the July 22nd event was limited to an "innocuous reference to some interface between the parties" as stated in the first trial judge's order denying the State's motion *in limine*.

¶ 26 During oral argument on the State's Motion to Allow, defendant's attorney began by stating "Judge, nobody says that the incident from July 22nd shouldn't come in. The question here is the manner and form in which it comes in." Defense counsel characterized the first trial judge's order as allowing the incident to come in "as far as there was some bad blood. There was an incident that happened on the 22nd." Defense counsel asked the trial court to "limit the manner in which the State *** can bring up the incident that happened on the 22nd" and argued the State could adduce evidence of bad blood but not the specifics of the incident. Defendant's attorney conceded the evidence should come in but it should be limited. The court asked defense counsel for an opinion on the amount of evidence that could be admitted. Defense counsel advocated that only a) that an incident occurred and b) that there was bad blood between the parties was admissible, and that the trier of fact should not hear what happened or who was involved.

¶ 27 Defense counsel argued that position was consistent with the earlier ruling denying the motion *in limine* and this court's order, and further stated as follows:

> "We understand that this Court has a right to look at this freshly, to look at--determine what evidence can be brought in, but we urge this Court to go along with what the prior Court ruled: That an innocuous reference to the previous incident can be brought up, but nothing more specific than that."

¶ 28 Following the parties' arguments on the State's Motion to Allow, the trial court ruled that because this court dismissed the appeal of the trial court's order on the State's motion *in*

limine for lack of jurisdiction the court was not bound by any prior decision on the matter. The court ruled, in part, as follows:

> "[B]ecause of the ambiguity in [the appellate court's] opinion and the disagreement between both sides as to what the opinion means, and because of my inherent authority to review decisions that I make as well as review decisions that other judges have made, I am--and previously ordered that counsels prepare this motion anew and present it to me *** for purposes of me looking at it fresh, not considering much of what is in the appellate opinion and look at it anew."

¶ 29 The trial court held that evidence of the July 22nd incident was admissible for several proper purposes other than to show defendant's propensity to commit a crime, including for purposes of a continuing narrative to explain both events. The court also held that "the probative effect of the evidence to establish motive, identity, hostility, rebut self-defense outweighs the prejudicial effect." The court found there was no risk the trier of fact would convict defendant based on the previous incident where there were no weapons involved in the previous incident, no gun was involved, and it was a fight in which the victim was not involved. The court found that limiting the evidence of the previous incident as defense counsel suggested would not permit the trier of fact to use the evidence for the proper purposes for which the State sought to introduce the evidence, specifically to indentify the defendant and rebut the claim of self-defense. The court instructed the parties:

> "I will allow testimony as generally what happened on the 22nd and the identification of the perpetrators that did it in order to satisfy the legal, permissible reasons for the other crimes evidence."

¶ 30 The court also indicated it would instruct the jury as to proof of other offenses or conduct pursuant to Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000).

¶ 31 a. Prior Ruling

¶ 32 The State argues defendant acquiesced to the trial court's authority to revisit the earlier ruling on the motion *in limine* and, therefore, should be found to have forfeited this issue for appeal. Forfeiture aside, the State argues defendant's argument lacks merit because the State sought only to clarify, not to relitigate, the earlier order before the new trial judge. The State argues neither the law of the case, the *Taylor* rule, or *res judicata* is applicable to the trial court's initial ruling or this court's dismissal order. Defendant argues the trial court's ruling on the State's Motion to Allow "effectively abrogated and reversed the prior ruling" on the motion *in limine* "when there was no authority to reconsider at all." We disagree.

¶ 33 We recognize that the prior grant of a suppression motion cannot be relitigated. *People v. Williams*, 138 Ill. 2d 377, 391 (1990). Under the *Taylor* rule:

> "A suppression order may be an appealable order under our Rule 604(a)(1) (107 Ill. 2d R. 604(a)(1)), and, if it is, the State must either appeal or not. Except for seeking timely reconsideration by the same or a successor judge of the court in which the order was entered [citation], the State cannot now have the order

> reviewed by another trial judge and cannot before such a judge retry the issues therein decided [citations]." (Internal quotation marks omitted.) *Id.* at 389-90.

¶ 34 The original order did not result in a suppression of evidence. This court made that fact explicit in its order dismissing the State's appeal for lack of jurisdiction. We disagree with defendant's contention that, under the facts of this case, the trial court lacked authority to revisit the earlier ruling on the State's motion *in limine*. Our supreme court distinguished an unappealable interlocutory order, entered by one judge and later modified by another, from the appealable orders governed by the *Taylor* rule. *Id.* at 391. Thus the *Taylor* rule does not apply to these facts. Nor do the doctrines of law of the case or *res judicata* apply. *Id.* at 389 ("The parties have argued this phase of the present cause in terms of collateral estoppel, *res judicata*, and law of the case, yet none of these legal doctrines controls here, although the issue in *Taylor* has occasionally been described in terms of one or another of them.")

¶ 35 "A court in a criminal case has inherent power to reconsider and correct its own rulings, even in the absence of a statute or rule granting it such authority. [Citations.] A court's power to reconsider and correct its decisions extends to interlocutory *** judgments. [Citations.]" *People v. Mink*, 141 Ill. 2d 163, 171 (1990). The trial court's authority also extends to orders by a previously assigned trial judge. See *People v. Jones*, 207 Ill. 2d 122, 136-37 (2003) ("Upon determining that the first trial judge erred in vacating defendant's mob action conviction and setting the case for retrial, both the subsequent trial judge and the appellate court had the authority to reinstate the conviction."). The order on the motion *in limine* was unappealable. Because the trial court had the inherent authority to correct the

ruling on the State's motion *in limine*, we find that defendant's arguments to the contrary lack merit.

¶ 36 b. Admissibility of "Other Crimes" Evidence

¶ 37 Defendant argues the "other crimes evidence" of the events of July 22, 2006 would only be admissible to prove *modus operandi*, intent, identity, motive, or absence of mistake, and that the evidence in this case was not admissible for any of those purposes and had at best "neutral" probative value to any other issue. Defendant argues the admission of this evidence prejudiced him by resulting in a "mini-trial" in which defendant had to defend himself against the other crime and because the court relied on the other crime to find defendant guilty of the charged offense. The State responds defendant also forfeited this issue by failing to object to Young's testimony and, regardless, the evidence was admissible to put defendant's behavior into context, to rebut defendant's claim of self-defense, and to corroborate the witnesses' identifications; and its probative value was not outweighed by its prejudicial effect.

¶ 38 The decision on the admissibility of evidence rests within the discretion of the trial court, and the court's decision will not be disturbed absent an abuse of that discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12.

> "Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime. [Citation.] Other-crimes evidence is admissible to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged. [Citation.] However, even where relevant, the

> evidence should not be admitted if its probative value is substantially outweighed by its prejudicial effect. [Citation.]" *Id.* ¶ 11.

¶ 39 "When the State seeks admission of other-crimes evidence, it must first show that a crime took place and that the defendant committed it or participated in its commission." *Id.* ¶ 15. Defendant argues the other crimes evidence in this case is inadmissible because the threshold of identifying the perpetrators of the other crime, other than Firecracker, was never met. Defendant argues the threshold of identity of defendant as having participated in the other crime was not met in this case because defendant is not named in the police report Young filed after the event and, he argues, "Young could never discern who among the many were actually attempting to hit him." The State could establish defendant's participation at trial (See *People v. Thingvold*, 145 Ill. 2d 441, 453 (1991) (holding trial court did not err in admitting testimony regarding other crime probative of the defendant's intent at trial)) and the evidence at trial established defendant's involvement in the events of July 22, 2006. Young did not know the name of the second man in the Emery's backyard on the day in question, but in court, Young identified defendant as the second man who was in the backyard. As far as defendant's involvement in the actual attack on Young, the testimony was that after Young hit Firecracker, defendant began to come at Young. Further, "[p]roof that the defendant committed the crime, or participated in its commission, need not be beyond a reasonable doubt [citations], but such proof must be more than a mere suspicion [citations]." *Id.* at 456. We find the evidence sufficient to show more than a mere suspicion that the acts took place and that defendant participated in those acts.

¶ 40 Defendant argues that "rationales of showing 'context' and 'a continuing narrative' are not among the standard exceptions" to the rule against other crimes. In *Pikes* our supreme court distinguished the evidence before it--an event in which the defendant in that case was not involved but which precipitated the crime for which the defendant was charged--from "other crimes evidence" because in *Pikes* there was no dispute the defendant was not involved in the prior event and, therefore, the incident was "not an 'other crime' for purposes of evaluating its admissibility under *** the other-crimes doctrine." *Pikes*, 2013 IL 115171, ¶ 20. Defendant asserts that our supreme court found the evidence of the prior incident admissible in *Pikes* "precisely because" the defendant was not involved, unlike this case, where the State did "insinuate" defendant's involvement in the prior incident. Therefore, defendant argues, *Pikes* provides "no support" for "broadening a 'continuing narrative' notion *** and circumventing the ban on other crimes."

¶ 41 In *Pikes*, our supreme court recognized the State's argument in that case that a line of authority existed allowing admission of evidence of other crimes that are "intrinsic" or related to the charged offense in some way, or are part of a "continuing narrative" of the events giving rise to the charged offense, or are "intertwined" with the charged offense. Our supreme court agreed that "[o]ther courts have treated 'intrinsic' evidence as an exception to the general exclusion of other-crimes evidence." *Pikes*, 2013 IL 115171 ¶ 19 (citing *People v. Carter*, 362 Ill. App. 3d 1180, 1189-90 (2005), *People v. Evans*, 373 Ill. App. 3d 948, 958-59 (2007)). Moreover, our supreme court "has recognized that evidence of other crimes may be admitted if it is part of the 'continuing narrative' of the charged crime." *Id.* ¶ 20 (citing *People v. Adkins*, 239 Ill. 2d 1, 33 (2010)). The *Adkins* court dealt with the question of the scope of

the continuing-narrative exception. *Adkins*, 239 Ill. 2d at 31. The court held that "other-crimes evidence may not be admitted under the continuing-narrative exception, even when the crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at a different place at a separate time. [Citation.]" (Internal quotation marks omitted.) *Id.* at 33. In *Adkins*, our supreme court found the defendant's statement regarding a second, uncharged burglary (*Adkins*, 239 Ill. 2d at 15) was admissible in the defendant's trial for a burglary and murder the defendant allegedly committed on the same day and in the same building immediately prior to the second burglary. *Adkins*, 239 Ill. 2d at 33. The court held this evidence "was properly admitted in this case because it was part of the continuing narrative of the charged murder." *Id.*

¶ 42 The *Adkins* court addressed events that continue the narrative of the offense charged, but this case involves events that precipitate the crime charged. Thus we find *Carter*, cited in *Pikes*, more instructive. There, as here, "the other-crimes evidence was not part of a continuous narrative of the facts surrounding the charged offense. Rather, it furnished a back story that made the immediate evidence of the charged crime coherent and understandable." *Carter*, 362 Ill. App. 3d at 1191. The court found that without the evidence, "the fact-finding process would be shortchanged because the jury would be limited to considering a sterile environment of what happened within the few hours on the 17th of December, 2001, when there was a history here that is clearly relevant to a determination of the true facts of what took place on the date in question." (Internal quotation marks omitted.) *Carter*, 362 Ill. App. 3d at 1190. The court found support for its holding in *People v. McFarland*, 259 Ill. App. 3d 479, 481 (1994), which admitted other-crimes evidence because, in *McFarland*, the evidence

"set the stage for the confrontation between the victim and the defendant." (Internal quotation marks omitted.) *Carter*, 362 Ill. App. 3d at 1190 (quoting *McFarland*, 259 Ill. App. 3d at 481).

¶ 43 Similarly, in *Evans*, 373 Ill. App. 3d at 958 (also cited in *Pikes*), the court held that where "events which occurred earlier in the evening led to the charged offense, such evidence may be admissible." *Id.* But the *Carter* court also found that a short time span between events is not a requirement before this exception can apply, and that courts had applied the exception when the events spanned weeks. *Carter*, 362 Ill. App. 3d at 1191. Instead, "the temporal link between other-crimes evidence and evidence of the immediate offense is but one of several factors for the trial court to consider as it exercises its discretion to determine whether the continuing-narrative exception applies in a given case." *Id.*

¶ 44 In this case, the trial court did not abuse its discretion in admitting evidence of the events of July 22, 2006 because the events of the day prior to the murder were the "back story" to the immediate evidence of the crime charged. The history of events between Young, Quione, and defendant is clearly relevant to a determination of the true facts of what took place on July 23, 2006. Defendant claimed he was defending his brother against an unprovoked attack with a baseball bat when he shot and killed Quione. The State's position was that defendant both perpetuated and escalated a previous dispute by introducing a handgun. The trier of fact would be left in the "sterile environment" of July 23, 2006 to determine where the truth lies and the fact-finding process shortchanged without the challenged evidence. *Carter*, 362 Ill. App. 3d at 1190. Defendant's argument that the State could prove its case by simply introducing evidence of "bad blood" between the opposing

groups is not persuasive. "Although the State possibly could have proved its case without this evidence, there is no rule that requires the State to present a watered-down version of events simply because otherwise highly probative evidence is unflattering to defendant." *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011). The incident in the Emery's backyard is highly probative of material questions other than defendant's propensity to commit crime. *Pikes*, 2013 IL 115171, ¶ 13 ("this court has held that evidence of other crimes committed by the defendant may be admitted if relevant to establish any material question other than the propensity to commit a crime." (quoting *Thingvold*, 145 Ill. 2d at 452)). Nor was the evidence unfairly prejudicial to defendant. *Rutledge*, 409 Ill. App. 3d at 25 ("not all prejudicial evidence must be excluded but, rather, only that which is unfairly prejudicial.").

¶ 45 Evidence of the fight in the Emery's backyard tended to prove that defendant, who Young testified was present in the backyard, was present at the brawl on July 23, a fact his brother's testimony refuted despite defendant's claim of defense of others. The prior altercation also tends to prove that defendant intended to, at minimum, instigate the brawl, and at worst, shoot a combatant, when he armed himself and told Quentin "y'all can get it again." The prior altercation also explains Quentin and Young's approaching Firecracker and provides context for defendant's comments at that meeting which, absent the appropriate background, could be twisted to convey a wholly different meaning than the implicit threat that is evident with knowledge of the prior day's events. That threat itself tends to negate defendant's claim of defense of others and to prove his intent. The probative nature of the evidence is clear, the evidence was admissible, and the trial court did not abuse its discretion.

"Therefore, we conclude that evidence of defendant's conduct [on July 22, 2006] was not unfairly prejudicial and was properly admitted." *Id.*

¶ 46 2. Admissibility of Defendant's Statements by Omission

¶ 47 Next, defendant argues the State elicited inadmissible hearsay from defendant's brother, and then used that evidence in its closing argument. The State argues defendant forfeited this argument for review. Forfeiture aside, defendant's argument lacks substantive merit.

¶ 48 During trial, the State asked Daniel if he had told anyone about the events of July 23, the day of the murder. When Daniel responded he told defendant, and defendant only asked Daniel where he was struck and if he knew who did it, the State followed up by asking Daniel had defendant stated "hey, I saw you there." Defense counsel objected and the trial court sustained the objection. The State requested to make an argument on the objection. The State argued to the court as follows:

> "The defense here is self-defense. I'm entitled to--it's my opinion I'm entitled to cross-examine this witness on the veracity of this incident right here, that the person that the defense is claiming did the shooting. He's talking to that person; the person who's his brother. The person who would normally, you would expect, would say something other than, really; okay ***.
>
> I'm inquiring in that line of inquiry for the sole purpose of the credibility of what the defendant is claiming now."

¶ 49 The trial court continued to sustain the objection to the State's question as to whether defendant told Daniel he (defendant) saw Daniel at the incident on July 23. The State did ask if that was the end of the conversation and Daniel said that it was. Then, in closing, the State made the following argument:

> "When he talks to [defendant, he] asked him some question about what happened, where did it happen, that's it and nothing. Nothing. No discussion saying 'well, you know, I took care of him. I saved you,' or anything like that, so the reasonable inference of that testimony is [defendant] isn't there. That's silly. It's silly. Self-defense would be gone out the window. Now it's a whodunit and there is no question about who done it. It's these two guys."

¶ 50 The defense did not object to this portion of the State's closing argument.

¶ 51 "Hearsay is an out-of-court statement offered to establish the truth of the matter asserted [citations] and testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay [citations]." *People v. Banks*, 237 Ill. 2d 154, 180 (2010). An "exception to the hearsay rule permits the introduction of otherwise inadmissible hearsay if it constitutes an admission by a defendant, either express or tacit. [Citation.] The necessary elements for admissibility under the tacit admission rule are (1) that defendant heard the incriminating statement, (2) that defendant had an opportunity to reply and remained silent, and (3) that the incriminating

statement was such that the natural reaction of an innocent person would be to deny it." *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 67.

¶ 52 Defendant argues his silence in the face of Daniel's statement to him about the incident is not admissible as a tacit admission because his brother did not accuse him of illegal or prohibited activity or imply defendant had done anything wrong. The State does not attempt to justify its questioning on the grounds defendant's silence constitutes a tacit admission. The State maintains its position that the questioning initially sought what statements, if any, defendant made that would constitute admissions and thenceforth was simply testing Daniel's credibility and the veracity of his testimony that he was alone when he was struck by a baseball bat, and that the last time he saw defendant before the attack defendant was at their brother's house playing cards. Defendant argues the State did not elicit the testimony to impeach Daniel's credibility. We disagree.

¶ 53 The State's argument to the trial court is sufficient proof of its intent in questioning Daniel as it did. The State's assertion is facially plausible because evidence that defendant never identified himself to Daniel as his rescuer is itself implausible in light of defendant's claim of defense of another, and should defendant's role in the incident be established (which it was, based on the defense put forth), then Daniel's testimony that he did not learn that fact when he and his brother first discussed the incident tests the trustworthiness of Daniel's testimony. "[W]here evidence is relevant and otherwise admissible, it is not to be excluded because it may also have a tendency to prejudice the accused. [Citation.]" *People v. Patterson*, 154 Ill. 2d 414, 458 (1992). Defendant has pointed to nothing that would persuade this court to find that the State's proffered reasons for its questions were untrue or that the State sought

to surreptitiously elicit a tacit admission. Regardless, the trial court sustained defendant's objection to the questioning. "A prompt sustaining of an objection will cure any prejudice resulting from an improper remark. [Citation.]" (Internal quotation marks omitted.) *People v. Outlaw*, 388 Ill. App. 3d 1072, 1088 (2009).

¶ 54 The State also argues its closing argument properly refers to Daniel's unobjected to testimony and was in response to the defense's argument that Daniel's testimony was credible and corroborative of the defense. The State argues it made the complained of argument to comment on how unbelievable Daniel's testimony was. Defendant claims the State's closing argument was improper because it did not merely summarize Daniel's testimony, as claimed, but instead the State allegedly used the conversation and defendant's silence substantively against him. Defendant argues he suffered prejudice because the trial court relied on the improper evidence and argument to convict him. In support of his claim the court relied on the improper evidence, defendant argues the court must have relied on the evidence and the State's argument because the court rejected his claim of defense of others. Again, we disagree with defendant.

¶ 55 We agree with the State that its closing argument was a proper comment on Daniel's admissible testimony. "A prosecutor may argue the evidence presented, or reasonable inferences therefrom, even if the inference is unfavorable to the defendant." [Citations.] (Internal quotation marks omitted.) *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 139. Daniel testified that after defendant asked two questions, the conversation ended. In closing argument, the State argued that one inference from Daniel's testimony was that defendant was not present and therefore could not have shot Quione. The State argued that in light of the

evidence in its totality, specifically defendant's claim of defense of another, Daniel's testimony was not worthy of belief. This was a proper argument by the State based on the evidence admitted at trial. Further, we do not find that the trial court relied on defendant's silence in the face of Daniel's alleged "revelation" of the events of July 23 to defendant simply because the court did not accept the defense of another argument. In a bench trial, we must presume the trial judge only considered competent evidence. *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 42. It is unlikely the trial court considered defendant's omission of his innocence and justifiable use of force from his conversation with Daniel as an admission to the crime because, as defendant argues on appeal, "[a]s the conversation contained no accusation or implication by the brother, there was no tacit admission in the response." See *Donegan*, 2012 IL App (1st) 102325, ¶ 67. The trial court's express finding that Daniel was incredible further supports finding that the court only considered the argument for its proper purpose of attacking Daniel's credibility as a witness.

¶ 56 We find no error in the prosecutor's questioning or closing argument with regard to the conversation between defendant and his brother following the murder.

¶ 57 3. Opinion Evidence

¶ 58 Finally, as to evidentiary issues, defendant argues the State elicited improper opinion testimony when Young testified that defendant's act of pointing at one group of males on the corner Young and Quentin passed on their way back to the Emery residence, then pointing to Young and Quentin, after which both groups rushed at them, was a "signal" to get the men "to come after us." The assistant state's attorney asked Young the following questions, and Young gave the following answers:

"Q. [Assistant State's Attorney:] Do you see anything out in the street as you're walking back?

A. It was like--okay, on each corner it was like four guys on the corner, and another four guys on another corner, and [defendant] raised his hand and gave them, went like that, (indicating).

Q. And just for the record, the witness had his hand in one direction, pointed it in another direction. The first direction he's pointing at, what direction was the defendant pointing at?

A. He was pointing at the guys on the corner, on one of [*sic*] corner.

Q. And you testified he moved his finger and pointed somewhere else?

A. In other words, trying to tell them to come after us.

Q. Don't worry about what he was trying to say, where was he pointing at?

A. He was pointing at the Mexicans on the corner.

Q. Okay. And then he turned his hand, he pointed where?

A. Towards us.

* * *

Q. All right. And does anything happen as you continue on to [Quasheena's] house?

A. The other guys on the corner was [*sic*] coming towards us; me and Quentin."

¶ 59 Defendant argues that Young's interpretation of defendant's conduct was unsubstantiated and not grounded in personal knowledge and was, therefore, an inadmissible opinion. Defendant argues that the alleged error in admitting Young's testimony prejudiced him because the trial court relied on Young's testimony to find that Young and Quentin were "run back home" after the conversation with defendant and Firecracker, which tipped the scales against defendant. In denying defendant's posttrial motion, the trial court stated, in part, as follows:

"[T]hey got run back to their house. When the guy came out with the bat, he got shot. You can't start something and then shoot somebody and say we acted in self-defense because he got a bat to defend himself."

¶ 60 Defendant argues this statement by the trial court demonstrates the court's reliance on Young's testimony for its finding that defendant was the aggressor. We disagree. The record contains sufficient evidence other than Young's testimony to support the trial court judgment. First, Quentin testified defendant was among the men charging at him and Young. Quentin identified Daniel in court (although the trial court ruled Quentin did not have sufficient opportunity to identify Daniel) and testified that he (Daniel) came up fast on Quentin and attempted to hit Quentin. Quentin specified that the aggressor--regardless of his

identity--made a motion like he was going to hit Quentin. Despite the fact Quentin landed the first blow, the testimony is sufficient to reasonably find that Quentin's punch was defensive. Quentin testified he hit the initial aggressor before Quentin himself could be hit.

¶ 61 We believe defendant mischaracterizes the trial court's findings. Based on the record, the court did not find that defendant's act of threatening Young and Quentin and signaling the attack was the initial aggression for purposes of this prosecution. Rather, the interpretation of defendant's act--if the court even considered it in light of the assistant state's attorney's admonition to the witness--was additional evidence that Young and Quentin were not the initial aggressors, just as the State argued during proceedings on defendant's motion for a new trial. The initial act of aggression was the group of 8 men charging at the 2 men who had just spoken with defendant and one of them attempting to punch Quentin. All of those events transpired, as the trial court stated, after defendant, Firecracker and several other individuals charged after Young and Quentin as they were walking back home.

¶ 62 The trial court's statement in its entire context is consistent with our view that the trial court's judgment that defendant was an initial aggressor is not based on Young's characterization of defendant's gestures. The trial court also said that Quione came out of his house with a bat to defend the two men who were run back home. It was not until after the fight began that Quione exited the home with the baseball bat. Quione was defending Young and Quentin from the fight that started when defendant and the other men charged and one of them actually tried to punch Quentin. "An error is harmless if it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained. [Citation.]" (Internal quotation marks omitted.) *People v. Spicer*, 379 Ill. App. 3d 441, 456

(2007). The trial court had a sufficient basis for its judgment without Young's testimony that defendant signaled the men on the corner to come after him and Quentin. Therefore, any error in the admission of his testimony in that regard is harmless beyond a reasonable doubt.

¶ 63 Regardless, defendant cannot complain of Young's testimony. "When a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, the defendant cannot contest the admission on appeal." *People v. Greenwood*, 2012 IL App (1st) 100566, ¶ 35. "When a defendant objects to certain testimony on direct examination, but then questions the witness on cross-examination concerning that allegedly inadmissible testimony, any error is waived for purposes of appeal. [Citation.]" *People v. Hanson*, 238 Ill. 2d 74, 99 (2010). Defendant did not object to Young's testimony during the State's direct examination, and on cross-examination, defense counsel asked Young what this "signal" meant, and Young answered "He was trying to tell them to come after us." Defendant did not pursue the cross-examination of Young in response to an adverse evidentiary ruling on the substance of Young's testimony. Compare *Id.* at 100 (finding issue not waived) ("When a circuit court makes an adverse evidentiary decision, defense counsel cannot be forced to choose between waiving an issue for appeal and allowing damaging testimony to go unanswered on cross-examination."). In this case, defendant cannot complain that testimony he elicited was erroneously admitted. For this reason as well, defendant's argument must fail.

¶ 64 B. Sufficiency of the Evidence to Support Defendant's Conviction

¶ 65 Next, defendant argues the evidence does not support his conviction because "the deceased's companion *** was the violent aggressor who started a fistfight, and *** the

deceased was either attacking or imminently threatening the defendant's unarmed and defenseless brother with a baseball bat." Defendant argues the State failed to rebut defendant's claim of defense of another and alternatively that his conviction should be reduced to second degree murder because the deceased "escalated a mutual quarrel." "When faced with a challenge to the sufficiency of the evidence, this court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" *People v. Hayes*, 2011 IL App (1st) 100127, ¶ 30. "Taking the evidence in the light most favorable to the prosecution *** includes allowing all reasonable inferences from the evidence consistent with the outcome." *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 30.

¶ 66 1. Defense of Another

¶ 67 The affirmative defense of defense of another can be summarized as follows: "The use of deadly force in defense of the person is justified where (1) force is threatened against the person, (2) the person threatened is not the aggressor, (3) the danger of harm is imminent, (4) the force threatened is unlawful and (5) the person threatened actually believes that a danger exists, that the use of force is necessary and that such beliefs are reasonable." *People v. Ellis*, 269 Ill. App. 3d 784, 789-90 (1995). "If a defendant raises the affirmative defense of self-defense, the State must also prove beyond a reasonable doubt that he did not act in self-defense. *** The State satisfies its burden if it negates any one of these elements." *People v. Hayes*, 2011 IL App (1st) 100127, ¶ 30.

¶ 68 Defendant argues the State's evidence is not sufficient to rebut his claim of defense of another. Defendant asserts the evidence establishes that deadly unlawful force was being used

and threatened against Daniel when defendant came to his aid, the danger to Daniel was imminent, defendant and his brother reasonably believed in the danger, and defendant used the force necessary to avert the danger. The only evidence that Quione was threatening the imminent use of deadly force against Daniel at the time defendant shot Quione came from Daniel and Mendez, both of whom the trial court found not credible. Even without the trial court's finding that the only evidence in support of the defense theory came from incredible witnesses, their testimony on its face is highly suspect and would not raise a reasonable doubt that the State proved all of the elements of the offense, including that defendant did not act in defense of another.

¶ 69 Daniel testified that he saw individuals standing over him about to hit him again, but the fact this was supposedly after being struck in the head with a baseball bat without warning casts doubt upon his ability to perceive his attackers or even what had just (allegedly) happened. Daniel himself admitted that his vision was "getting blurry," at minimum casting doubt on his identification of Quione. Mendez gave inconsistent testimony as to what Quione was doing when defendant shot him (Quione). One version of events as recounted by Mendez obliterates the defense allegation that the danger of harm was imminent and consequently defendant's theory of defense of another. On cross-examination by the defense, Mendez testified he saw a man exit a house with a baseball bat, strike defendant's brother in the head, and that he saw that man standing over defendant's brother appearing to be about to strike him again. But during his direct examination, when the assistant state's attorney asked Mendez if it was "in fact, true that the black guy was trying to run away, but he was hit by one of the shots and fell to the ground," Mendez agreed that was true. The State also elicited

testimony that Mendez said in his statement that defendant continued to fire at the man on the ground while advancing toward him. Mendez testified that his statement to the assistant state's attorney, given closer in time to the events, was the truth about what he remembered happening on the night of the shooting.

¶ 70 Moreover, Young testified no one was on the ground when the shot was fired. Young's testimony is consistent with Mendez's testimony that defendant shot Quione and continued firing as Quione was on the ground. Young testified that when he heard the first shot, he saw Quione drop and get back up, and then he saw defendant shoot Quione again. Although Young testified that after the first shot Quione got back up, Young did not testify that Quione attempted to run away after the first shot. Rather, Young testified that "he got up, but he hit the ground again." Thus, Young's testimony is not inconsistent with Mendez's testimony that Quione was attempting to run away when defendant shot him.

¶ 71 "That one witness's testimony contradicts the testimony of other prosecution witnesses does not render each witness's testimony beyond belief. [Citation.] The trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22. The record contains sufficient evidence which a rational trier of fact could accept to find defendant guilty of first degree murder. See *Id.* at ¶ 32 ("Taking all of the evidence in the light most favorable to the prosecution, we cannot say that no rational trier of fact could have found credible portions of the testimony *** such that the essential elements of murder were proved beyond a reasonable doubt. The evidence was more than sufficient to support the defendant's murder conviction.").

¶ 72 Defendant also argues that he and his brother were not the aggressors and that he had not caused his brother to be in harm's way. The State responds the evidence established defendant was the aggressor and, therefore, not justified in shooting Quione. Defendant's claim of defending Daniel requires us to determine whether *Daniel* would have been justified in using deadly force against Quione. "[A] person defending another stands in the other's shoes and may do whatever the other would be justified in doing to defend himself." *In re W.D.*, 194 Ill. App. 3d 686, 706 (1990). To make that determination we must decide whether Daniel was an initial aggressor in the confrontation. "[A] person may not provoke the use of force and then retaliate claiming self-defense." *People v. Heaton*, 256 Ill. App. 3d 251, 257 (1994). Whether a participant was the initial aggressor, *i.e.*, the one who provoked the fatal confrontation, is a question of fact to be decided by the trier of fact. *People v. De Oca*, 238 Ill. App. 3d 362, 367 (1992). "[T]he fact findings of the trial court will only be overturned where the evidence is so palpably contrary to the verdict or judgment that it is unreasonable, improbable or unsatisfactory and, thus, creates a reasonable doubt of guilt. [Citation.]" *People v. Pintos*, 172 Ill. App. 3d 1096, 1101 (1988).

¶ 73 The trial court acquitted Daniel based on finding "no credible evidence that he did anything." The trial court noted Daniel's testimony where he "puts himself somewhere where that [*sic*] shots were fired that day" but "based on the other things that he said his testimony is pretty unbelievable." Quentin placed Daniel at the scene and identified Daniel as the person who tried to hit him, but the court found that Quentin did not have sufficient opportunity to identify Daniel. Mendez also testified that both defendant and Daniel were involved in the fight with Quentin and Young, but the trial court found Mendez's testimony

difficult to credit. Regardless, the evidence is that the brawlers fighting Young and Quentin started the fight. Defendant's arguments necessarily place Daniel among them. Allowing all reasonable inferences from the evidence consistent with the outcome below, as we must, we find that the evidence is not so contrary to a finding that Daniel provoked the confrontation that we are left with a reasonable doubt of defendant's guilt.

¶ 74 The trial court's finding that there is no credible evidence Daniel did anything and acquitting Daniel of the charges against him is not legally inconsistent with finding that the State proved beyond a reasonable doubt that defendant was not acting in defense of another where defendant's claim was based on defending Daniel. "Verdicts are legally inconsistent if they necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not to exist." *People v. Hill*, 315 Ill. App. 3d 1005, 1011 (2000). "Generally, a verdict which acquits and convicts a defendant of crimes composed of different elements, but arising out of the same set of facts, is not legally inconsistent." (Internal quotation marks omitted.) *People v. Edwards*, 337 Ill. App. 3d 912, 926 (2002). The State did not have to prove Daniel committed mob action or any other crime to prove that defendant was not justified in shooting Quione. See *People v. Dunlap*, 315 Ill. App. 3d 1017, 1025-26 (2000) ("Even the mere utterance of words may be enough to qualify one as an initial aggressor."). To the extent the court's judgments seem at odds it is clear that a logically inconsistent verdict involving different verdicts arising from the same facts may stand. *Edwards*, 337 Ill. App. 3d at 926 ("a verdict which acquits and convicts a defendant of crimes composed of different elements, but arising out of the same set of facts, is not legally

inconsistent.") (Internal quotation marks omitted.). We find no error in the trial court's judgment defendant was not entitled to claim self defense. *Ellis*, 269 Ill. App. 3d at 789-90.

¶ 75 2. Second Degree Murder

¶ 76 Finally, defendant argues his conviction should be reduced to second degree murder because the deceased's use of a baseball bat, either to escalate the violence or to assault defendant's brother, or both, was a serious provocation of defendant.

> "A person commits second degree murder when he commits first degree murder while acting either under a sudden and intense passion resulting from serious provocation by the victim, or under the belief that the circumstances surrounding the killing would justify or exonerate its commission. [Citation.] Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person. [Citation.] The four categories of provocation that courts recognize as sufficient to warrant a second degree murder instruction are mutual quarrel or combat, substantial physical injury or assault, illegal arrest, and adultery with the offender's spouse. [Citation.]" *People v. Lopez*, 371 Ill. App. 3d 920, 934-35 (2007).

¶ 77 The State responds the evidence establishes that "defendant and seven of his cohorts initiated an attack on two unarmed men," therefore this was not a case of mutual combat. Defendant denies the State can articulate how he started the fight, and that Quentin, Young, and Quione were actually the aggressors.

> "Mutual combat is defined as a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat. [Citations.] *** One who instigates a quarrel cannot rely on the victim's response as evidence of mutual combat. [Citation.]" *Lopez*, 371 Ill. App. 3d at 935.

¶ 78 The trial court correctly found that there was no mutual combat. Quione did not escalate matters into mutual combat when he exited his home with a baseball bat and struck one of the attackers. *Id.* at 935-56 (rejecting the defendant's argument that victim's revelation of infidelity to the defendant-husband "escalated into mutual combat" where the defendant "was the aggressor who initiated the quarrel"). In this case, "there simply is no evidence suggesting that the defendant and the victim entered the altercation willingly" for purposes of reducing first degree murder to second degree murder based on serious provocation. *People v. Leach*, 405 Ill. App. 3d 297, 315 (2010). The evidence establishes that Quione was reacting to the instigation of a fight, just as he had done the day before. "A defendant cannot characterize a fight as 'mutual combat' where defendant instigated the fight." *People v. Banks*, 227 Ill. App. 3d 462, 474 (1992).

¶ 79 We have already held that the State did prove that defendant and the other men who charged at Young and Quentin started the fight. The evidence proves that although Quentin may have made the first physical contact, his action was defensive and was not the start of the fight. Defendant would have this court believe that two men--likely experienced in the ways

of street battle--went unarmed into their enemies' territory outnumbered 2 to 1 looking for a fight. The trier of fact is not required to check common sense at the courtroom door. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 108 (2006). Although the testimony was that defendant was not part of the first wave of attackers, the testimony was equally clear that defendant was involved in the fray that was started by his compatriots (and very likely at defendant's direction). A rational trier of fact could easily find that defendant instigated the fight that resulted in Quione's death from that evidence alone. Quione only emerged after the fight started. Therefore, defendant cannot rely on Quione's response to reduce the severity of his crime. *Id.*

¶ 80 When that evidence is coupled with defendant's threats, arming himself for combat, sinister hand gestures, and the resulting mob attack on Young and Quentin, that defendant was the primary if not sole instigator is equally apparent. There is no credible evidence that Young and Quentin were seeking or intended a confrontation. Defendant's argument that defendant's statements, even if he did use the past-tense, "whatever happened, happened" and "y'all can get it again" were overtures of "cessation and truce" coupled with a warning that "if necessary, the Hispanics would defend themselves" is not only disingenuous, it is facially ludicrous. In context of what happened next, to claim that defendant wanted to let "bygones be bygones" is utterly fatuous.

¶ 81 Defendant failed to establish a mitigating factor by a preponderance of the evidence. *People v. Jeffries*, 164 Ill. 2d 104, 118 (1995) ("A first degree murder charge will be reduced to second degree murder only where *** the defendant has established a mitigating factor by a

preponderance of the evidence."). Accordingly, defendant's conviction will stand and the trial court's judgment is affirmed.

¶ 82 C. Constitutionality of Sentencing Enhancement

¶ 83 Defendant's last argument raises a challenge to the mandatory enhancement to his sentence based on personally discharging a firearm that proximately caused death to another person during the commission of the offense. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). Defendant argues this sentencing provision violates the Second Amendment to the United States Constitution (U.S. Const. Amend II) under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 U.S. 3020 (2010).

¶ 84 This court has held that the scope of both *Heller* and *McDonald* is limited to the question presented, *i.e.*, the right to possess a handgun in the home for self-defense is protected under the second amendment as a fundamental right." *People v. Coleman*, 409 Ill. App. 3d 869, 878 (2011) (citing *People v. Ross*, 407 Ill. App. 3d 931, 939 (2011)). Our supreme court has noted that the *Heller* court found that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." (Internal quotation marks omitted.) *People v. Aguilar*, 2013 IL 112116, ¶ 26 (quoting *Heller*, 554 U.S. at 626). The *Augilar* court upheld a post-*Heller* challenge to the statute criminalizing the possession of handguns by minors. *Id.* ¶ 27. We similarly reject defendant's challenge to the sentencing statute at issue in this case. Other courts have rejected similar arguments.

¶ 85 In *State v. Isreal*, 2012 WL 5193390, No. CA2011-11-115 (Ohio App. October 22, 2012), the defendant challenged a statute imposing a mandatory prison sentence for having a gun during the commission of an offense. *Id.* ¶ 95. The defendant argued that "this

sentencing statute is in violation of the right to possess firearms guaranteed by the Second Amendment to the United States Constitution." *Id.* The Ohio Appellate Court found that the defendant's arguments lacked merit. *Id.* The court held as follows:

> "[I]t is well-settled that the right to bear arms is not absolute and is instead subject to the reasonable regulation pursuant to the state's police power. [Citations.] Additionally, federal courts have held that federal firearm enhancements *** do not run afoul of the Second Amendment. [Citations.] We agree with the reasoning of these courts and find that [the statute] is constitutional." *Id.* ¶ 97 (citing *United States v. Goodlow*, 389 Fed. App. 961 (11th Cir. 2010); *United States v. Jacobson*, 406 Fed. Appx. 91 (8th Cir. 2011); *Benson v. United States*, W.D. Mich., 2011 WL 6009961, No. 1:11–CV–368 (Dec. 1, 2011)).

¶ 86 The United States Court of Appeals for the Sixth Circuit has addressed "a post- *Heller* Second Amendment challenge to a *** dangerous weapon enhancement" to the defendant's sentence for conspiracy with intent to distribute methamphetamine." *U.S. v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012). Under the approach adopted by several circuits to resolve Second Amendment challenges after the decision in *Heller*, the Court of Appeals had to "determine whether the *** enhancement burdens conduct that falls within the scope of the Second Amendment right as historically understood. If the enhancement falls outside the scope of the Second Amendment right as historically understood, the possession of a weapon during a drug offense is unprotected and our inquiry ends." *Id.* at 518.

¶ 87 After discussing the historical understanding of that right as explained in *Heller*, the Court of Appeals held that the sentencing statute "punishes an individual who possess a dangerous weapon for an unlawful purpose and, thus, it falls outside the scope of the Second Amendment right." *Id.* at 520. The Court reasoned that:

> "By penalizing weapon possession during a drug offense, the *** enhancement is consistent with the historical understanding of the right to keep and bear arms, which did not extend to possession of weapons for unlawful purposes. To hold the contrary would suggest that the Second Amendment protects an individual's right to possess a weapon for criminal purposes. Nothing in *Heller*, the common law, or early case law suggests such a reading." *Id.* at 520.

¶ 88 Defendant does not have a right to possess a gun for criminal purposes. Based on the foregoing authorities, we hold that defendant's Second Amendment challenge must fail.

¶ 89 III. CONCLUSION

¶ 90 For the foregoing reasons, defendant's conviction and sentence are affirmed.

¶ 91 Affirmed.