2015 IL App (1st) 132166-U

SIXTH DIVISION
September 25, 2015

No. 1-13-2166

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTONIO POOLE, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 11 CR 13427 Honorable Charles P. Burns, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** The evidence was sufficient to support defendant's conviction for first degree murder despite defendant's claim of self-defense. The trial court did not abuse its discretion in allowing the State to impeach defendant's credibility with his prior guilty plea and conviction for second degree murder in Michigan, nor did it abuse its discretion in denying defendant's request for a second degree murder instruction based upon serious provocation. The trial court did not err in finding that second degree murder in Michigan is substantially similar to first degree murder in Illinois. Accordingly, the judgment of the trial court is affirmed.

¶ 2 Following a jury trial, defendant Antonio Poole was convicted of first degree murder and sentenced to natural life imprisonment. On appeal, defendant contends that (1) the State failed to disprove his justification theory of self-defense beyond a reasonable doubt, or in the alternative,

that his conviction should be reduced to second degree murder; (2) the trial court abused its discretion in allowing the State to impeach defendant's credibility with his prior guilty plea and conviction for second degree murder in Michigan; (3) the trial court abused its discretion in denying defendant's request for a second degree murder instruction based upon serious provocation; and (4) the trial court erred in finding that second degree murder in Michigan is substantially similar to first degree murder in Illinois. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Antonio Poole was charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012)) in connection with the August 1, 2011, stabbing death of his roommate, Larry Dumas. Before trial, defendant filed a motion *in limine* indicating that he "might" assert self-defense as an affirmative defense and asking the trial court to prevent the State from impeaching defendant with his November 1990 guilty plea and conviction in Michigan for second degree murder. On the same day, the State filed a motion seeking to introduce defendant's Michigan conviction for impeachment purposes in accordance with *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 5 At the combined hearing on both motions, the State noted that defendant had spent nearly 20 years in prison on that conviction before being paroled on August 6, 2009. The State added that defendant then moved to Chicago and was arrested for Dumas's murder on August 1, 2011, while defendant was still on parole. The State then argued that defendant's Kent County, Michigan, conviction was relevant on the issue of defendant's credibility. Defendant countered that the conviction occurred twenty years prior and would be "almost negligible" with respect to probative value, but that the prejudicial effect on the jury would be "enormous." Following argument, the trial court denied defendant's motion and allowed the State to introduce the

conviction for impeachment purposes should defendant testify, but subject to a limiting instruction. Defense counsel later filed a motion to reconsider, and argued at a second hearing that, should the trial court reject his motion, counsel asked to present evidence that the prior conviction resulted from a guilty plea. The trial court rejected defendant's motion to reconsider, finding that, although it had some concerns because the prior conviction was similar to the charged offense, the "recency" of the current offense (*i.e.*, that defendant had been released from prison less than two years before the current offense) outweighed any prejudicial effect. The trial court then denied defense counsel's request to produce evidence that the prior conviction was entered following a guilty plea, unless counsel could provide case law "from this jurisdiction" allowing for that. Defense counsel did not provide any such authority.

¶ 6 The following evidence was adduced at defendant's jury trial. Charles Frazier testified that he, Lisa Davis (Frazier's girlfriend and defendant's sister), defendant, and Dumas, lived on the second floor of a two-flat apartment building at 7144 South Champlain Avenue in Chicago. Frazier had known Dumas, who was also known as "Sock Man," for about two years. In addition, Dumas, according to Frazier, smoked "crack" daily and weighed between 250 and 300 pounds. Frazier said that there were two entries to the shared apartment: the front door in the foyer of the building (that locked), which led to the front door of their second floor apartment (that did not lock), and the back door of the apartment (which did not lock). Frazier said that the back door of the apartment was secured with a two-by-four propped against it, but Dumas would occasionally not secure the back door.

¶ 7 Frazier then stated that, at around 10:30 p.m. on July 31, 2011, he and Davis spent the night at 237 North Sacramento Boulevard, where they were "house sitting." The next morning, Frazier went to work, while Davis stayed at the Sacramento residence. Between 8 and 8:30 a.m.,

defendant called Frazier asking to speak with Davis. Frazier then said that, about 5 to 10 minutes after that call ended, defendant called him again, and Frazier spoke to both defendant and the victim (Dumas). Later that day, Frazier received another call from Davis's friend, who then picked up Frazier and Davis and took them immediately to their apartment.

¶ 8 Chicago police officer Carlton Cook testified that, at around 8:45 a.m. on August 1, 2011, he was on patrol alone in a marked vehicle traveling south along the 6900 block of South Cottage Grove Avenue. Cook saw defendant driving northbound sounding the car's horn, waving his arms at Cook, and yelling that he needed help. Cook immediately got out of his car, and when defendant got out of his car, defendant fell to the ground. Cook observed that, although defendant was conscious, there was blood on defendant's face, hands, shirt, arms, and legs. Cook described defendant as hysterical and immediately requested an ambulance. Defendant later showed Cook a laceration near defendant's right waist.

¶ 9 Cook asked defendant what happened, and defendant said that three individuals tried to rob him near the basketball courts at a park near the intersection of East 72nd Street and South Martin Luther King Drive. Cook, however, said that defendant could not provide any additional details. Cook used his radio and asked for other units to search the basketball courts near the park around "72nd and King Drive" for the possible assailants. An ambulance and other police officers then arrived on the scene, and defendant was eventually transported to Christ Hospital. Cook was then alerted to another crime scene at 7144 South Champlain Avenue. Cook said that he went to that scene because defendant's wound appeared to be from a stabbing and not a gunshot, and the two locations were close to each other both in terms of time and distance.

¶ 10 Kathleen Kelly testified that, at around 8:45 a.m. on August 1, 2011, she was on duty as a paramedic, and she received a call directing her to East 69th Street and South Cottage Grove

Avenue. When Kelly arrived at the scene, she saw defendant was in the care of a firefighter. Defendant was then immediately placed on a stretcher and into the back of Kelly's ambulance, and she transported defendant to the hospital. While en route, Kelly said that defendant was awake, alert, and oriented, despite his hands and upper torso being covered in blood. Defendant told Kelly that he had been "jumped" by several teenagers but escaped and drove "to the police station."

¶ 11 In addition, the parties stipulated that, if she had been called to testify, Chicago police officer Kendra Pepper would have testified that she accompanied defendant to the emergency room at Christ Hospital, and that defendant told Pepper that he lived at 3856 South Lake Park in Chicago, and that he had been walking south on King Drive at 72nd Street when three black males walked up to him and demanded his money. According to Pepper, defendant said he refused, and the three individuals began punching and kicking defendant about the body and head. Defendant also told Pepper that the three males were dressed in white T-shirts and blue jean shorts, and one of the individuals was around six feet tall.

¶ 12 Chicago police officer Jeffrey Brosseau testified that, at 8:46 a.m. on August 1, 2011, he was directed to go to 72nd Street and Martin Luther King Drive to locate a crime scene. Brosseau arrived within one minute and began looking for evidence, but he stated that there was "no indication physically" of a crime. Brosseau also spoke to a woman who was at the park with her toddler and had been there for at least 20 minutes, but the woman saw nothing unusual. Brosseau received a dispatch about the crime scene at 7144 South Champlain, and went to that location. Brosseau saw an unresponsive black male lying at the top of the porch with one arm against the railing, bleeding "profusely" from his left side.

¶ 13 Chicago police detective Patrick Hackett testified that, at around 9 a.m. on August 1, 2011, he and his partner, Detective Paul Alfini, went to 7144 South Champlain to investigate a homicide. When they arrived, Hackett saw the body of the victim (who was barefoot) lying on the front porch and a "significant" amount of blood around the victim's body, on the front door, and on the stairs leading up to the second floor. Hackett went to the back of the residence and up the stairs to the second-floor apartment. There, he observed a large amount of blood puddled in a rug and a large blood-stained knife. In addition, there was spattered blood on the dining room walls, in the living room, and on a comforter on a bed in the living room. The only weapon Hackett recovered was the knife. Hackett and his partner went out the front door of the apartment and noticed a great deal of blood on the floor, the walls, as well as bloody footprints and a bloody shoeprint leading down the stairs. Hackett said that he and his partner completed their investigation of the scene when they were informed of defendant's waving down of a patrolman. They then went to that scene.

¶ 14 When they arrived at East 69th Place, they saw defendant's car, which had bloodstains in it, and they learned that defendant had been transported to the hospital. They went to the hospital and spoke to defendant, who told them that he lived at 3856 Lake Park with his sister, Sabrina Jennings. Hackett further recounted that defendant claimed that he left that address earlier that morning to talk to someone about a job, but that person did not show up, so defendant went to the park at East 71st Street and South Martin Luther King Drive. Defendant said that, after he arrived, three black males tried to rob him and stabbed him in the process, resulting in blood on his T-shirt, shorts, and shoes. Hackett said that, after three to four hours at the hospital, defendant was released and taken to the police station.

¶ 15 Chicago police officer Edward McCartan testified that, on August 1, 2011, he was an evidence technician and that he and his partner were assigned to investigate the crime scene at 7144 South Champlain. McCartan saw blood "everywhere," and recovered a knife from the dining room floor in the apartment in addition to a pair of glasses and a hat. McCartan and his partner also went to the location where defendant's car had been parked. They saw blood on the seat and floor of the car, from which they took blood swabs. Officer McCartan also went to the hospital and photographed defendant's injuries while defendant was being treated. Defendant had a cut on his finger and a red mark on the side of his face. With respect to the stab wound, McCartan stated that defendant received stitches but did not undergo surgery.

¶ 16 Cook County assistant medical examiner Adrienne Segovia stated that she performed the autopsy on the victim on August 2, 2011. Segovia stated that the victim had a 1.2-inch vertical stab wound on the left side of his chest, horizontal incised wounds on the left side of his head and his anterior right forearm, as well as "scrape marks" on the front of both lower legs. Segovia stated that the victim died of a stab wound and multiple incise wounds. In particular, Segovia noted that the stab wound to the victim's chest was inflicted with "[s]ignificant force" and the forearm incise wound indicated a defensive injury. Finally, Segovia noted that the victim's blood tested positive for cocaine and its metabolites, indicating recent use.

¶ 17 The State also presented testimony from three experts in the field of forensic DNA analysis who were all employed as forensic scientists in the biology and DNA section of the Illinois State Police Forensic Science Center. First, Jennifer Belna testified that she analyzed the blood samples from the knife blade and handle, as well as the eyeglasses recovered from the Champlain Avenue apartment. She opined that the blood on the knife blade and handle was the victim's and not defendant's. With respect to the eyeglasses, one of the two swabs only matched

the victim's DNA whereas the second swab contained a "major human male DNA profile" matching the victim and a "minor human male DNA profile" from which defendant could not be excluded. Second, Meredith Misker testified that she analyzed the swabs from defendant's car and opined that the DNA in the blood samples matched only the victim and not defendant. In addition, Misker analyzed swabs from the victim's right- and left-hand fingernails. Misker stated that those swabs contained a major profile matching the victim and a minor profile from which defendant could not be excluded. Finally, Christine Prejean opined that the DNA in the blood swab taken from defendant's shoe only matched the victim.

¶ 18 The State then rested, and defendant testified on his own behalf. Defendant began by explaining that he lived with his sister, her boyfriend (Frazier), and the victim at the Champlain Avenue apartment and that defendant had previously lived at the Lake Park residence with his sister and brother-in-law. Defendant stated that everyone, including himself, referred to the victim as "Sock Man." Defendant further testified that he saw the victim smoke crack every day, but defendant said he never had any "problems" with the victim.

¶ 19 Defendant then recounted that, on the night before the stabbing, he drove his sister and Frazier to an apartment at Sacramento and Lake and then returned to Champlain Avenue and stayed the night there with a friend, Senovia Mays. Mays left at around 7 a.m. the next morning, August 1, 2011, and defendant stayed behind. Defendant saw the victim sitting up in his bedroom. Poole testified that, at some point that morning, he saw the victim smoking crack in his room and also smelled it. At around 8 a.m., defendant wanted to leave the apartment to go finish a painting and cement job that he had been doing. Defendant wanted to ensure that all the doors were locked before he left, but he was concerned that the victim might leave the apartment unlocked if defendant left before the victim. Defendant tried to call Davis but could not reach

her, so he called Frazier and told him that he had to leave at 8:30 and asked whether Frazier wanted him to leave and let the victim lock up. About five minutes later, defendant called Frazier again, and the victim also talked on the phone with Frazier.

¶ 20 After this second call, the victim and defendant had a conversation from their respective rooms. The victim felt that defendant was treating the victim like a child. Defendant described the victim as angry and using a lot of profanity. Defendant claimed that he responded to the victim by saying that the victim had been "a little careless," noting that the victim had previously left the door unlocked three times.

¶ 21 Defendant eventually started to leave the apartment, but as he entered into the dining room area, the victim ran out of his room and hit defendant on the side of the face with such force that it knocked defendant over a glass table, to the couch and then the floor. The victim was then "on" defendant, punching, swinging, and "cutting" him, and the victim was also "growling, like he was just like really angry." Defendant saw nothing in the victim's hands, and defendant could not fight back because defendant's hand had been recently broken. Instead, defendant only put his hands up and to stop the punches, shouted to the victim to stop and calm down, and also tried to flee. The victim, however, did not stop. Defendant then rolled over and tried to get up and run, but the victim kept grabbing and catching him, hitting his legs and knocking him down three times. Defendant said that, each of the three times, the victim "was on me so fast I couldn't do anything."

¶ 22 Defendant stated that he tried to push the victim away multiple times to escape, but the victim kept grabbing and cutting him, including on defendant's side. Defendant said the cut on his side burned and defendant saw blood "everywhere." At this point, defendant was on the floor, with his back against two partial dividers between the dining and living room, and the

victim ran toward him "full force." Defendant said he told the victim to stop, and when he put his hand down, and he felt the knife that the victim normally used to close his door. Defendant picked it up and continued asking the victim to stop.

¶ 23 Defendant held the knife in his left hand and extended it straight out from his body while his right hand was "palm up" with the elbow bent. The victim still ran at defendant, cut defendant on his side, and inflicted other injuries, including a bruise on defendant's face and various other cuts on defendant's hand, arm, and back. The victim, however, while charging forward, "ran into" the knife. Defendant then dropped the knife, turned, and ran from the apartment with the victim chasing him. Defendant thought the victim was going to kill him, but when defendant ran down the steps from the patio to the front yard, he turned and saw the victim on the porch. Defendant ran to his car, looked back again, and this time saw the victim sitting on the porch. Defendant said he did not think the victim was fatally wounded.

¶ 24 Defendant then drove toward the police station at East 71st Street and South Cottage Grove Avenue, but flagged down an officer while en route. He explained that he told the officer that he had been robbed because he did not want to get the victim locked up, adding that the victim was on crack and defendant did not believe that he knew what he had been doing. Defendant further agreed that he told the same story to officers while at the hospital. Finally, defendant stated that he stabbed the victim because he thought the victim was going to kill him.

¶ 25 On cross-examination, defendant maintained that he referred to the victim by his nickname, Sock Man. When his video recorded interview with Detectives Hackett and Alfini was played for the jury, however, he admitted telling the officers, "I don't call [the victim] shit."

¶ 26 Following defendant's testimony, the defense rested, and the State presented in rebuttal a certified copy of defendant's conviction for second degree murder in Kent County, Michigan, on

November 1, 1990. The trial court instructed the jury that it could consider the prior conviction as evidence with respect to defendant's believability as a witness but not as evidence of his guilt.

¶ 27 At the close of the evidence, the trial court dismissed the jury for the evening and held a jury instructions conference. At defendant's request, the trial court agreed to instruct the jury as to self-defense and unreasonable-belief second degree murder. The trial court, however, denied defendant's request to also instruct the jury as to second degree murder based upon "a sudden, and intense passion resulting from serious provocation" by the victim. The trial court found that the evidence presented did not support a provocation instruction.

¶ 28 The parties then presented their closing arguments. During defendant's closing argument, defense counsel argued that the victim was not a bad person; rather, the victim's drug use that morning and the "little interaction" the victim had with defendant resulted in the victim having a "violent crack cocaine outburst." Defense counsel further argued that defendant's actions were rooted in "fear and survival."

¶ 29 Following closing arguments, the trial court instructed the jury. In addition to the self-defense and unreasonable-belief second degree murder instructions, the trial court also reiterated the limiting instruction regarding defendant's prior conviction, and it instructed the jury that a non-initial aggressor had no duty to retreat. The jury retired to deliberate, after which it found defendant guilty, and the cause proceeded to sentencing.

¶ 30 At defendant's sentencing hearing, Diana Judge, the records administrator for the Michigan Department of Corrections, confirmed that defendant pleaded guilty to second degree murder in Kent County, Michigan, on October 1, 1990, and was sentenced on November 1, 1990, to 12 to 40 years' imprisonment. At the end of the hearing, the State argued that a mandatory life sentence was required due to defendant's prior second degree murder conviction

in Michigan. Defendant disputed this, arguing that the Stated failed to show sufficient similarity between the second degree murder statute in Michigan and the first degree murder statute in Illinois. The trial court, however, agreed with the State, finding sufficient similarity and noting that the legislature had taken away the trial court's discretion with respect to this aspect of sentencing, requiring it to impose a natural life sentence. This appeal followed.

¶ 31 ANALYSIS

¶ 32 Defendant's Self-Defense Claim

¶ 33 Defendant first contends that the State failed to prove beyond a reasonable doubt that defendant did not act in self-defense. Defendant claims that the State's evidence established either uncontroverted facts or supported defendant's self-defense claim. Defendant asserts that the State's entire theory was based upon "the implausible supposition that [defendant] simply disliked [the victim], *** so he killed him." Defendant asks that we either reverse his conviction outright, or in the alternative, reduce it to second degree murder because the evidence showed that defendant acted with the unreasonable belief that his actions were justified.

¶ 34 The defense theory at trial was justification based upon self-defense under section 7-1 of the Criminal Code of 2012 (Code) (720 ILCS 5/7-1 (West 2012)), which is an affirmative defense. 720 ILCS 5/7-14 (West 2012); *People v. Lee*, 213 Ill. 2d 218, 224-25 (2004). When a defendant raises an affirmative defense under section 7-1, the State then has the burden of proving beyond a reasonable doubt not only the elements of the charged offense, but also that the defendant did not act in self-defense. *Id.* at 224. The elements of a claim of self-defense or defense of others are as follows: (1) unlawful force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) 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. 720 ILCS 5/7-1 (West 2010); *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). If the State negates only one of these elements, the defendant's claim fails. *Id.* The issue of self-defense is always a question of fact that the trier of fact must resolve. *People v. De Oca*, 238 Ill. App. 3d 362, 367 (1992). "The trier of fact need not believe defendant's version even though it was the only one, and it may consider other facts and circumstances in the record which tend to contradict defendant's story or at least raise serious questions about its probability." *People v. Liddell*, 32 Ill. App. 3d 828, 830 (1975). As such, it is under no obligation to believe or accept as true the defendant's claim of self-defense. *De Oca*, 238 Ill. App. 3d at 369.

¶ 35 Defendant's claim that the State failed to disprove beyond reasonable doubt that defendant acted in self-defense is a challenge to the sufficiency of the State's evidence as to this point. When presented 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.' " (Emphasis in original.) *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the function of this court to retry the defendant. *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 113 (citing *People v. Evans*, 209 Ill. 2d 194, 209 (2004)). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* (citing *Evans*, 209 Ill. 2d at 211). Moreover, the fact-finder is not obligated to accept the defendant's version of events as among competing versions, but may reject it. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001). In essence, this

court will not reverse a conviction unless the evidence is "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Evans*, 209 Ill. 2d at 209.

¶ 36 Viewing the evidence in the light most favorable to the State, as we must (*De Filippo*, 235 Ill. 2d at 384-85), we find the State's evidence negated at least one of the elements of self-defense. Specifically, the evidence at trial was that the victim, a daily crack cocaine user with no prior history of violence, suffered both a stab wound to the chest that had been inflicted with significant force (resulting in a substantial loss of blood) and also a defensive wound around his arm. Defendant, by contrast, suffered a stab wound to his side that required stitches and a bandage, but no surgery, and the blood soaking defendant's clothing was that of the victim. In addition, no other weapon was found other than the large knife that defendant used to stab the victim, and only the victim's DNA was found on the knife blade. Finally, defendant admitted on cross-examination that, shortly after he stabbed the victim in the chest, he told police investigators that he did not call the victim by his nickname; instead, he told them that he did not "call [the victim] shit." From this evidence, the jury could have reasonably inferred that (1) unlawful force was *not* threatened against defendant, (2) defendant *was* the aggressor, (3) the danger of harm was *not* imminent, and (4) defendant's use of force was *not* necessary.

¶ 37 In addition, defendant's claim at trial was that, after being repeatedly beaten and then stabbed by the victim, defendant fled in his car to a police station but flagged down an officer en route, and then concocted a story of being attacked by three other individuals so that the victim—the person who had just stabbed and repeatedly beat defendant, but whom defendant left bleeding profusely from the chest—would not get into trouble. As noted above, the jury could consider the improbability of defendant's account and was under no obligation to believe or accept as true defendant's claim of self-defense. *Liddell*, 32 Ill. App. 3d at 830; *De Oca*, 238 Ill.

App. 3d at 369. The jury was thus free to reject defendant's version of events, including his claim of self-defense. See *People v. Herrett*, 137 Ill. 2d 195, 206 (1990) ("The jury in this case was not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt."). Since the State's evidence refuting defendant's self-defense claim is not "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt," we will not reverse his conviction. *Evans*, 209 Ill. 2d at 209. Defendant's contention that the State failed to refute his self-defense theory is meritless.

¶ 38 Finally, defendant's reliance upon *People v. Evans*, 259 Ill. App. 3d 195 (1994), and *People v. Davis*, 278 Ill. App. 3d 532 (1996), is misplaced. In *Evans*, we reversed the defendant's first degree murder conviction of her husband, concluding that she had acted in self-defense. *Evans*, 259 Ill. App. 3d at 196-97. Specifically, we noted that the defendant was a victim of battered woman's syndrome resulting from her husband verbally brutalizing and physically beating her. *Id.* at 211 (recounting that the defendant's husband threatened to break her " 'mother-fucking neck,' " hit her with his fists, a shovel, a baseball bat and a skillet; and he also spit on her and threw objects at her, resulting in various injuries, including a broken shoulder, a " 'punched-out' " tooth that was swallowed, a leg injury, and back abrasions). *Id.*

¶ 39 In *Davis*, this court noted that, while the State proved that the handgun used to kill the defendant's ex-wife was the same handgun that the defendant owned and possessed in 1987 (four years before the murder), the State produced no evidence to rebut testimony that the last time that the defendant saw the handgun was in 1987. *Davis*, 278 Ill. App. 3d at 540. We also noted that, despite "an intensive police investigation which included fingerprint testing, blood and hair testing, neighborhood canvassing, numerous interviews, telephone record checks and license

plate checks," there was "no evidence of any kind" placing the defendant at or near the location when the victim was killed. *Id.* at 541. We thus reversed the defendant's conviction. *Id.* at 544.

¶ 40 In this case, there was no evidence whatsoever that the victim repeatedly brutalized defendant in the same vicious manner as the husband in *Evans*. To the contrary, there was no history of violence on the part of the victim, even when he had been using crack cocaine. Unlike *Davis*, there was no dispute here that defendant killed the victim—defendant eventually admitted as such under police questioning, but there was no evidence to corroborate defendant's bald assertion that the victim attacked and stabbed defendant, which caused defendant to fatally stab the victim in self-defense. As noted above, the jury apparently considered the improbability of defendant's version of events and rejected defendant's claim of self-defense, which it was entitled to do. See *Villarreal*, 198 Ill. 2d at 231; *De Oca*, 238 Ill. App. 3d at 369. Defendant's reliance upon *Davis* and *Evans* is therefore unavailing.

¶ 41 Defendant also contends in the alternative that, should we reject his challenge to the sufficiency of the State's evidence refuting his self-defense claim, we should reduce his conviction to second degree murder. Specifically, defendant asserts that, because the victim was "nearly twice [defendant's] size," had smoked crack, and complained of being treated like a child, there was a preponderance of evidence indicating that defendant acted under an unreasonable belief that he was justified in stabbing the victim.

¶ 42 Under section 9-2 of the Code, a person commits second degree murder when he commits first degree murder, but at the time of the killing, he believes that circumstances exist that would either justify or exonerate the killing but his belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2012). Thus, to prove a defendant guilty of second degree murder, the State must first prove the defendant guilty of first degree murder beyond a reasonable doubt. 720

ILCS 5/9-2(c) (West 2012). At that point, the burden shifts to the defendant to prove the existence of the mitigating factor by only a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2012). The State, however, is not required to prove the absence of the mitigating factor beyond a reasonable doubt. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 51 (citing *People v. Shumpert*, 126 Ill. 2d 344, 352 (1989)), *appeal denied*, No. 113117 (Nov. 30, 2011).

¶ 43 Whether a defendant is guilty of second degree murder is a question for the trier of fact (*id.* ¶ 52), who must resolve conflicts in the evidence and determine witness credibility (*People v. Chapman*, 49 Ill. App. 3d 553, 557 (1977)). Rather than challenge the sufficiency of the State's evidence, however, defendant argues that he presented sufficient evidence of a mitigating factor (namely, an unreasonable belief in the need for lethal self-defense) to reduce his first degree murder conviction to second degree murder. Therefore, we must determine whether, in viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the mitigating factor *not* present. *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996).

¶ 44 We reject defendant's alternative contention. It is true that there was evidence that the victim smoked crack cocaine daily, outweighed defendant, and (according to defendant's testimony) complained that defendant treated him like a child. That, however, was not the only evidence at trial. First, there was no history of antagonism between the victim and defendant at the time of the stabbing—indeed, defendant testified that he "never had a problem" with the victim, and the evidence was that the victim never displayed violence, even when under the effects of crack cocaine. Furthermore, other than defendant's testimony, the victim did not brandish a weapon, and the only weapon recovered at the scene was covered in the victim's blood only. Finally, after defendant fled the scene of the stabbing and flagged down a police officer while on the way to the police station, he did not inform the officer that he and the victim

had stabbed each other in a mutual combat and that the victim was left "sitting" on the porch of their residence; instead, defendant crafted a false story of three people stabbing him during an attempted robbery at a nearby park. The jury found defendant's self-serving testimony not credible, and we may not retry defendant. *Crawford*, 2013 IL App (1st) 100310, ¶ 113. Consequently, we cannot hold that no rational trier of fact could have reached the same conclusion. *De Filippo*, 235 Ill. 2d at 384-85. Defendant claim in the alternative thus fails.

¶ 45 Finally, our holding on this point is unaffected by defendant's citation to *People v. Collins*, 213 Ill. App. 3d 818 (1991). There, the defendant's conviction for the first degree murder of his unarmed roommate was reduced to second degree murder because the evidence was "too inconclusive, vague, and contradictory" to sustain a conviction for first degree murder but was sufficient to support a conviction for second degree murder. *Id.* at 826. A witness testified that the defendant was nonviolent, but the victim had a violent temper. *Id.* at 821. In addition, there was no physical evidence to support the State's theory that the defendant fired two shots, and the only witness to suggest two shots was inconsistent in his testimony and admitted to having been drinking at the time of the shooting. *Id.* at 824-25. Finally, the witness and the defendant were the only two people to testify to the circumstances of the shooting, and both testified that the defendant and the victim were wrestling with a gun at the time the victim was shot. *Id.* at 825. Here, by contrast, there was no evidence to corroborate defendant's testimony that the victim became suddenly (and uncharacteristically) violent, and defendant's testimony did not establish there had been a struggle over the knife; rather, defendant stated that he held the knife up away from his body, and the victim ran at the knife and impaled himself on it. Defendant's reliance upon *Collins* is therefore unpersuasive.

¶ 46 The State's Use of Defendant's Prior Conviction in Michigan

¶ 47 Defendant next contends that the trial court erred in granting the State's motion *in limine* that sought to introduce defendant's conviction for second-degree murder in Michigan. Defendant argues that the "enormously prejudicial" effect of the prior conviction far outweighed its probative value. Defendant argues that there is nothing intrinsic in a murder conviction that would reflect either a tendency or willingness to deceive, and that the crime of murder says nothing about a witness's honesty. Defendant adds that, even with the trial court's limiting instruction, the jury likely assumed that defendant was guilty in this case because he had committed murder in the past. Defendant asks that we reverse this conviction, or alternatively, that we grant him a new trial because the trial court precluded him from introducing the mitigating evidence that the prior conviction was the result of a guilty plea.

¶ 48 In *People v. Montgomery*, 47 Ill. 2d 510, 516-17 (1971), our supreme court established a rule for trial courts to determine whether a defendant's prior convictions should be admitted to impeach the defendant's credibility. Under the *Montgomery* rule, evidence of a defendant's prior conviction is admissible to attack the defendant's credibility when: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements; (2) less than 10 years have elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Id.* Defendant initially seems to challenge all three *Montgomery* factors, but in reply narrows his challenge to only the third: whether the prejudicial effect outweighed the probative value. We review a trial court's decision to admit evidence of a prior conviction for impeachment purposes for abuse of discretion. *People v. McKibbins*, 96 Ill. 2d 176, 187 (1983). "An abuse of discretion exists only

where the trial court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010) (citing *People v. Donoho*, 204 Ill. 2d 159, 182 (2003)).

¶ 49 Here, the trial court acted within its discretion. The record indicates that the trial court considered this matter twice: before trial on the parties' motions *in limine* and then on defendant's motion to reconsider. The trial court referred to the *Montgomery* decision, engaged in a lengthy discussion of the probative value and prejudicial effect of the prior conviction, expressly noting its concern at the second hearing that the two charges were the same, and eventually found that defendant's commission of the current offense within two years of his release from prison prevailed over any prejudicial impact. Defendant reiterates his claim that the prior conviction occurred 21 years before the crime in this case. Defendant, however, admits that his prior conviction is admissible if "less than 10 years have elapsed since the date of conviction of the prior crime *or release of the witness from confinement*, whichever is later." (Emphasis added.) *Montgomery*, 47 Ill. 2d at 516-17. Defendant stabbed and killed the victim within two years of his release from confinement, placing this conviction squarely within the time frame contemplated by *Montgomery*. Defendant's argument on this point is thus meritless.

¶ 50 Turning to defendant's alternative claim regarding the guilty plea, we agree with the State that defendant has forfeited this argument. The record clearly reflects that the trial court offered defendant an opportunity to provide case law "from this jurisdiction" indicating that defendant would be allowed to present evidence that the prior conviction stemmed from a guilty plea. Defendant, however, provided nothing.

¶ 51 Defendant attempts to rescue this claim in his reply brief, however, by claiming ineffective assistance of counsel. We need not consider this claim, however, because it is well

settled that a party may not first raise an issue in his reply brief. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). As this court has observed, "Almost a century ago, our supreme court noted, 'Under the rules of this court and its long[-]settled practice, questions not raised by appellants in the original brief cannot be raised in the reply brief. A contrary practice would permit appellants to argue questions in their reply briefs as to which counsel for appellees would have no opportunity to reply.' " (Alteration in original.) *People v. English*, 2011 IL App (3d) 100764, ¶ 22-23 (quoting *Holliday v. Shepherd*, 269 Ill. 429, 436 (1915)).

¶ 52 Anticipating this result, defendant nonetheless argues that his ineffective assistance claim may be raised in his reply brief. In support, he argues that, in *People v. Maxwell*, 89 Ill. App. 3d 1101, 1104 (1980), a panel in the Third District of this court held that such a claim raised for the first time in the reply brief was proper because it "grows out of and is response to the waiver argument made by the State in its appellee's brief." In *Maxwell*, however, the defendant had filed a separate motion seeking to add this claim in response to the State's waiver argument, the State responded to the motion, and the court took the motion with the case, eventually rejecting the newly-added claim. *Id.* at 1104-05. In this case, by contrast, defendant did not file a motion with this court seeking to add this claim; and the State was therefore denied any opportunity to respond to this new argument. Defendant's reliance upon the *dicta* in *Maxwell* is therefore without merit.

¶ 53 The Denial of a Serious-Provocation Second Degree Murder Instruction

¶ 54 Defendant next contends that the trial court erred in refusing to instruct the jury with respect to second degree murder based upon serious provocation. Defendant argues that the

evidence that defendant received a "substantial physical injury to his abdomen" immediately before stabbing the victim supported the giving of this instruction.

¶ 55 It is axiomatic that a defendant is entitled to an instruction on his theory of the case "if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury." *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). Even very slight evidence will justify the giving of an instruction. *Id.* at 132. Nonetheless, a trial court must be cautious "so as not to permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment." *People v. Everette*, 141 Ill. 2d 147, 157 (1990). A trial court's decision with respect to jury instructions is reviewed for an abuse of discretion. *People v. Jones*, 219 Ill. 2d 1, 31 (2006).[1] A trial court abuses its discretion when its decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004).

¶ 56 In this case, there was no abuse of discretion. Defendant's theory of the case was that he fatally stabbed the victim in self-defense or in the alternative that he had an unreasonable belief that he had to kill the victim in self-defense. As the State points out, defendant's testimony belies any claim that he could have acted under a serious provocation. Defendant stated that, while partially lying on the floor, he held the knife out in front of him to defend himself from the victim's alleged assault, and the victim then ran at the defendant and impaled himself on the knife. Defendant reiterated at trial that the victim's death was an accident. On these facts, the trial court's denial of defendant's serious-provocation second degree instructions was not

[1] We reject defendant's argument that our standard of review is *de novo* based upon our supreme court's holding in *People v. Washington*, 2012 IL 110283, ¶ 19. The issue in *Washington* was whether an *unreasonable-belief* second degree murder instruction must be provided if there is evidence supporting a self-defense instruction. *Id.* ¶ 56. The *Washington* court did not address the differing standards, nor did it overrule the long line of cases adhering to an abuse of discretion standard of review. Regardless, our result is the same even when reviewed *de novo*.

"fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *Id.* The trial court did not abuse its discretion in rejecting defendant's request for a serious-provocation second degree murder instruction.

¶ 57 Defendant's Natural Life Sentence

¶ 58 Finally, defendant contends that the trial court erred in finding that second degree murder in Michigan is substantially similar to first degree murder in Illinois. That finding elevated the sentence to a mandatory life term. Defendant argues that this issue is controlled by this court's decision in *People v. Austin*, 267 Ill. App. 3d 469 (1994), which held that first degree murder in Illinois was not substantially similar to second degree murder in Michigan.

¶ 59 Section 9-1(b)(3) of the Code provides in part that a defendant may be sentenced to death if the defendant has been convicted of murdering "two or more individuals under subsection (a) of this Section or under any law of *** any state which is substantially similar to subsection (a) of this Section." 720 ILCS 5/9-1(b)(3) (West 2014).[2] Therefore, we must conduct a comparative analysis of the first degree murder statute in Illinois and the second degree murder statute in Michigan to determine whether conduct constituting second degree murder in Michigan also constitutes first degree murder in Illinois. See *People v. Guest*, 115 Ill. 2d 72, 92 (1986). It is important to note, however, that "substantial similarity" is not found in the language of the respective statutes but, rather, in the mental states required by each statute in order to prove the offense of murder. *Id.* at 95. Whether the two statutes are substantially is a question of law and statutory interpretation, which we review *de novo*. *People v. Martin*, 2011 IL 109102, ¶ 20.

[2] Defendant, however, received a natural life sentence under section 5-8-1(a)(1)(c)(i) of the Unified Code of Corrections. 730 ILCS 5/5-8-1(a)(1)(c)(i) (West 2014) (the trial court "shall sentence the defendant to *** natural life imprisonment when the death penalty is not imposed if the defendant[] has previously been convicted of first degree murder under any state *** law.").

¶ 60 Illinois' murder statute provides in relevant part that a person commits first degree murder if he kills an individual without lawful justification and, in performing the acts which cause the death either intends to kill or do great bodily harm to that individual, or he knows that such acts create a strong probability of death or great bodily harm to that individual. 730 ILCS 5/9-1(a) (West 2012). The *Guest* court further observed that, in enacting the Criminal Code of 1961 (which established the current statutory definition of murder), the legislature intended to retain the common law meanings of "express and implied malice" but replace these terms with the more modern and less ambiguous terms of "intent and knowledge." *Guest*, 115 Ill. 2d at 96.

¶ 61 The Michigan Penal Code in 1990 (the time of defendant's conviction) defined all murders as either first degree or second degree. See Mich. Comp. Laws Ann. §§ 750.316, 750.317 (West 1990). Section 316 of the Michigan Penal Code defined first degree murder in part as "murder which is perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing." Mich. Comp. Laws Ann. § 750.316 (West 1990). Second degree murder was simply "[a]ll other kinds of murder." Mich. Comp. Laws Ann. § 750.317 (West 1990). Under Michigan law, "malice aforethought is the 'grand criterion' which elevates a homicide, which may be innocent or criminal, to murder." (Footnotes omitted.) *People v. Aaron*, 409 Mich. 672, 714 (1980). Malice is further defined as the intention to either kill, do great bodily harm, or "create a high risk of death or great bodily harm with knowledge that such is the probable result." *People v. Porter*, 169 Mich. App. 190, 192-93 (1988).

¶ 62 In both Illinois and Michigan, the defense of self-defense vitiates murder. Compare 720 ILCS 5/7-1(a) (West 2012) and *People v. Robinson*, 375 Ill. App. 3d 320, 334-35 (2007) with *People v. Heflin*, 434 Mich. 482, 502 (1990) ("In Michigan, the killing of another person in self-

defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.").

¶ 63 Over 30 years ago, in 1994, this court examined the murder statutes of Illinois and Michigan to determine whether they were substantially similar to each other. *Austin*, 267 Ill. App. 3d at 470. In *Austin*, as in this case, the defendant had been convicted of first degree murder and was sentenced to natural life imprisonment due to a prior second degree murder conviction in Michigan (also resulting from a guilty plea). *Id.* The court relied upon a Michigan appellate decision, *People v. Deason*, 148 Mich. App. 27 (1985), *abrogated on other grounds in People v. Heflin*, 434 Mich. 482, 503, n.16 (1990). *Deason* held that unreasonable-belief self-defense was not a defense to murder in Michigan. *Austin*, 267 Ill. App. 3d at 474-75 (citing *Deason*, 148 Mich. App. at 31-32). Based upon the holding in *Deason*, the *Austin* court held that second degree murder in Michigan was *not* substantially similar to first degree murder in Illinois because in Illinois, an imperfect self-defense results in a reduction from first degree murder to voluntary manslaughter, whereas "the defendant in Michigan remains guilty of second degree murder." *Id.* at 475 (citing *Deason*, 148 Mich. App. at 31-32).

¶ 64 In 2012, however, the Michigan supreme court issued a decision purporting to "resolve whether Michigan law recognizes the doctrine of 'imperfect self-defense' as an independent theory that automatically mitigates criminal liability *** from murder to voluntary manslaughter" when a defendant is the initial aggressor and then claims the victim's response required the use of force. *People v. Reese*, 491 Mich. 127 (2012). The court engaged in a lengthy discussion of the development of the law of homicide in Michigan, noting eventually that the elements in the offense of voluntary manslaughter were included in murder, but murder

also included the single additional element of malice. *Id.* at 144 (citing *People v. Mendoza*, 468 Mich. 527, 540 (2003)).

¶ 65 Turning then to self-defense and imperfect self-defense, the *Reese* court noted that the theory of imperfect self-defense first appeared as *dicta* in a footnote. *Id.* at 147 (citing *People v. Morrin*, 31 Mich. App. 301, 311 n.7 (1971)). The *Reese* court then observed that, in *People v. Springer*, 100 Mich. App. 418, 421 (1980), the camel's nose came under the tent: the *Springer* court reversed a second degree murder conviction, reasoning that the defendant's imperfect self-defense (he had been the initial provocateur) warranted a conviction for manslaughter, not second degree murder. *Reese*, 491 Mich. at 147-48. The court recalled that several other Michigan appellate decisions applied imperfect self-defense to situations in which the defendant had been the initial aggressor, and it also noted that various opinions complained that the inquiry must focus on the defendant's intent in causing the confrontation, instead of whether defendant was simply the initial aggressor. *Id.* at 148-49. Reasoning that imperfect self-defense did not exist at the time the Michigan legislature codified the common law crimes of murder and manslaughter, the court held that this doctrine does not exist "as a freestanding defense" mitigating murder to manslaughter. *Id.* at 150. The *Reese* court further held that *Springer* erred in adopting and then applying imperfect self-defense because that doctrine arose after the legislature codified the common law crimes of murder and manslaughter in 1846, and the law should not have been "tampered with except by legislation." *Id.* at 150-51.

¶ 66 The *Reese* court, however, then held the following:

> "Although we reject the doctrine of imperfect self-defense, many circumstances that involve what the Court of Appeals labeled 'imperfect self-defense' can nevertheless provide grounds

> for a fact-finder to conclude that the prosecution has not proved the malice element that distinguishes murder from manslaughter. However, we emphasize that the operative analysis for the fact-finder is not whether the circumstances involving 'imperfect self-defense' exist. Rather, the operative analysis is whether the prosecution has proved the element of malice beyond a reasonable doubt. This focus rightly turns on the *actual elements* of murder and manslaughter, rather than any label of 'imperfect self-defense' as a judicially created shorthand that risks becoming unmoored from the actual element distinguishing the two crimes." (Emphasis in the original.) *Id.* at 151.

The court also noted that the term "malice" evolved from being a mere intent to kill to also include "the absence of mitigating circumstances." *Id.* at 151-52.

¶ 67 The holding in *Reese* has muddied the waters considerably. Although *Reese* reaffirms (in bold capital letters, no less) the notion that imperfect self-defense does not exist as a freestanding defense mitigating murder to manslaughter (*id.* at 150), the court then explains that "many circumstances" referred to as imperfect self-defense could provide a jury with grounds to find that the State had failed to prove malice (*id.* at 151). Since malice is the "grand criterion" that distinguishes murder from other types of homicide (*Aaron*, 409 Mich. at 714), the *Reese* court has implicitly opened the door to allow the use of imperfect self-defense as a means of avoiding both a first degree and a second degree murder conviction under Michigan law. Under these circumstances, we are compelled to hold that, as a result of *Reese*, the second degree murder

statute in Michigan *is* substantially similar to first degree murder in Illinois. Under both statutes, a successful imperfect self-defense assertion could result in a manslaughter conviction.[3]

¶ 68 We recognize that this holding is contrary to the holding in *Austin*, but *Austin* was decided over 30 years ago, and well before the 2012 holding in *Reese* that further explained the nuances of Michigan criminal law. In reply, defendant asserts that *Reese* is of no moment because that decision dates from 2012, whereas *Austin* dates from 1994, which is closer in time to defendant's conviction in 1990. We disagree and must decline to follow *Austin*. *Reese* was not construing the Michigan murder statute as it existed at one particular point in time; to the contrary, it spoke in general of the availability of the imperfect self-defense theory—holding that, although it is not accepted as a stand-alone defense, its concepts *are* to be used by the finder of fact in determining whether the accused had the requisite *mens rea*. *Reese*, 491 Mich. at 151. Furthermore, defendant points to no relevant change in the Michigan murder statutes between defendant's 1990 conviction and the 2008 statute under which the *Reese* defendant was convicted, and we can find none. Defendant's final contention of error is thus without merit.

¶ 69 CONCLUSION

¶ 70 The evidence was sufficient to support defendant's convictions for first degree murder despite defendant's claim of self-defense. The trial court did not abuse its discretion in allowing the State to impeach defendant's credibility with his prior guilty plea and conviction for second degree murder in Michigan. The trial court did not abuse its discretion in denying defendant's request for a second degree murder instruction based upon serious provocation. Finally, the trial court did not err in finding that second degree murder in Michigan is substantially similar to first degree murder in Illinois. Accordingly, the judgment of the trial court is affirmed.

[3] The *Austin* court explained that, in 1987, our legislature changed the name of the offense of voluntary manslaughter to second degree murder, the name it retains today. See *Austin*, 267 Ill. App. 3d at 474, n.1; 720 ILCS 5/9-2 (West 2014).

¶ 71 Affirmed.