FOURTH DIVISION
March 31, 2015

No. 1-12-2284

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 9109
	)	
JERRY JONES,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Trial court did not err in excluding evidence of murder victim's prior conviction and arrest where evidence was not probative of victim's character for violence.

¶ 2 Following a jury trial, defendant Jerry Jones, Jr., was found guilty of second-degree murder and sentenced to 15 years' incarceration. On appeal, defendant contends that the trial

court erred when it barred introduction of evidence of the victim's previous conviction for aggravated unlawful possession of a weapon by a felon and his previous arrest for disorderly conduct, in violation of the principles set forth in *People v. Lynch*, 104 Ill. 2d 194 (1984). He also contends that the mittimus incorrectly reflects two counts of second-degree murder. We affirm defendant's conviction and correct the mittimus.

¶ 3 Defendant was charged with six counts of first-degree murder. The charges stemmed from a fight in a private "lock-down" club on October 10, 2009. After a night of drinking and socializing, defendant shot and killed Ronald Duncan following an altercation between Duncan and defendant's friend. At trial, defendant claimed self-defense.

¶ 4 Prior to trial, the State moved *in limine* to bar defendant from introducing certain *Lynch* material in regard to Duncan's criminal history. Defendant had identified two prior acts by Duncan that he claimed were indicative of Duncan's violent and aggressive character and which would help defendant show that Duncan was the initial aggressor in the altercation that led to his death. After hearing arguments on the motion, the trial court barred defendant from introducing the testimony.

¶ 5 At trial, Leterious Hall, Duncan's cousin, testified that he was socializing and drinking at his uncle's small club on the morning of October 10, 2009. Duncan, Consuela Reynolds, Givita Taylor, a man called "Train," defendant and several other individuals were also drinking and socializing at the club. Both Hall and Duncan had been drinking continuously throughout the night. At some point that morning, a woman informed Hall that his uncle's keys were missing. Hall was concerned that they would be unable to exit the club without the keys. He informed

Duncan. Duncan went to the front room of the club, loudly stating that no one would leave until the keys were found. Hall went into a back room. Soon, Reynolds came to the back room and told Hall his cousin was fighting. When Hall got to the front room, Duncan was on top of Train, holding him down by his neck. Hall saw defendant pull a gun out of his pocket, so he began to tell Duncan to stop and calm down. Duncan left Train and began to walk towards Hall, but defendant stepped between them. Defendant pushed Duncan and then shot him in the neck. Hall fled out of the club's back door.

¶ 6 Givita Taylor testified that the club was a "lock-down club." She explained that the club was locked down so "you can do whatever you want to do in the club." Taylor was in the club's front room when Duncan entered looking for his uncle's keys. Duncan grabbed Train by the shirt and neck and then pushed him down onto the bar. Duncan released Train and said that if the keys weren't found, "everybody here is gonna die." Defendant then came out of a back room, walked up close to Duncan, and told him to let Train go. Duncan "jumped in the defendant's face" asking about the keys. The two men exchanged angry words and defendant told Duncan that he had a gun. Duncan said that he would take the gun from defendant. Defendant pulled out the gun and shot Duncan in the neck. Duncan fell to the floor, leaning against a banister. Defendant was "real angry." He walked past Duncan, but turned around and shot him a second time in the head.

¶ 7 Consuela Reynolds was in the back room of the club with defendant, Duncan, and another woman when Hall entered and told Duncan the keys were missing. Duncan began to "go[] off" about the keys, so Reynolds went into the front room. Duncan followed and began to talk to Train. Train and Duncan began to struggle. Reynolds returned to the back room and

informed Hall of the fight. Defendant then walked to the front room and walked up to Duncan. Reynolds saw a flash and heard a noise and then fled out of the back door.

¶ 8 Following the testimony of several investigating police officers, a medical examiner, and a forensic scientist, the State rested. The trial court denied defendant's motion for a directed verdict. Defendant then took the stand in his own defense.

¶ 9 Defendant testified that he was in the club's back room with Duncan and two women when Hall informed Duncan that the keys were missing. They all moved to the front room. Duncan began to search one of the women, "feeling all on her." Defendant and Train tried to leave the club, but Duncan began to yell that they could not leave without being searched. Defendant told Duncan he had a gun. Duncan began to search Train as he had the woman. Train said, "Man, what is you doing?" Duncan then jumped up, grabbed Train around the neck, and "[took] him to the ground." Defendant thought Duncan was going to strangle and kill Train. Train escaped the chokehold and Duncan got up. He told defendant that he would take defendant's gun. He jumped and grabbed defendant. Defendant said he believed that Duncan was going to take his gun. Defendant reached into his coat pocket, "snatched back, pulled away, and that's when [defendant] upped and fired." After shooting Duncan, defendant began to run away. He heard someone running behind him; he stumbled, turned, and fired another shot. He then ran out the door. Defendant never saw Duncan with a weapon.

¶ 10 Defendant rested his case. He requested the court give a second-degree murder instruction. The court found he had knowingly and voluntarily requested the instruction and granted the request. After closing arguments by both parties, the trial court instructed the jury.

¶ 11 The jury found defendant guilty of second-degree murder. The court sentenced defendant to 15 years' incarceration. Defendant appeals.

¶ 12 Defendant first contends that the trial court erred in excluding evidence of Duncan's prior conviction for aggravated unlawful use of a weapon (AUUW) and the arrest for disorderly conduct. He argues the two incidents were probative of the victim's violent disposition and propensity for violence when intoxicated, and that *Lynch*, 104 Ill. 2d 194, required their admission.

¶ 13 A trial court's decision on the admission of evidence will not be reversed absent an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). A court abuses its discretion when its decision is arbitrary, fanciful or unreasonable. *Id.*

¶ 14 When a defendant raises the theory of self-defense, he may offer substantive evidence of the victim's aggressive or violent character under one of two scenarios. First, if the defendant knew of the victim's violent character or prior acts, the evidence may be offered to support the defendant's contention that he reasonably believed the use of force in self-defense was justified. *Lynch*, 104 Ill. 2d at 199-200. That circumstance is not present in this case, as defendant never claimed to be aware of Duncan's criminal record prior to the incident in question. The second scenario in which a defendant may offer evidence of the victim's violent character occurs where there are conflicting witness accounts about how the events in question transpired, and the evidence proffered by the defendant serves to bolster his claim that the victim—not the defendant—was the initial aggressor. *Id.* It is this second prong of *Lynch* that defendant pursues.

¶ 15 There is no question that the jury heard conflicting witness testimony as to how the events leading up to the shooting unfolded. Leterious Hall's account of the night included defendant brandishing his gun during the altercation between Duncan and Train, and then confronting Duncan once that altercation was over. Defendant, on the other hand, testified that he did not draw his gun until Duncan grabbed him and, in defendant's mind, was trying to take the gun for himself. Hall identified defendant as the initial aggressor, while Defendant identified Duncan as such. The testimony of Givita Taylor tended to support defendant's version of the events, while the testimony of Consuela Reynolds fell somewhere between the two extremes. Defendant easily satisfies the requirement of conflicting witness testimony under *Lynch*.

¶ 16 Still, evidence under the second prong of *Lynch* is only admissible if it constitutes "reasonably reliable evidence of a violent character." *Id*. at 201. Thus, we must consider each of the prior acts individually to make this determination.

¶ 17 Defendant first points to Duncan's AUUW conviction. According to defendant's proffer at the hearing on the State's motion *in limine*, in July 2006, Duncan was approached by police while he was riding a bicycle; he fled the police on foot, removed a gun from his waistband while in flight, and threw the gun on the roof of a building. The gun was later recovered, and ultimately Duncan pleaded guilty to a weapons charge that was aggravated because Duncan had a previous felony drug conviction.

¶ 18 We agree with the trial court that this evidence was not probative of violent or aggressive behavior. Possession of a weapon, without additional evidence that it was used or brandished, is not probative of a violent character, nor does it show a propensity for violence. *People v.*

Cruzado, 299 Ill. App. 3d 131, 137 (1998); *People v. Costillo*, 240 Ill. App. 3d 72, 82 (1992). The record reveals no indication that Duncan committed violence or even threatened violence against the arresting officers or any other individual. If anything, Duncan's actions suggested the polar opposite of violent confrontation—he turned and fled, and rather than use the weapon in any threatening manner, he tried to dump it. The fact that Duncan possessed a firearm in July 2006 did not support any inference that he had a propensity for violence, or possessed a violent character, on the morning of October 10, 2009. Simply put, this evidence does not make it more likely that Duncan, rather than defendant, was the initial aggressor on the morning of October 10, 2009, when the shooting at issue occurred.

¶ 19 Defendant further argues, however, that Duncan's prior AUUW conviction made it more likely that he was armed with a gun on the morning of October 10, 2009. We reject this claim as well. Initially, we question whether this proffer is a proper *Lynch* argument in the first place, as *Lynch*'s second prong is concerned only with evidence of a victim's violent character or propensity and whether it supports a defendant's argument that the victim was the initial aggressor. See *Lynch*, 104 Ill. 2d at 199-200. Defendant's argument here is a more specific propensity argument—because Duncan possessed a gun once before, it is more likely he possessed one on the day of the shooting—that would not appear to fall under *Lynch*. But we need not decide that issue, because even if defendant's argument were a proper *Lynch* claim, it is irrelevant to the question before us. Defendant presented no evidence that he believed Duncan to be armed and, in fact, testified that he did not see Duncan with a weapon. None of the witnesses testified that Duncan was armed or appeared armed. There is no basis in the record to suggest

that Duncan possessed a firearm in that bar. This evidence, for this secondary purpose defendant suggests, would not be relevant to any contested issue in this case.

¶ 20 The second act proffered by defendant was evidence of Duncan's arrest for disorderly conduct in February 2006. According to defendant, police that day responded to reports of a disturbance and found Duncan on the street screaming profanity, language he then directed at the officers upon their approach. The officers attempted to pat down Duncan, but he "tightened up his arms," continued to yell "f--- you" at the officers, and blew smoke in one of the officers' face. He admitted being drunk. The officers arrested him and placed him in their squad car. Duncan began to bang his head on the car's door panel. After being taken to jail, he beat his head against the cell bars and later claimed an officer punched him in the eye. The disorderly conduct charge was later dismissed. At the hearing on the motion *in limine*, defense counsel indicated that "there are police officers who filed a report who will be ready and willing to come in and testify to those alleged facts . . . ."[1]

[1] The State, in its brief to this court, argues that "defendant did not offer to call police officers as witnesses" regarding Duncan's arrest for disorderly conduct. It would appear, based on the language quoted above from defense counsel, that the State is incorrect, and that defense counsel was prepared to call witnesses to elaborate on the circumstances of Duncan's arrest. (The question became moot after the trial court excluded this evidence.) This mistake is troubling because it infected the State's later argument. The State cited to two cases relied upon by defendant, *People v. Cook*, 352 Ill. App. 3d 108 (2004) and *People v. Simon*, 2011 IL App (1st) 091197, as supporting the State's position because in each of those cases, *Lynch* evidence was deemed inadmissible where no first-hand, live witness testimony was offered beyond the arrest report themselves. The State wrote that, "[a]s in *Cook*, defendant in this case did not offer live testimony" and, as in *Simon*, "[d]efendant did not offer firsthand testimony to support the victim's disorderly conduct arrest." To avoid any prejudice resulting from this error, we will assume in our analysis that defendant was prepared to call Chicago police officers to testify regarding the details of Duncan's disorderly conduct arrest.

¶ 21 We hold that the trial court did not abuse its discretion in refusing to admit evidence regarding Duncan's disorderly conduct arrest. This evidence may have revealed in Duncan a lack of respect for law enforcement and the capacity for erratic behavior—but not physically violent behavior toward others. There was no evidence that Duncan struck the officers, attempted violent acts against them, or even threatened violence against them. Indeed, the only violence indicated in the second report was self-inflicted. Such self-inflicted harm, by itself, does not indicate that a person is likely to behave violently towards others. Moreover, the police reports tendered by defendant demonstrated that Duncan, during and following arrest, claimed that officers had struck him and that he would sue the police. It is at least possible that Duncan's self-inflicted injuries were thus strategic in nature. In any event, this proffer did not constitute reasonably reliable evidence of Duncan's character or propensity for violence. At a minimum, we cannot say that the trial court's decision was so arbitrary or fanciful that it constituted an abuse of discretion. See *Becker*, 239 Ill. 2d at 234.

¶ 22 Defendant cites multiple cases in which courts have reversed convictions for failing to admit *Lynch* evidence. The primary difference between those decisions and the instant case is that those cases involved actual acts of violence, or at least threats of violence, in the victims' pasts. See, *e.g.*, *Lynch*, 104 Ill. 2d at 201(victim had three battery convictions); *People v. Bedoya*, 288 Ill. App. 3d 226, 235-36 (1997) (victim had three convictions for aggravated battery); *People v. Hanson*, 138 Ill. App. 3d 530, 536-37 (1985) (victim had threatened individuals with knife on two occasions); *Cook*, 352 Ill. App. 3d at 126 (victim had been arrested "on several occasions" for misdemeanor battery and domestic battery); *Simon*, 2011 IL App (1st) 091197, ¶

69 (victim had previously shot and attacked defendant). Another case cited by defendant, *People v. Booker*, 274 Ill. App. 3d 168, 172 (1995), is distinguishable because it involved the first prong of *Lynch*, not the second one as argued in this case.

¶ 23 Accordingly, we find that the trial court did not abuse its discretion in barring evidence of Duncan's prior AUUW conviction, his arrest for disorderly conduct, or the circumstances surrounding either incident.

¶ 24 Defendant next contends that one of his convictions for second-degree murder should be vacated as there was only one decedent. The State concedes that the mittimus should be corrected to reflect only one conviction for second-degree murder. We agree with the parties' contention that the mittimus is in error. Where a defendant kills only one victim, there can be only one murder conviction. *People v. Mack*, 105 Ill. 2d 103, 137 (1984), *vacated on other grounds sub nom. Mack v. Illinois*, 479 U.S. 1074 (1987). A reviewing court may correct an incorrect mittimus without remand. See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). Therefore, we order the correction of the mittimus to reflect a single conviction for second-degree murder.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and direct the clerk of the circuit court to correct the mittimus to reflect one conviction for second-degree murder.

¶ 26 Affirmed; mittimus corrected.