2016 IL App (1st) 132465-U

SIXTH DIVISION
March 31, 2016

No. 1-13-2465

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 10 CR 17985
v.	)	
	)	
CURTIS MARBLE,	)	
	)	Honorable
Defendant-Appellant.	)	Maura Slattery Boyle,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for first degree murder was affirmed where: (1) the trial court did not err when it barred evidence that the defendant alleged supported his theory of self-defense; (2) defense counsel was not ineffective; and (3) the prosecutor's remarks in closing argument did not require that the defendant receive a new trial.

¶ 2 Following a jury trial, the defendant, Curtis Marble, was found guilty of first degree murder in connection with the death of his brother, Laird "Bob" Marble (Bob), and sentenced to 65 years' imprisonment in the Department of Corrections. The defendant appeals raising the following contentions: (1) the trial court's rulings deprived him of presenting a defense at trial; (2) defense counsel was ineffective; and (3) the prosecutor's remarks in closing argument required that he receive a new trial. For the reasons set forth below, we affirm the defendant's conviction and sentence.

¶ 3 Around 10 p.m. on the evening of May 30, 2010, a group of men, including the defendant and Bob, were outside playing dice on the 6100 block of South Bishop Street in Chicago. Brenda Marble, the defendant and Bob's mother, was sitting on the front porch of a house across the street from where the dice game was taking place. The defendant and Bob began to argue, which led to a physical confrontation between the two men. After the defendant and Bob were separated, the defendant went to his car, which was parked nearby on South Bishop Street. He removed a gun from the trunk and shot Bob, killing him. The defendant fled the scene discarding the gun, which was later discovered in a trash can. Three months after the shooting, the defendant was discovered hiding in an abandoned building. He was arrested and charged with Bob's murder.

¶ 4 The autopsy revealed that Bob had sustained three gunshot wounds, one of which penetrated his chest and struck his heart and liver. Only two bullets were recovered: one from Bob's body and one from the scene. Two gunshot wounds were consistent with a

person shooting at Bob as he lay on the ground. No gunpowder residue was found on Bob, indicating that the shots were not fired at close range, meaning the shots were fired more than two or three feet away. The cause of death was multiple gunshot wounds, and the manner of death was homicide. The police discovered the handgun used by the defendant in a trash container located in the alley between Bishop Street and Loomis Avenue. Expert firearms testimony established that only three of the six bullets from the murder weapon had been fired.

¶ 5 The State presented the testimony of several eyewitnesses to the shooting. Their testimony is set forth below.

¶ 6 Tonyarika Stewart testified as follows. She had known the defendant and Bob for 10 years and was a friend of their mother, Brenda. On the evening of May 30, 2010, Tonyarika was sitting and talking with a group of women, including, Brenda, Pamela Hawkins and Tania Hawkins on the porch of the house at 6111 South Bishop Street. [1] Across the street, five or six men were playing dice, among them the defendant and Bob. Tonyarika saw the defendant and Bob get into an argument, and she heard one of them say to the other, " 'You owe me $2. Give me my $2.' " She did not know which one of the two men said it. Both men stood up, and she observed the defendant swinging at Bob while Bob put his hands up trying not to fight with the defendant. Bob did not throw any punches at the defendant or appear to be fighting him. Brenda left the porch and stood between the defendant and Bob to break up the fight. Tonyarika heard Bob calling the defendant names, telling him he was " 'dirty,' " and stating loudly " 'you need to clear up that disease.' " The defendant responded, " 'I will shoot you.' "

[1] A woman named Tawana was also mentioned by some of the witnesses as being on the porch at 6111 South Bishop Avenue on the night of the shooting. None of the witnesses were certain of her last name, and she was not a witness at the trial.

¶ 7 After the above exchange, the defendant walked towards a gold-colored car. Brenda walked over to the car and sat on the trunk. After opening the driver's door, the defendant walked back to the rear of the car and tried to get Brenda off the trunk. Finally, he "flung" her off, and Brenda ran into the house at 6111 South Bishop. The defendant opened the trunk and retrieved something from the inside. He then returned to middle of the street where Bob was still standing. Bob appeared to be backing away while the defendant began to approach him. The men were approximately two feet apart, and the defendant said to Bob, " 'Now what?' " The defendant lifted his arm and pointed at Bob. Tonyarika heard a "boom" and saw sparks. She concluded that the defendant had a gun and had shot Bob. Bob fell backwards on to the ground. The defendant walked over to where Bob fell and stood over him, firing three more times. The defendant then ran east in the direction of the alley between Bishop Street and Loomis Avenue.

¶ 8 Tonyarika stayed with Bob until the ambulance came. She did not see Bob with any weapons before the shooting or see any weapons on or about Bob's body. Tonyarika did not hear Bob threaten the defendant prior to the shooting.

¶ 9 Tania Hawkins testified as follows. She lived in the basement apartment at 6111 South Bishop with her mother, Sylvia Hawkins, and her brother, Darryl Hawkins. Her aunt and uncle, Pamela and Daryl Hawkins and her uncle Johnny lived in the first floor apartment and another aunt lived on the top floor of the building. Tania had known Bob since she was 10 years old.

¶ 10 On the evening of May 30, 2010, Tania attended a family barbeque. She had some alcohol at the barbeque but was not intoxicated. Tania, accompanied by Tonyarika, returned

to 6111 South Bishop Street and sat on the stairs to the porch while Pamela and Brenda sat on the landing. It was dark, but she had no trouble seeing because the streetlights were lit.

¶ 11 Tania observed the defendant and Bob playing dice with a group of men across the street. She heard the defendant and Bob arguing over the dice game and watched as both men moved to the middle of the street. Tania heard Bob tell the defendant that "he was homeless, he had his clothes on, he had this disease." The defendant became angry, and each man took a swing at the other. While Bob remained in the middle of the street, the defendant went to his car, and after pulling Brenda off the trunk, he removed a gun from the trunk. The defendant returned to the middle of the street where Bob was standing and telling the defendant "shoot me, shoot me." The defendant fired one shot, and Bob fell. The defendant stood over Bob and fired three more times. The defendant then ran east towards the alley between Bishop Street and Loomis Avenue. Tania did not see any weapons in Bob's hands and did not hear Bob threaten the defendant that night.

¶ 12 Pamela Hawkins testified as follows. She had known Brenda and Brenda's children, Bob, the defendant and their two sisters, for 19 years. On the evening of May 30, 2010, Pamela was sitting on the porch landing at 6111 South Bishop talking with her sister, Sylvia, and Brenda. Around 11 p.m., the women were joined by Tania and Tonyarika, who sat on the stairs.

¶ 13 Pamela observed her son, Darryl, playing dice across the street with the defendant and Bob. She heard the defendant say to Bob that he owed him $2. Bob responded that the defendant had a "package," meaning an infection. The defendant seemed to "snap" and walked off towards his car. When Brenda saw the defendant move toward his car, she ran over to the car and sat on the trunk. After removing Brenda from the top of the trunk, the

defendant reached into the trunk. Bob began walking toward the defendant; he did not have anything in his hands. Pamela saw a flashing blue light and sparks coming from the defendant's hand, and Bob fell backwards. As Bob tried to get underneath a nearby car, the defendant shot Bob three more times. The defendant then fled the scene through a gangway on the east side of Bishop Street.

¶ 14 Pamela did not hear Bob threaten the defendant. Prior to the shooting, the defendant and Bob were "tussling" with each other; Bob was trying to get away from the defendant.

¶ 15 Pamela did not see Brenda attempt to separate the defendant and Bob. As the defendant walked toward his car, Bob walked south past the defendant's car. Pamela knew that Bob's car was parked further south on Bishop Street. At that point, Pamela believed that both men were leaving. When Bob then started to walk back, the defendant walked to the rear of his car. Pamela could not see Bob's face or if he had anything in his hands since her view was blocked by the cars on the street. On redirect examination, Pamela clarified her earlier testimony and acknowledged that she did not know if Bob had a car parked on South Bishop Street that evening.

¶ 16 The defendant maintained that he shot Bob in self-defense. The defendant presented the testimony of several witnesses to support his defense.

¶ 17 Qiana Clark Marble testified as follows. The defendant is the father of her child. Qiana owned a gold-colored Ford Contour with Wisconsin license plates, U27227. On May 30, 2010, she loaned her Ford Contour to the defendant. On that date there was no damage to the windshield. The defendant picked the car up early in the afternoon but never returned the car.

¶ 18 Darryl Hawkins testified as follows. Darryl had been convicted of weapons and drug offenses. At the time of Bob's murder, Darryl resided with his mother, Sylvia, Tania, his sister, and his aunt, Pamela, at 6111 South Bishop Street. He had grown up with Bob, and they were friends. Darryl also knew the defendant.

¶ 19 In the late evening hours of May 30, 2010, the defendant and he were playing dice in front of a house on South Bishop with Darryl's cousin and his friend. Bob arrived driving a white Buick LaSabre and joined the dice game. During the game, Bob kicked the dice out of the defendant's hand, and the two men began to argue. Bob accused the defendant of wearing Bob's clothes, being HIV-positive and homeless. As the defendant started to walk off, Bob approached him, and both men put their hands up as if they were going to fight each other. Brenda got between them, telling them both to leave. While the defendant walked toward his car, Bob followed him, continuing to repeat his earlier accusations against the defendant. Finally, Bob said to the defendant, " 'I'll kill you.' " After the defendant pulled her off the trunk of the car, Brenda turned to Bob, who was still repeating his accusations, and told him to leave. By this time, the defendant had retrieved a gun from the trunk and then shot Bob.

¶ 20 Darryl did not speak to the police about what he witnessed because he did not want to be involved. In 2012, Darryl moved to Minnesota to live.

¶ 21 On cross-examination, Darryl acknowledged that he was a friend of both the defendant and Bob. Darryl was standing very close to the defendant's car at the time of the shooting. He did not see any weapons in Bob's hands. When Bob threatened to kill the defendant, the defendant responded, " 'Oh, I'm gonna show you who the killer is.' " The defendant reached around Brenda and shot Bob, who fell to the ground. As Bob attempted to get under a minivan parked on South Bishop Street, the defendant stood at Bob's feet and fired two more

shots into him. The defendant then ran through the alley between South Bishop Street and Loomis Avenue.

¶ 22 Brenda, the defendant's and Bob's mother, testified as follows. In the late evening hours of May 30, 2010, Brenda was sitting with Sylvia on the front porch of the house at 6111 South Bishop Street. She saw Bob arrive in a white Buick, which he parked on the west side of Bishop Street and south of the house where she was sitting, and join the dice game. When it was the defendant's turn to shoot, Bob kicked the dice out of the defendant's hand. The defendant told Bob to leave him alone and that he was not in the mood. Bob pushed the defendant who walked away as if he was leaving. Bob followed telling him that he was "dirty" and that he had "a disease." As the defendant continued to walk away, Bob continued to follow him telling him he would "beat his little punk ass." The defendant responded that "he wasn't gonna do nothing." The two men traded punches at which point Brenda separated them, telling Bob to go home and leave the defendant alone. Bob told her he was not going anywhere, and he began to follow the defendant who was trying to get away from him.

¶ 23 Brenda saw the defendant go to his car and tell his friend, Von, who was standing there, to get in the car so they could leave. Brenda thought Bob was going to leave because she saw him go back to his car. Bob got in his car but then exited the car and walked to where the defendant was standing, saying, " 'On my momma, I'll pop your ass.' " According to Brenda, it meant that Bob was going to shoot the defendant. Bob walked over to the defendant. Brenda heard a gunshot, but she did not see a gun or who was shooting. She ran back to 6111 South Bishop Street and entered the residence. It was not until later when she arrived at the hospital that she learned that Bob was dead.

¶ 24 Brenda described Bob's behavior prior to the shooting as "crazy." She had never seen him behave like that toward the defendant. The two brothers were very close; they had argued but never as they did the night of the shooting. Brenda did not see Bob in possession of any weapons that night. She did not remember seeing Darryl other than at the dice game. After hearing the first shot, Brenda ran to 6111 South Bishop Street. Standing in the hallway, she heard three more shots.

¶ 25 The defendant testified on his own behalf as follows. The defendant had a prior conviction for aggravated discharge of a firearm and was sentenced to seven years' imprisonment. Bob and he had a loving relationship as brothers, though they argued from time to time. Bob was older, and the defendant looked up to him.

¶ 26 On the evening of May 30, 2010, the defendant was playing dice with a group of men including Darryl and Levon "Von" Odum. Bob arrived with Lester, their cousin, and joined the game. As the defendant was rolling the dice, Bob kicked the dice out of his hand. The defendant warned Bob not to do it again, but when the defendant again rolled the dice, Bob stomped on his hand. The defendant warned Bob again, and Bob responded that he could do whatever he wanted to do. When the defendant objected, Bob began haranguing him calling him "dirty" telling him to take off Bob's shoes, that he had AIDS, and that he had a "book bag," another word for carrying the AIDS virus. The defendant responded that he was not listening and started to walk toward the car he borrowed from Qiana. Bob followed him, repeating his taunts loudly. When Bob got within two feet of him, the defendant told Bob to stop following him. Bob responded telling the defendant that he would "whip his ass out here." When the defendant replied that Bob was not "gonna do shit to me," Bob hit the defendant who hit him back. Brenda got between them and was struck trying to separate

them. The defendant then proceeded to walk to his car. Bob followed until the defendant reached the back of his car and then walked on toward his own car parked further down on Bishop Street. The defendant thought Bob was going to leave since Lester, Bob's passenger, was following Bob. Bob and Lester got in Bob's car, but Bob got back out and walked back toward the defendant. As Bob approached, the defendant noticed that Bob's eyes were very bright, and he had a crazed look on his face. Bob told the defendant he was going to "pop" him, meaning to shoot him.

¶ 27 The defendant explained that he was afraid for his life based on an incident that occurred two days prior to the shooting. On May 28, 2010, Bob and he had an altercation resulting from the defendant's refusal to give Bob, who was accompanied by two females, the keys to their grandmother's basement apartment where he was living at the time. Bob told the defendant that he was "always acting like a little bitch," and drove away stating he would be back. The defendant left driving Qiana's car. When he stopped at a stop sign, he saw Bob's car approaching him from the rear at high speed. Bob proceeded to chase the defendant for three blocks. The defendant believed that Bob was trying to run him off the road. Finally, the defendant stopped in front of the house of a friend and joined his friend on the front porch. Bob pulled his car up next to the defendant's car laughing. Bob then drove away.

¶ 28 Based on the May 28, 2010, incident and his belief that Bob had removed a gun from his car and was going to shoot him, the defendant released the trunk latch so he could retrieve his gun to protect himself. After removing Brenda from the top of the trunk, he reached into the trunk and pulled out a gun. Seeing the defendant reach into the trunk, Bob told him "I know you got it, you better use it." The defendant responded "what are you gonna do? You gonna shoot me with that 22?" When Bob replied "on my momma I'll pop your ass," the defendant

heard a gunshot. He did not know where the shot came from, but it made him feel that his life was in danger from Bob. The defendant then fired his gun three times. While he believed that he had shot Bob, he did not intend to harm or kill Bob. According to the defendant, there was no damage to the windshield of the Ford Contour when he parked it on South Bishop Street. However, following the shooting, a bullet hole was found in the windshield of the car.

¶ 29 Following the shooting, the defendant ran through a gangway and discarded the gun in a trash container. He ran from the scene because he was scared by what happened.

¶ 30 Bob's taunts did not make him angry since Bob often made such remarks to him. The defendant did not know if Bob had a weapon since he was not looking at Bob's hands. He denied telling Bob that he would show him who a killer was. After hearing the first gunshot, the defendant fired in Bob's direction three times. The defendant was standing at the back of the car, and Bob was standing at the front of the car when the defendant fired the shots. He did not see Bob fall.

¶ 31 In his statement to police following his arrest, the defendant never stated that he was in fear of his life the night of the shooting or referred to the incident of May 28, 2010, in which he claimed Bob was trying to kill him. The defendant did not tell the police he was afraid of Bob or that he fired three times because he heard a gunshot. The defendant did tell the police that he was too intoxicated to remember what happened.

¶ 32 The trial court instructed the jury on self-defense and second-degree murder. Following deliberations, the jury returned a verdict finding the defendant guilty of the first degree murder of Bob. The trial court sentenced the defendant to a term of 65 years' imprisonment. This appeal followed.

¶ 33 ANALYSIS

¶ 34 I. Exclusion of *Lynch* Evidence

¶ 35 The defendant contends that the trial court erred when it barred evidence supportive of his claim of self-defense.

¶ 36 A. Standard of Review

¶ 37 "A trial court's ruling regarding relevance and admissibility of evidence will not be reversed absent an abuse of discretion and manifest prejudice." *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 38 B. Discussion

¶ 39 A defendant claiming self-defense may present evidence of the victim's aggressive and violent character because such evidence is relevant to determine which person was the aggressor. *People v. Lynch*, 104 Ill. 2d 194, 200 (1984). Under the first prong of *Lynch*, evidence is relevant only if the defendant knew of the victim's violent acts and only the facts the defendant knew can be considered. Under the second prong of *Lynch*, the defendant's knowledge is not relevant, but there must be conflicting accounts of what occurred for the evidence to be admissible. *Figueroa*, 381 Ill. App. 3d at 841.

¶ 40 1. *Admission of Evidence Under the First Prong of Lynch*

¶ 41 Under the first prong of *Lynch*, the defendant must have knowledge of the victim's violent tendencies because the same deadly force that would be unreasonable in an altercation with a peaceful citizen may be reasonable in a similar situation involving a citizen with a violent or aggressive character. *Figueroa*, 381 Ill. App. 3d at 844. The trial court

barred Brenda's testimony that the defendant was present when she called the police because of Bob's threatening behavior towards her during a card game and that at another card game Brenda witnessed Bob threatening to "pop" the defendant.

¶ 42 Although the defendant was present, Brenda could only testify to how Bob's conduct in disrupting the card game and threatening the defendant affected her; she could not testify to how Bob's conduct and threats affected the defendant or whether he perceived them as threats. See *Figueroa*, 381 Ill. App. 3d at 844-85 (the first *Lynch* prong was not satisfied by the testimony of two witnesses in the car with the defendant that they were scared by the pursuing car since only the defendant could testify as to what he knew at the time and his state of mind). Therefore the trial court did not abuse its discretion when it barred Brenda's proposed testimony.

¶ 43 The trial court also barred the defendant from testifying that Bob acted aggressively and violently at a card game and at a dice game and that Bob possessed firearms and had committed armed robberies. "When a trial court refuses to admit evidence, a formal offer of proof is needed to preserve an appealable issue." *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 34. If it is not clear what the witness would testify to or the basis for the testimony, the offer of proof must be very detailed and specific so as to allow the reviewing court to know what was excluded so it then can determine whether the exclusion was error. *Bowman*, 2012 IL App (1st) 102010, ¶ 34. Where a party fails to make an adequate offer of proof, the error is forfeit. *Bowman*, 2012 IL App (1st) 102010, ¶ 34.

¶ 44 The defendant argues that defense counsel was not allowed to complete her offer of proof describing the other incidents the defendant witnessed in which Bob acted aggressively and violently. The record reveals that prior to trial, defense counsel made an offer of proof as to

the May 28, 2010, incident, and the trial court ruled that the defendant could testify to that incident. During the trial, defense counsel informed the trial court that "[t]here are other things that [the defendant] knows about his brother, knowing him all his life, that would factor into the defendant's state mind as well." The discussion continued as follows:

> "THE COURT: And I assume these are other things that I've already evaluated.
>
> [Defense Counsel]: No.
>
> THE COURT: Well, what are they, that I'm not being apprised of and haven't been brought to my attention, except for now in the middle of jury trial?
>
> [Defense Counsel]: There are two instances where [Bob] acted aggressively and violently at dice game or card games, gambling situations. One at his mother's house at a card game and one at a dice game. There is - - if I could get my notes - - there is another incident. There are the things that [the defendant] knows about the victim possession firearms and using them.
>
> THE COURT: That is inappropriate. We've been through this. It is inappropriate. It does not even come under Lynch.
>
> [Defense Counsel]: There are things the defendant also knows about the victim, [Bob], committing armed robberies.
>
> THE COURT: Absolutely not. I have made my ruling. You can bring up the incident two days before, that's it. Not anything else."

The court did allow defense counsel to present case law in support of her argument. In response the State pointed out that it had not been provided with any specifics with respect to the claimed prior bad acts by Bob and therefore could not sufficiently cross-examine the defendant about his information. The State further pointed out that the defendant failed to

provide the specifics of the card game incident between the defendant and Bob at Brenda's house.

¶ 45 Defense counsel had the opportunity to make an offer of proof as to the armed robberies and other incidents the defendant wished to testify to but failed to provide one that afforded either the trial court or this court the ability to determine the relevance of the evidence. *Bowman*, 2012 IL App (1st) 102010, ¶ 34 (an offer of proof must demonstrate to both the trial court and the reviewing court the admissibility of the excluded evidence). The fact that Bob possessed guns was not evidence that he was a violent person, since mere possession of a gun does not show a propensity for violence. *People v. Costillo*, 240 Ill. App. 3d 72, 82 (1992). Moreover, a trial court may reject even relevant evidence if it is remote, uncertain or speculative. *Figueroa*, 381 Ill. App. 3d at 840-41. Absent an adequate offer of proof, there is no indication of when Bob allegedly committed these armed robberies. See *Figueroa*, 381 Ill. App. 3d at 846 (remoteness was a relevant factor in determining whether evidence submitted pursuant to *Lynch* had a reliable foundation for admissibility).

¶ 46 In the absence of an adequate offer of proof, we cannot conclude that the trial court's exclusion of the defendant's testimony offered in support of the first prong of *Lynch* was an abuse of discretion.

¶ 47 2. *Admission of Evidence under the Second Prong of Lynch*

¶ 48 For the second prong of *Lynch* to apply, there must be conflicting accounts of what happened. In *Lynch*, for example, the defendant testified that the victim lunged at him with his right hand reaching behind his back, while another witness testified that the victim's hands were in front of him. *Lynch*, 104 Ill. 2d at 198-99. In the present case, the State's and the defendant's eyewitnesses' testimony describing the events leading up to the shooting was

consistent with only minor discrepancies. It was undisputed that Bob was unarmed and that the defendant shot Bob at least three times, resulting in his death.

¶ 49 The evidence in this case established two separate confrontations. The first confrontation began during the dice game with Bob taunting the defendant and turned physical with the two men exchanging punches. The first confrontation ended when Brenda separated the defendant and Bob and told them each to go home. Though Bob stated that he was staying, he then walked away. Brenda and the defendant testified that they believed that Bob was leaving the scene.

¶ 50 The second confrontation began when the defendant chose to remain at the scene. Instead of driving away, the defendant watched as Bob walked to his car and got inside. Bob then exited the car and began walking back towards the defendant. Rather than leave the scene, the defendant removed a gun from the trunk of his car and shot Bob. Unlike the conflicting testimony in *Scott*, it was undisputed that Bob did not possess a weapon at any time during the incident, and Bob and the defendant were only a car length apart at the time the defendant fired at him. The defendant claimed that he was reacting to the sound of a gunshot when he shot Bob, but he admitted that he did not know from where the shot was fired. By removing a gun from his car, the defendant either continued to be, as the State's witnesses testified, or became the aggressor in the final confrontation with Bob.

¶ 51 *People v. Jackson*, 293 Ill. App. 3d 1009 (1997) is instructive. In that case, the defendant testified that he was sleeping in a friend's apartment when the victim physically attacked him. The defendant fled to the lobby and called 911 from a telephone booth outside. Per the instructions of the 911 operator, the defendant returned to the lobby waiting for the police to arrive after first picking up a stick he found resting against the building. While waiting for

the police, he observed the victim walking to the bus stop carrying a television set. After the two men exchanged words, the victim attempted to grab the defendant who then struck the victim with the stick. After returning to the apartment to get dressed, the defendant returned to the lobby where he again encountered the victim at the elevator door. After a verbal exchange, the defendant attempted to exit the elevator but the victim looked at him like he intended to grab him and moved closer towards the defendant. The defendant struck the victim on the mouth to get him off him and then struck him in the head because he was afraid of the victim. *Jackson*, 293 Ill. App. 3d at 1011-12.

¶ 52 In affirming the defendant's conviction for the first degree murder of the victim, this court agreed that the undisputed facts in the record established that the defendant was the aggressor. We found that the defendant "initiated the confrontation and failed to withdraw at the bus stop or the lobby when he struck the death blows to [the victim's] head with the stick." *Jackson*, 293 Ill. App. 3d at 1012. We concluded that there was sufficient evidence in support of the trial court's ruling that there was no conflict as to who was the aggressor. Therefore the defendant was not entitled to introduce evidence under the second prong of *Lynch*. *Jackson*, 293 Ill. App. 3d at 1012.

¶ 53 Also instructive is *People v. Armstrong*, 273 Ill. App. 3d 531 (1995). In that case, the defendant was the initial aggressor. After the physical confrontation ceased, the defendant began to walk away, but was blocked from leaving by the victim who raised his fists to her. The defendant responded by continuing to argue. She then pulled out her gun and shot the victim. The reviewing court found that the defendant was the initial aggressor and continued to be the aggressor when she failed to walk away or at least cease hostilities. *Armstrong*, 273 Ill. App. 3d at 534.

¶ 54 Since there was no conflict as to the identity of the aggressor in this case, the trial court did not abuse its discretion in barring the defendant's evidence under the second prong of *Lynch*. See *Figueroa*, 381 Ill. App. 3d at 842-43 (the defendant became the aggressor when he could have requested the driver to seek assistance at a police station they passed, the defendant instead fired shots at the pursuing car, killing the victim); see also *Armstrong*, 273 Ill. App. 3d at 533-34.

¶ 55 3. *Claimed Error Does Not Require Reversal*

¶ 56 In this case, the jury heard ample testimony from the witnesses as well as the defendant about Bob's behavior toward the defendant at the dice game immediately prior to the shooting, and about the incident on May 28, 2010, in which the defendant described how Bob chased him and tried to run him off the road. The jury heard testimony as to Bob's threats to "pop," meaning to kill, the defendant. Bob's taunts to the defendant about his lack of cleanliness, his homelessness and his HIV-positive status clearly demonstrated to the jury the amount of hostility Bob harbored toward the defendant. See *People v. Nunn*, 357 Ill. App. 3d 625, 632 (2005) (no error in excluding a witness's testimony as to the victim's prior bad act where the defendant was allowed to introduce other evidence supporting his defense of others theory).

¶ 57 Even if the trial court abused its discretion in barring the defendant's *Lynch* evidence, the error does not require reversal.

¶ 58 II. Evidentiary Rulings

¶ 59 The defendant contends that certain evidentiary rulings by the trial court were so prejudicial to him that a new trial is required. We disagree.

¶ 60 The defendant was questioned by defense counsel as follows.

"Q. Curtis, the gun I showed you, the People's exhibit, the gun you fired three shots out of on May 30, 2010, why did you have that gun?

A. I had it for protection.

Q. Who were you protecting yourself against?

[Prosecutor]: Objection.

THE COURT: Sustained.

Q. Why did you think you needed it for protection?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Defense Counsel]: Nothing further."

¶ 61 The defendant maintains that the trial court's ruling sustaining the objections was error. The State responds that the defendant failed to raise the error in his posttrial motion. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (the defendant must object at trial and raise the specific issue in a posttrial motion, or the error is forfeit for review). The defendant neither disputed the State's forfeiture argument nor requested plain-error review. A defendant forfeits plain-error review when he fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Therefore, the defendant has forfeited both the error and plain-error review.

¶ 62 Next, the defendant contends that the trial court erred in sustaining the State's objections when the defendant was questioned by defense counsel as follows:

"Q. When you saw Bob [exit his car and walk toward the defendant], what did you think?

* * *

A. I thought he went to the car to get a gun.

Q. What made you think that?

A. What made me think that? Because I know he - -

[Prosecutor]: Objection.

THE COURT: Sustained.

* * *

Q. What happened as he was walking, if anything?

* * *

A. As he was walking toward me he told me he will pop me.

* * *

Q. What did he mean?

A. It mean that you will shoot someone."

¶ 63 The defendant described Bob's eyes as "very bright" and he had "like a crazed look on his face." Defense counsel continued to question the defendant as follows:

"Q. What did that make you feel like, given that he had just said I'm gonna pop you?

A. That made me fearful."

¶ 64 The defendant then testified that he retrieved his gun from his trunk. Bob continued to approach him, but Bob had not passed by the defendant and still was at the front of the defendant's car. The defendant then testified as follows:

"After that, that's when he seen me go into the trunk, and that's when he stated, I know you got it, you better use it. And that's when I asked him, what you gonna do? You gonna shoot me with that 22? Because I knew at the time, well - -

[Prosecutor]: Objection.

THE COURT: Sustained.

Q. So you said, what are you gonna do, are you gonna shoot me with that 22?

A. Yes.

Q. And when you said that what happened next?

A. That's when he stated, on my momma I'll pop your ass."

¶ 65 The defendant argues that it was reversible error for the trial court to exclude his testimony as to his intention and feelings at the time he shot Bob. Our supreme court has held that, even if the circumstances of the act in question might overcome the defendant's stated intention, the defendant had a right to testify to his intention and have the circumstances surrounding the act considered in connection with his testimony. *People v. Biella*, 374 Ill. 87, 89 (1940); see *People v. Allen*, 378 Ill. 164 (1941) (refusing to allow the defendant to testify as to his knowledge of the alleged dangerous and vicious character of the deceased was prejudicial error); *People v. Graves*, 61 Ill. App. 3d 732 (1978), (the defendant had the right to testify as to what his state of mind was at the time when he was struck and threatened by the victim since his intention, motive and belief were material to the issue); but see *People v. Flax*, 147 Ill. App. 3d 943, 951 (1986) (where the defendant had reached a place of safety, his state of mind was not relevant to the issue of whether he shot the victims in self-defense when he reinitiated the fight because he was not and could not have been in fear for his life).

¶ 66 The defendant's reliance on *Allen*, *Biella*, and *Graves*, to require that he receive a new trial on the basis of the trial court's rulings is misplaced. In *Allen*, while witnesses testified to the victim's reputation as a dangerous and violent man, the trial court barred the defendant from testifying whether he knew of the victim's general reputation as a violent and dangerous man who went about carrying a large knife. On review, the supreme court found that since the answer would be a material element to the defendant's claim of self-defense, it was error to sustain the State's objection. A new trial was required because "[p]rejudicial error was committed by the [trial] court in giving instructions ***and in refusing to allow the defendant to testify as to his knowledge of the alleged dangerous and vicious character of the deceased." *Allen*, 378 Ill. at 170.

¶ 67 In *Biella*, the defendant was the sole witness to the confrontation with the deceased. The defendant testified that the deceased attacked him with an ax and then threatened to kill the defendant with a broom. The defendant wrested the broom away from the deceased and beat him continually with it because he was afraid the deceased would make good on his threat to kill the defendant. The trial court refused to allow the defendant to testify as to how he thought the deceased was going to kill him or as to how the deceased could have killed him at that time. *Biella*, 374 Ill. at 89. Finding that the defendant had raised a reasonable claim of self-defense, the reviewing court held that it was essential that the record be free from prejudicial error and ordered a new trial based on "[t]he exclusion of the defendant's testimony as to his intention in striking the deceased and certain errors in the instructions." *Biella*, 374 Ill. at 90.

¶ 68 In *Graves*, the trial court excluded testimony that two days prior to the incident in question, the victim had threatened the defendant with a knife. The court also barred the

defendant from testifying that he was afraid of the victim or how he felt when the victim approached him with a pool cue and was reaching into his back pocket when the defendant shot him, even though the victim's actions were confirmed by the testimony of another witness. *Graves*, 61 Ill. App. 3d at 740-41. In ordering a new trial, the reviewing court determined that there was sufficient showing of self-defense. The defendant therefore should have been permitted to testify that he was afraid of the victim and how he felt when the victim approached him holding a pool cue and reaching into his back pocket since his intention, motive and belief were material to the issue. *Graves*, 61 Ill. App. 3d at 741.

¶ 69 In all three cases, the reviewing courts found sufficient evidence of self-defense, and while the exclusion of the defendants' testimony was found to be error, there were additional errors which together with the error in excluding the defendants' testimony required new trials. See *Allen*, 378 Ill. at 170; *Biella*, 374 Ill. at 90; *Graves*, 61 Ill. App. 3d at 742. *Graves* is also distinguishable because in that case, the defendant made an offer of proof both to the victim's prior attack on him and the events immediately preceding the defendant's shooting of the victim. The defendant in the present case did not make an offer of proof as to what answer he would have given to defense counsel's questions. Therefore, we have no way of knowing whether sustaining the State's objections prevented the defendant from presenting testimony relevant to his state of mind at the time he shot Bob.

¶ 70 In any event, there was no objection to the defendant's testimony that he was afraid of Bob because Bob threatened to shoot him, and after the State's initial objection was sustained, the defendant then testified, without objection, that he asked if Bob was going to shoot him with "that 22." Despite the trial court's sustaining of the State's objections, the defendant was able to tell the jury why he was afraid of Bob.

¶ 71 Finally, the defendant testified that immediately after Bob told him that he would "pop your ass," the defendant heard a gunshot. Defense counsel continued questioning the defendant as follows:

"Q. Who did you think might have fired that shot?

A. I thought Bob might have fired that shot.

[Prosecutor]: Objection.

THE COURT: Sustained. It will be stricken and disregarded, ladies and gentlemen. Completely speculative. Move on.

[Defense Counsel]: State of mind, judge.

THE COURT: That is not state of mind."

¶ 72 We find no error in the trial court's ruling. The defendant testified that he heard a gunshot but did not know from where the shot had come. Defense counsel's question invited the defendant to answer a question he already acknowledged he did not know the answer to, and he could only be guessing as to the identity of the shooter. The defendant's reliance on *People v. Pernell*, 72 Ill. App. 3d 664 (1979) is misplaced. In that case, the reviewing court held that the defendant should have been allowed to answer the questions, "[w]hat did you think was going to happen if you did not pull the trigger," and [w]hat were you thinking when you pulled the trigger?" *Pernell*, 72 Ill. App. 3d at 668. The defendant claimed self-defense, and the questions went to his intention or belief, a material fact in self-defense cases. The questions did not require the defendant to "speculate" in answering the question, as did the questions in the present case. Again, while excluding the testimony was error, the reviewing court had already ordered the case remanded for a new trial because the jury was not properly instructed on self-defense. *Pernell*, 72 Ill. App. 3d at 665, 668.

¶ 73 Moreover, the trial court's rulings did not exclude all the evidence of the defendant's state of mind and belief at the time of the shooting. The defendant testified to his fear of Bob, based on the May 28, 2010 incident. The defendant and Brenda both testified that, prior to the shooting, Bob threatened to kill the defendant. There was no objection to the defendant's testimony that he was afraid of Bob because Bob threatened to shoot him, and after the State's initial objection was sustained, the defendant then testified, without objection, that he asked if Bob was going to shoot him with "that 22." As a result of Bob's threats against him and his belief that Bob went to this car to obtain a gun, the defendant testified that he took his gun from the trunk of his car for protection from Bob. Therefore, in spite of the trial court's rulings sustaining the State's objections, the jury did hear evidence supporting the defendant's state of mind and supporting his belief that Bob was going to kill him at the time of the shooting.

¶ 74 The defendant emphasizes the fact that the physical evidence supported his contention that he fired only three shots while the State's witnesses testified that he shot Bob once and then three more times after Bob fell to the ground. He points out that following the shooting, there was a bullet hole in the windshield of the gold Ford Contour he was driving that had not been there prior to the shooting. The defendant never argued that someone else shot Bob. The jury could reject the testimony by the witnesses that the defendant fired four shots at Bob based on the physical evidence that only three shots were fired from the murder weapon and still find the defendant guilty of murder based on his own testimony that he fired three times at Bob.

¶ 75 Even if the trial court erred in sustaining the State's objections, the evidence of the defendant's guilt was overwhelming. Nonetheless, we have reviewed the record to determine

if these errors alleged by the defendant were material factors in his conviction or prejudiced him to such a degree that he did not receive a fair trial. We are satisfied that the trial court's rulings did not result in the jury's verdict finding him guilty and did not deny him a fair trial. See *People v. Tolbert*, 323 Ill. App. 3d 793, 809 (2001) (while asking the defendant to state whether a State's witness's testimony was true or untrue was improper, in light of the strong evidence of guilt, the question and answer were not a material factor in the defendant's conviction or so prejudicial as to warrant a new trial).

¶ 76 III. Ineffective Assistance of Counsel

¶ 77 The defendant contends that defense counsel was ineffective for calling Darryl Hawkins to testify on the defendant's behalf. The defendant points out that Darryl's testimony supported the State's theory of the shooting and directly contradicted the defendant's testimony.

¶ 78 A. Standard of Review

¶ 79 Where the facts surrounding the ineffectiveness claim are undisputed and the claim was not raised in the trial court, our review is *de novo*. *People v. Berrier,* 362 Ill. App. 3d 1153, 1167 (2006).

¶ 80 B. Discussion

¶ 81 In order to establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11; *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must establish both the deficiency of the performance and the resulting prejudice to him or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 82 We need not determine whether defense counsel's performance was deficient because, assuming it was, the defendant cannot establish a reasonable probability that but for his deficient performance the result of the proceeding would be different. *Simms*, 192 Ill. 2d at 362. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Simms*, 192 Ill. 2d at 362.

¶ 83 The defendant maintains that the jury's resolution of the conflicting versions of the events leading up to the shooting "could have gone either way." Therefore, he reasons that Darryl's testimony on cross-examination resulted in the jury's verdict of first degree murder.

¶ 84 On direct examination, Darryl testified that Bob threatened to kill the defendant. On cross-examination, Darryl testified that the defendant responded to Bob's threat to kill him by saying, " 'Oh, I'm gonna show you who a killer is,' " and proceeded to shoot Bob. Darryl further testified that Bob was trying to take cover under a minivan when the defendant walked over and shot him two more times. Finally, in closing argument the prosecutor referred to Darryl's testimony on cross-examination in support of his argument that the defendant failed to prove the existence of a mitigating factor for second degree murder.

¶ 85 It would have been reasonable for the jury to discount Darryl's testimony as to what Bob and the defendant said to each other. Other than Daryl's own testimony, there was no evidence that he was standing anywhere near the defendant's car to have heard their verbal exchange. In any event, the amount of evidence against the defendant leaves no reasonable probability that the omission of Darryl's testimony would have changed the result in this case.

¶ 86 All of the eyewitnesses with the exception of Brenda testified that following the first shot, Bob fell backwards and that the defendant stood over him and shot him three more times. Brenda testified that she did not see Bob fall; instead, hearing the first gunshot, she ran into the house at 6111 South Bishop Street and stayed in the hallway. There is no reasonable probability that Darryl's testimony rather than the testimony of the multiple eyewitnesses that the defendant stood over Bob and continued to shoot him caused the jury to reject the defendant's self-defense or second degree murder theories.

¶ 87 In the absence of a reasonable probability that, but for defense counsel's decision to have Daryl testify for the defendant, the outcome of the trial would have been different, the defendant cannot establish the prejudice-prong of the *Strickland* test, and his ineffective assistance of counsel claim fails.

¶ 88 IV. Prosecutor's Rebuttal Argument

¶ 89 The defendant contends that he was denied a fair trial by statements made by the prosecutor in rebuttal argument. He complains that by telling the jury they had to find him guilty of first degree murder or he would escape punishment the prosecutor denied him the jury's consideration of a second-degree murder verdict.

¶ 90 During her rebuttal argument, the prosecutor told the jury,

> "It is our burden - - to prove that [the defendant] was not justified in killing his brother because, ladies and gentlemen of the jury, the evidence does not support he was justified in killing his brother. It does not. Everyone says Bob said to him oh, shoot me.
>
> [Defense Counsel]: Objection.

THE COURT: Overruled.

[Prosecutor]: And what happened? He shot him. Self-defense, maybe, one shot, but when your brother falls, walking over to him and pumping two more into him, that's not self-defense. *** So the defendant says, okay, well, if you don't believe my self-defense, then let me off and give me second-degree murder because I mistakenly believed in self-defense.

[Defense Counsel]: Objection.

THE COURT: Overruled."

¶ 91 A. Standard of Review

¶ 92 The defendant maintains that the applicable standard of review is *de novo*, relying on *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); but see *People v. Blue*, 189 Ill. 2d 99,128 (2000) (the prosecutor's remarks were reviewed under the abuse of discretion standard). This apparent conflict in the applicable standard of review has not yet been addressed by our supreme court. Until the conflict is resolved, we decline to determine the applicable standard of review where the result would be the same under either standard of review. *People v. Anderson*, 407 Ill. App. 3d 662, 675-76 (2011).

¶ 93 B. Discussion

¶ 94 We agree with the defendant that *People v. Sutton*, 316 Ill. App. 3d 874 (2000) (*Sutton I*) is on point. In *Sutton I*, the jury was instructed on self-defense and second degree murder but found the defendant guilty of first degree murder. The defendant objected when the prosecutor in rebuttal told the jury that they could write the final chapter for the victims "with your signatures on the verdict forms of guilty of first degree murder because any other verdict lets [the defendant] walk away from this." (Emphasis omitted.) *Sutton I*, 316 Ill. App.

3d at 894-95. On appeal, the State pointed out that the trial court immediately informed the jury that it should not concern itself with sentencing issues, thereby curing any error. In any event, the evidence of the defendant's guilt was overwhelming. *Sutton I*, 316 Ill. App. 3d at 895.

¶ 95 We found the prosecutor's argument was error for two reasons:

> "First, it is error for a prosecutor to argue that, depending on the verdict, the defendant could avoid punishment when the jury plays no role in imposing punishment. [Citation.] Second, such error is even more egregious when compounded by an inaccurate statement as to the punitive effect of the verdict. This court and our supreme court have consistently reminded the State to refrain from misstating potential sentences to the jury." *Sutton I*, 316 Ill. App. 3d at 895.

In addition, the prosecutor's remark came at the end of the rebuttal argument, which left defense counsel with no opportunity to substantively challenge the improper comment. *Sutton I*, 316 Ill. App. 3d at 896.

¶ 96 The State responds that in *People v. Sutton*, 353 Ill. App. 3d 487 (2004) (*Sutton II*), this court found no error in the prosecutor's remark that to find the defendant guilty of second degree murder would be a "huge injustice," because "[t]he difference between first and second degree murder was huge," and that "second degree murder is so much different [from first degree murder] in many ways." *Sutton II*, 353 Ill. App. 3d at 498. The State's reliance on *Sutton* II is misplaced. Unlike the prosecutor's remarks in *Sutton I*, the prosecutor did not argue that, depending on the verdict, the defendant could avoid prison and made no inaccurate statement as to the punitive effect of the verdict. *Sutton II*, 353 Ill. App. 3d at 499-500.

¶ 97 The prosecutor's remark in rebuttal in the present case closely resembles the remark found to be error in *Sutton I*. Moreover, here, the defendant's objection was overruled, and the jury was not given a limiting instruction making the error more egregious than in *Sutton I*.

¶ 98 Nonetheless, the error does not require reversal. Improper arguments are not reversible error unless they are a material factor in the defendant's conviction or cause substantial prejudice to the defendant. *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008).

¶ 99 In *Sutton I*, this court could not say beyond a reasonable doubt that the jury's verdict did not reflect the view that the defendant would go free if the jury returned a verdict of second degree murder and "[t]he cumulative effect of this improper comment, together with the improper cross-examination of defendant made with statements made to [a nontestifying psychiatrist], warrants reversal." *Sutton I*, 316 Ill. App. 3d at 896.

¶ 100 In *People v. Cisewski*, 118 Ill. 2d 163 (1987), the defendant argued that she was prejudiced by the prosecutor's comment to the jury that a guilty verdict on voluntary manslaughter would allow the defendant to " 'walk out of that door today' " and that she " 'could be home before the jurors are home.' " *Cisewski*, 118 Ill. 2d at 177. Our supreme court found the comment was error but not reversible where the comment was brief and unrepeated, the defendant's objection to the comment was immediately sustained and additional curative instructions were given at the end of the trial. *Cisewski*, 118 Ill. 2d at 177-78. Finally, while the prosecutor's remark was "best left unsaid," in light of the overwhelming evidence of the defendant's guilt, the court concluded that the verdict would not have been different absent this single isolated remark. *Cisewski*, 118 Ill. 2d at 177-78.

¶ 101 The complained-of comments by the prosecutor must be reviewed in light of the entire record, in particular the arguments of both the prosecutor and defense counsel in their entirety, and on a case-by-case basis. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). While the trial court overruled the defendant's objection to the prosecutor's remark, like the comment in *Cisewski*, the prosecutor's remark as to the sentencing implications was brief and was not repeated. The prosecutor's rebuttal argument continued with a review of the testimony of the witnesses, followed by argument that there was no credible evidence of legal justification or of any mitigating factor that required a verdict less than first degree murder. She urged the jury to find the defendant guilty only if the credible evidence proved he was guilty.

¶ 102 While error, the prosecutor's comments were not a material factor in the jury's determination that the defendant was guilty of first degree murder. Our review of the trial record in this case reveals that there was overwhelming credible evidence to support the jury's verdict finding the defendant guilty of first degree murder rather than not guilty on the basis of self-defense or guilty of second degree murder. We are satisfied that, absent the error, the jury would still have returned a verdict of first degree murder in this case.

¶ 103 CONCLUSION

¶ 104 The judgment of the circuit court is affirmed.

¶ 105 Affirmed.