2016 IL App (1st) 133179-U

No. 1-13-3179

Fourth Division
March 24, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GREGORY HYCH, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 12 CR 9637 Honorable Paula M. Daleo, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held:* The State disproved defendant's self-defense claim; the State did not engage in misconduct which denied defendant a fair trial; the trial court's jury instructions regarding the limits on an initial aggressor's use of force in self-defense were proper; the trial court properly barred defendant's hearsay testimony; the trial court's refusal to instruct the jury on the definition of intent for attempted murder was proper; whether defendant had an unreasonable belief in the need for self-defense does not mitigate his attempted murder conviction; counsel was not ineffective for failing to request that the jury be instructed that, if it found that defendant acted with an unreasonable belief in self-defense, it must acquit him of attempted murder; defendant's sentence for attempted murder does not "shock the conscience" or violate equal protection and due process; the firearm add-on does not violate due process as applied to defendant; the mittimus should be corrected to reflect one conviction of attempted murder.

¶ 2 Following a jury trial, defendant Gregory Hych was convicted of attempted murder pursuant to section 8-4(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) and aggravated battery with a firearm pursuant to section 12-3.05(e)(1) of the Code (720 ILCS 5/12-3.05(e)(1) (West 2012)) and sentenced to 31 years in prison. On appeal, defendant contends that: (1) the State failed to disprove that he acted in self-defense; (2) he was denied a fair trial due to the State's misconduct; (3) he was denied a fair trial when the judge erroneously gave the jury instruction about the limits on an initial aggressor's use of force in self-defense; (4) the trial court erred in barring testimony that went to his state of mind; (5) the trial court erred in refusing to instruct the jury on the definition of intent for attempted murder; (6) the evidence showed that he unreasonably believed that he needed to use force to defend himself; (7) he was denied effective assistance where counsel failed to request that the jury be instructed that, if it found that he acted with an unreasonable belief in self-defense, it must acquit him of attempted murder; (8) as applied to him, his sentence for attempted murder is unconstitutional because it shocks the conscience and violates equal protection and due process; (9) as applied to him, his sentence for attempted murder violates due process because the firearm add-on imposed is not reasonably related to the aim of deterring firearm use where he, at a minimum, unreasonably believed that he needed to act in self-defense; (10) his sentence for attempted murder and the conviction for aggravated battery with a firearm must be vacated under the one-act, one-crime doctrine. For the following reasons, we affirm the judgment of the trial court.

¶ 3 Following the April 28, 2012, shooting of Brandon Smith, a grand jury indicted defendant and codefendant Kenesha Sheridan[1] on various counts, including attempted murder and aggravated battery with a firearm. Prior to trial, the court granted the State's motion *in*

[1] Codefendant was found not guilty in a simultaneous bench trial and is not a party to this appeal.

limine, barring the use of defendant's statement to the police, in which defendant claimed that he shot Smith in self-defense. The trial court also barred defendant from testifying that his associate Demetrius Bean had told him that Smith was a drug dealer, finding that the statement was hearsay. The following evidence was adduced at trial.

¶ 4 Smith testified that on the afternoon of April 28, 2012, he was shopping with his girlfriend Ashley Moore, and her sister, Amber Moore, in Hillside, Illinois. At some point, he left the shopping center to retrieve something from his home. On his way home, he ran into Bean and Smith sat in Bean's car to talk for awhile. Shortly after leaving Bean, Smith noticed that he had lost his cell phone, a prepaid phone that he had gotten from Boost Mobile. He used a neighbor's phone to call his phone, but no one answered. After searching his home for the cell phone, Smith returned to the shopping center to use Amber's cell phone to call his cell phone. Smith left the shopping center and searched his home again, using Amber's cell phone to repeatedly call his cell phone. As he was leaving his home, a male, later identified as defendant, finally answered his call. Smith told defendant that he was the owner of the phone and he and defendant agreed to meet at the 7-Eleven on Des Plaines Avenue and Roosevelt Avenue, in Forest Park, Illinois, so that Smith could retrieve his cell phone. Smith did not offer defendant any money for his phone during this conversation. On his way to meet defendant, he ran into his friend, Myron Cribbs. Smith told Cribbs that he was on his way to pick up his cell phone, and Cribbs joined Smith.

¶ 5 Ashley drove Smith to meet defendant, and pulled into the 7-Eleven parking lot. Smith then called his cell phone. Defendant answered, and said that he was walking up, so Smith got out of the car to meet him. As Smith exited the car, he observed defendant walking from Des Plaines Avenue with a woman, later identified as co-defendant. Smith walked up to defendant and informed defendant that he was the man that defendant had spoken with on the phone and

asked if defendant had his cell phone. Defendant asked Smith what he was going to give him in exchange for the phone, and Smith offered defendant $25. Defendant rejected the offer, and told Smith that he wanted $100. Smith told defendant that he was not going to give him $100, but offered defendant $50, which defendant refused. Smith explained that he did not want to give defendant $100 because the phone belonged to him, but was willing to compensate defendant for his time. When defendant refused to return the cell phone, Smith became angry and took off his hoodie, balled it up, and threw it inside the car. Smith then told defendant that there was "no way [he] was just going to let him leave with [his] phone." Defendant responded, "if you want to fight, we can go in the alley." Smith initially agreed, but Ashley said no. Defendant then took a small gun from the upper part of his jacket and pointed it in Smith's face. Smith, who was standing 2-3 feet away from defendant, tried to turn around and run, but defendant shot him. The bullet struck Smith in the lower right side of his neck. After he fired the shot, the gun fell out of defendant's hands and he picked it up and fled. Smith fell to the ground, but jumped up to run away "because [he] felt like [his] life was still in danger" because defendant "was still there, and the gun was still there." Smith ran into the 7-Eleven, and shortly after the shooting, the ambulance arrived and Smith was taken to Loyola Medical Center. Smith had multiple surgeries for his gunshot wound and was treated for about three weeks. As a result of his injuries, Smith lost half a lung and now has trouble breathing. Smith confirmed that he is five feet, ten inches tall and weighed about 185-190 pounds at the time of the incident.

¶ 6 During his testimony, Smith admitted that he had been previously convicted of five felonies, including a 2003 conviction for aggravated unlawful use of a weapon and a 2006 conviction for possession of a controlled substance. The parties stipulated to his 2006 domestic battery conviction.

¶ 7 The State presented the testimonies of Ashley Moore and her sister Amber, which largely corroborated Smith's testimony. Ashley was with Smith when defendant shot him, and Amber was on her way to meet them at the 7-Eleven when she observed parts of the incident from a stoplight near the parking lot. Both sisters testified that they identified defendant in a lineup following the shooting. The State did not present testimony from Cribbs. The State also presented a video of the confrontation and shooting which was captured by a red light camera. The video showed some of the events from the shooting, but the view from the camera was obstructed by a 7-Eleven sign.

¶ 8 Defendant testified in his own defense that on April 28, 2012, he received a visit from Bean. He told Bean that he needed some money. Bean then gave defendant a cell phone and defendant answered it when it rang.[2] The caller, Smith, offered defendant $100 to return his phone as a "finder's fee." Defendant stated that $100 was "a little bit too steep," and Smith replied that $100 was not a problem for him because he "gets it in the street," which indicated to defendant that Smith was a drug dealer. Defendant agreed to meet Smith at a 7-Eleven, but armed himself with a loaded .38 revolver. Defendant noted that he was "a little weary," about meeting Smith, but he needed the money. On his way to meet Smith, he ran into co-defendant, who accompanied him to the 7-Eleven. As defendant approached the 7-Eleven, he observed Smith standing with Cribbs and Ashley Moore. He told Smith that he was there to exchange the phone for the $100 reward that they discussed over the phone. Smith told defendant that he was not going to give defendant "[mf-ing] $100 for a [mf-ing] cell phone." Smith was very angry, and this made defendant feel "very uneasy." Cribbs was standing to the right of Smith. Ashley Moore then got out of the car and said something to agitate Smith even more, and she told

[2] The trial court barred defendant from answering defense counsel's question regarding what Bean had told him about the phone, finding that it was hearsay.

defendant to give Smith "the mf-ing phone." Smith removed his hoodie and continued to curse at defendant, to which defendant simply stated that Smith "wasn't a man of his word." Smith then "came at [defendant] in a flashing moment. He really had [defendant] scared. He had one hand in his waistband and one hand out of his waistband *** and he came towards [defendant] in an angry manner." Smith told defendant that it was going to be "real ugly for [him]" if he did not return the cell phone. Defendant believed that Smith had a gun in his waistband and that Cribbs, who was ducking on the side of the car at that point, was "arming himself." Because he believed that Smith was going to shoot him, defendant became nervous and scared and shot Smith once in self-defense. Defendant did not intend to kill Smith when he shot him, but felt forced to defend himself. He denied inviting Smith to the alley to fight. Defendant fled the scene because he was scared and he did not know whether Cribbs would shoot him.

¶ 9 On cross-examination, defendant stated that at some point Smith offered him $20 for the cell phone, but he did not take the money because Smith offered it in a "threatening manner," and he wanted Smith "to be a man of his word." Defendant testified that after the shooting, he went to codefendant's uncle's house, changed his jacket, and smashed Smith's cell phone because it ruined his life. Defendant hid the gun and never went to the police because he "left to clear [his] mind for a day;" however, he did admit that he texted a friend after the shooting that he thought "[he] knocked someone off." He did not tell the friend that he shot his victim in self-defense. Defendant was later arrested outside of his home. Defendant testified that he returned home to turn himself in, but admitted that he did not tell police where the cell phone, gun, or his jacket was located. Defendant further noted that although defendant was afraid that Cribbs would shoot him, he did not shoot at Cribbs because he did not want anybody else to get hurt. He conceded that he did not try to shoot the gun in the air or point the gun at Smith as a warning. Defendant confirmed that he is six feet, two inches tall and weighs 280 pounds.

¶ 10 Officer Robert Salas and Detective Michael O'Connor also testified for the defense that they spoke with Amber Moore after the shooting, who indicated that during the confrontation she observed Smith take off his jacket and approach defendant. The defense did not present testimony from codefendant.

¶ 11 Following closing arguments, the court instructed the jury. Defendant objected to the court's decision to give Illinois Pattern Instruction, Criminal, No. 24-25.09 (4th ed. 2000) (hereinafter, IPI Criminal 24-25.09) and Illinois Pattern Instruction 24-25.11 (4th ed. 2000) (hereinafter, IPI Criminal 24-25.11), instructing the jury regarding the use of force by an initial aggressor. The court also denied defendant's request to instruct the jury pursuant to Illinois Pattern Instruction, Criminal, No. 5.01A (4th ed. 2000) (hereinafter, IPI Criminal 5.01A) the definition of intent. The jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm, finding that he personally discharged a firearm that proximately caused great bodily harm to another person. The trial court sentenced defendant to a 6-year term for attempted murder with a consecutive mandatory 25-year firearm enhancement and a concurrent 25-year term for aggravated battery with a firearm, which the trial court merged into the attempted murder conviction, for a total of 31 years in prison. The trial court subsequently denied defendant's motion for a new trial and motion to reconsider his sentence.

¶ 12 ANALYSIS

¶ 13 Sufficiency of the Evidence

¶ 14 First, defendant argues that the State failed to disprove his claim of self-defense and that he did not intend to kill Smith. The State responds that it proved that defendant did not shoot Smith in self-defense, but rather shot Smith after he refused to pay defendant $100 to retrieve his own cell phone.

¶ 15 Here, defendant maintains that he was acting in self-defense when he fired his gun at Smith, who was unarmed at the time of the altercation. Self-defense is an affirmative defense *People v. Lee*, 213 Ill. 2d 218, 224 (2004)) and to raise it the defendant must provide some evidence of each of the following elements: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. 720 ILCS 5/7-1 (West 2012); see also *Lee*, 213 Ill. 2d at 225. Once the defendant has met his burden, the burden of proof shifts to the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. *People v. Hawkins*, 296 Ill. App. 3d 830, 837 (1998). The State carries its burden if it negates *any one* of the elements beyond a reasonable doubt. (Emphasis included.) *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995). Moreover, a defendant is justified in the use of force which is intended or likely to cause death or great bodily harm only if: (1) he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or (2) the commission of a forcible felony. 720 ILCS 5/7-1 (West 2012); *People v. Nolan*, 214 Ill. App. 3d 488, 495 (1991).

¶ 16 Furthermore, it is the jury's function to assess the credibility of the witnesses and the weight to be given their testimony by resolving any conflicts or inconsistencies in the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). Whether a defendant acted in self-defense is also a question for the jury to determine. *People v. Goliday*, 222 Ill. App. 3d 815, 822 (1991). The jury is "not obligated to accept a defendant's claim of self-defense," but instead must consider the probability or improbability of the testimony, the surrounding circumstances, and the testimony of other witnesses. *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). A reviewing court will not

reweigh the evidence or substitute its judgment on these matters for that of the jury. *Tenney*, 205 Ill. 2d at 428. On appeal, a conviction will be affirmed "unless the proof is so improbable, unsatisfactory, or unconvincing as to raise a reasonable doubt of defendant's guilt." *People v. Gill*, 264 Ill. App. 3d 451, 459 (1992).

¶ 17 Here, we believe that defendant cannot claim self-defense because the State's evidence reveals that defendant's belief that he needed to shoot Smith in self-defense was objectively unreasonable. At trial, defendant testified that he shot Smith because Smith "came at [him] in a flashing moment. He really had [him] scared. He had one hand in his waistband and one hand out of his waistband *** and he came towards [him] in an angry manner." Defendant also alleged that, as Smith was charging toward him, Smith stated that things would get "real ugly for [him]" if he did not return the cell phone. Defendant also feared that Cribbs, who was ducking behind Ashley Moore's car, was loading a gun.

¶ 18 The State, however, presented evidence that defendant could not have actually believed he was in danger, and even if he did, such a belief was not objectively reasonable. First, neither Smith nor Cribbs were armed at any point during the confrontation, and defendant's own testimony supports this fact, as he never indicated that he observed either man with a weapon. Second, Smith was considerably smaller than defendant as the State presented evidence that Smith was five feet, ten inches and weighed 185-190 pounds and defendant was six feet, two inches tall and weighed 280 pounds. Third, and perhaps most importantly, when defendant pulled out his gun to shoot Smith, Smith was attempting to turn around and run away from defendant. Thus, although Smith had retreated, defendant proceeded to fire his gun at defendant at point-blank range, striking Smith in the lower right side of his neck. We conclude from our review of the record that the State proved that defendant's use of force was unreasonable and excessive, thus warranting rejection of his claim of self-defense. Accordingly, we find that the

evidence was sufficient for a trier of fact to find that defendant was proven guilty of attempted murder beyond a reasonable doubt. See *Jeffries*, 164 Ill. 2d at 128(1995) (holding that "[i]f the State negates *any one* of the self-defense elements, the defendant's claim of self-defense must fail").

¶ 19 Nonetheless, defendant, citing *People v. Booker*, 274 Ill. App. 3d 168 (1995), argues that defendant's beliefs were objectively reasonable because "when a person reaches into his waistband, it is reasonable to infer that he has a weapon." However, *Booker* does not stand for this proposition. In *Booker*, this court held that the trial court erred when it excluded the defendant's testimony that he knew that the victim had been charged with murdering another person as the testimony was relevant to the defendant's claim of self-defense. *Id.* at 172. Nowhere in *Booker* does this court hold that it is reasonable to infer that an individual has a weapon simply because he reaches into his waistband. Thus, defendant's reliance on *Booker* is misplaced.

¶ 20 Defendant also argues that a negative inference must be drawn from the State's decision not to call Cribbs as a witness because Cribbs' version of events was critical to whether defendant acted in self-defense. As a general rule, if a potential witness is available and appears to have special information relevant to the case, so that his testimony would not merely be cumulative, and the witness's relationship with the State is such that he would ordinarily be expected to favor it, the State's failure to call the witness may give rise to a permissible inference that, if the witness were called, the witness's testimony would have been unfavorable to the State's case. *People v. Doll*, 371 Ill. App. 3d 1131, 1137 (2007). However, a negative inference is permissible only under certain circumstances such as where the State fails to call a witness who possesses unique knowledge of a crucial, disputed issue of fact. *Id.* Here, defendant does not present any evidence to suggest that Cribbs possessed unique knowledge regarding whether

defendant acted in self-defense or information beyond what Smith had already given during his testimony; therefore, Cribbs' testimony would have amounted to cumulative evidence. Furthermore, we note that according to defendant, Cribbs was ducking behind a car when defendant shot Smith; thus, it is not clear whether Cribbs had an adequate view of the events immediately leading up to the shooting. Consequently, we find no negative inference arising from the State's failure to call Cribbs as a witness under the circumstances reflected in the record.

¶ 21 Accordingly, we find that, viewed in the light most favorable to the prosecution, the evidence supporting defendant's conviction was not so improbable, unsatisfactory, or unconvincing as to raise a reasonable doubt of his guilt.

¶ 22 Alternatively, defendant argues that the evidence at a minimum established by a preponderance of the evidence that he unreasonably believed that he needed to act in self-defense (*i.e.*, imperfect self-defense), and therefore, he could not have committed the crime of attempted murder and his conviction should be vacated. The State points out that defendant did not advance this theory at trial, and thus the jury never considered this argument. Nonetheless, the State argues that *People v. Guyton*, 2014 IL App (1st) 110450, is dispositive. We agree. Unlike in a case where a defendant is charged with murder, where he can attempt to mitigate the offense to second degree murder by proving, by a preponderance of the evidence, either the existence of provocation or imperfect self-defense, see 720 ILCS 5/9-2(c) (West 2012), a defendant charged with attempted murder cannot similarly mitigate his offense as attempted second degree murder does not exist in Illinois. We addressed this issue in *Guyton*.

¶ 23 In *Guyton*, the State charged defendant with first degree murder of one victim and attempted first degree murder of another. *Guyton*, 2014 IL App (1st) 110450, ¶ 37. At trial, defendant argued that he acted in self-defense when he shot the two victims. *Id.* at ¶ 39-40. The jury found defendant guilty of second degree murder based on imperfect self defense as to the

first victim and attempted first degree murder of the second victim. *Id.* On appeal, defendant argued that the jury's verdict of second degree murder revealed that he was acting in imperfect self-defense when he shot the two victims, and since he shot both victims at the same time with no change in his mental state, he could not have had the requisite intent to commit attempted first degree murder and his conviction should be vacated. *Id.* at ¶ 40. This court rejected the defendant's argument, and found that the presence of a mitigating factor did not negate the jury's finding of the defendant's mental state regarding the attempted first degree murder conviction because mitigating factors are not elements of the crime. ¶ 41-46. The court noted:

> "[t]he evidence established, and the jury found, the intent required to sustain an attempted first-degree murder conviction. The determination by the jury that mitigating circumstances existed to allow for a conviction of a lesser second degree murder offense because of defendant's unreasonable belief in the need to defend does not invalidate the attempted murder conviction." *Id.* at ¶ 46.

The court further found that, pursuant to *People v. Lopez*, 166 Ill. 2d 441 (1995), there is no offense of attempted second degree murder in Illinois; therefore, even though the jury's verdict on second degree murder revealed that it found the defendant acted in imperfect self defense, the jury could not have been instructed on and could not have found the defendant guilty of attempted second degree murder. *Guyton*, 2014 IL App (1st) 110450, ¶ 46.

¶ 24 Thus, pursuant to *Guyton*, when a jury finds that the evidence establishes that defendant committed the offense of attempted first-degree murder, as in the instant case, a defendant's ability to establish his unreasonable belief in the need for self-defense is irrelevant because the attempted first degree murder statute does not provide for reduction in sentence based on imperfect self-defense. *Id.* at ¶ 46.

¶ 25 Defendant argues that *Guyton* was wrongly decided and cites *People v. Reagan*, 99 Ill. 2d 238 (1983) and *Lopez*, 166 Ill. 2d 441 (1995) as support. In *Reagan*, our supreme court held that there was no crime of attempted voluntary manslaughter based on an unreasonable belief of self-defense. *Reagan*, 99 Ill. 2d at 240. The court explained that the attempt statute provides that "[a] person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." *Id*. Based on that statute, attempted voluntary manslaughter, however, would require the defendant to specifically intend to kill with an unreasonable belief in the need to use deadly force in self-defense. *Id.* Because it is impossible to intend an unreasonable belief, attempted voluntary manslaughter based on imperfect self-defense could not exist. *Id.*

¶ 26 Similarly, in *Lopez*, the defendant was convicted of attempted first degree murder. He appealed his conviction, arguing he had acted under a sudden and intense passion, yet the trial court had refused his tendered jury instruction on attempted second degree murder. *Lopez*, 166 Ill. 2d at 443. The appellate court upheld his conviction, concluding that there was no crime of attempt second degree murder in Illinois. *Id.* at 442. Our supreme court affirmed. The *Lopez* court noted that for a defendant to commit an attempt offense, he must intend to commit a specific offense. *Id.* at 448. To commit second degree murder, a defendant must have acted under either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force. *Id.* The court concluded a person cannot intend either of these things, and so under the Illinois attempt statute, no crime of attempted second degree murder exists. *Id.* at 449.

¶ 27 However, neither *Reagan* nor *Lopez* stand for the proposition that a defendant who establishes an unreasonable belief in self-defense cannot be convicted of attempted first degree murder. As stated above, when a jury finds sufficient evidence to convict a defendant of

attempted first degree murder, it necessarily finds that defendant had the specific intent to commit first degree murder which cannot then be mitigated by defendant's unreasonable belief in the need for self-defense. *Guyton*, 2014 IL App (1st) 110450, ¶ 46.

¶ 28 Moreover, as the parties note, the legislature has not chosen to allow a defendant to mitigate the offense of attempted murder based on an imperfect self-defense claim, although it amended the attempted murder statute to allow a defendant to mitigate the offense if it resulted from provocation. Specifically, under section 8-4(c)(1)(E), a defendant convicted of attempted first degree murder is allowed to prove at sentencing, by preponderance of the evidence, that the mitigating factor of provocation was present, so as to reduce the class of offense from a Class X to a Class 1. See 720 ILCS 5/8-4(c)(1)(E); *Guyton*, 2014 IL App (1st) 110450, ¶ 61. As the court in *Guyton* suggests, the legislature has, by its inaction, provided that defendants acting under imperfect self-defense can nonetheless be convicted of attempted first degree murder. *Id.* ¶¶ 45-46. Accordingly, we reject defendant's assertion that the holdings in *Regan* and *Lopez* necessitate a different outcome in this case, as the holding in *Guyton* is not inconsistent with either case.

¶ 29 Ineffective Assistance of Counsel

¶ 30 Next, defendant alleges that he was denied effective assistance of counsel, where trial counsel failed to request that the jury be instructed that, if it found that he acted with an unreasonable belief in self-defense, it must acquit him of attempted murder. The State responds that defendant's argument fails because there was no basis in law for counsel to request such an instruction.

¶ 31 The right to counsel guaranteed by both the United States and Illinois Constitutions includes the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that counsel's performance fell below

an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688).

¶ 32 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). It is well-settled in Illinois that counsel's choice of jury instructions is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). "Such decisions enjoy a strong presumption that they reflect sound trial strategy rather than incompetence," and therefore are "generally immune from claims of ineffective assistance of counsel." *People v. Enis*, 194 Ill.2d 361, 378 (2000).

¶ 33 Here, we do not find that defendant's trial counsel was ineffective. As discussed above, an unreasonable belief in self-defense does not negate an attempted first degree murder conviction; therefore, counsel's decision not to request an instruction informing the jury that defendant should be acquitted if found that he acted with an unreasonable belief in self-defense was reasonable. Furthermore, counsel's failure to request the instruction did not prejudice defendant because, contrary to defendant's contention, even if defendant had established an unreasonable belief in self-defense, he would not have been entitled to an acquittal of attempted first degree murder. See *Guyton*, 2014 IL App (1st) 110450, ¶ 46. Thus, his ineffective assistance of counsel claim must fail.

¶ 34 Prosecutorial Misconduct

¶ 35 Defendant next argues that the State's pervasive and egregious misconduct denied him a fair trial, including where the State kept out evidence of defendant's self-defense statement to the police and suggested that the self-defense claim was fabricated, and commented on codefendant's failure to testify in support of defendant. Alternatively, he contends that counsel was ineffective

by failing to object to the State's improper comments. The State responds that defendant forfeited review of this issue when he failed to object to the prosecutors' comments at trial and raise the matter in a posttrial motion; nonetheless, it argues that the prosecutors' comments were proper.

¶ 36 Defendant acknowledges that he forfeited review of this claim, but requests that this court consider the issue under the closely balanced prong of the plain error analysis. However, before we can determine whether the plain error doctrine applies in this case, we must first determine whether an error actually occurred. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 34. Absent a finding of error there can be no reversible error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 37 It is well established that prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant. *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994) (citing *People v. Pittman*, 93 Ill. 2d 169, 176 (1982)). During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses. *People v. Hudson*, 157 Ill. 2d 401, 441-45 (1993). In evaluating the propriety of a prosecutor's rebuttal argument, a closing argument must be viewed in its entirety with all remarks taken in the context of the entire argument. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009).

¶ 38 We first address defendant's contention that the State "violated its own motion *in limine* and, more importantly, flagrantly lied to the jury by arguing that [defendant] never told police he acted in self-defense." The State's knowing use of false or misleading evidence to obtain a conviction violates due process. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995).

¶ 39 During rebuttal, the State commented that "[defendant] didn't call the police afterwards and say this was a horrible mistake, I thought somebody had a gun. He didn't do any of those things. He ran and told you himself I had to get away. " The State then argued,

"you really can't bring a gun to a fist fight. So where does the defense go then? Oh, yes, but I thought Brandon Smith had a gun. Never saw the gun, but I thought he had a gun. He took off his hoodie so it would probably no longer conceal the gun. He obviously didn't have it in his sweatshirt but he's sure he had a gun. He's not sure he had a gun 'cause he didn't have a gun. But that sound[s] really, really good, doesn't it? Brandon Smith, that convicted felon who I didn't know and never met before but I knew was a bad guy had a gun."

¶ 40 We do not find that the prosecutor's comments were improper as they are aimed at attacking defendant's self-defense claim by pointing out that defendant's own testimony was contrary to such a claim. See *People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002) (holding that during closing argument the prosecution may attack a defendant's theory of defense). Specifically, at trial defendant testified that after he shot Smith, he hid the gun and did not call the police because he "left to clear [his] mind for a day." Defendant then admitted that after the shooting he texted a friend that he thought "[he] knocked someone off," but did not tell his friend that he shot the victim in self-defense. Although defendant testified that he returned home to turn himself in, he did not tell police where the cell phone, gun, or his jacket was located. Additionally, defendant testified that he thought Smith had a gun; however, the prosecutor's comments highlight the fact that there was no evidence, other than defendant's self-serving statement, that Smith was armed at any point before defendant shot him. Accordingly, we do not find that the State's attempt to discredit defendant's self-defense claim was improper nor do the comments suggest that defendant's self-defense claim was recently fabricated. See *People v. Dresher*, 364 Ill. App. 3d 847, 859 (2006) (holding that a witness's credibility is the proper subject of closing argument if it is based on the evidence or reasonable inferences drawn from the evidence). Moreover, we reject defendant's argument that the State violated its motion *in limine* by making

these comments, as the motion only barred testimony regarding defendant's statement given to police following his arrest. The motion *in liminie* did not bar the State from otherwise commenting on defendant's self-defense claim, which was presented in defendant's trial testimony.

¶ 41 Second, defendant argues that the prosecutor's comment "condemning [defendant's] failure to produce corroborating evidence of his innocence through [codefendant], was improper because it shifted the burden of proof." It is axiomatic that an accused is presumed innocent and that the burden of proof as to his guilt lies, at all times, with the State. *People v. Lopez*, 152 Ill. App. 3d 667, 677 (1987). Consequently, the failure of the defendant to call, as witnesses, persons who may be aware of facts material to the question of his guilt or innocence cannot be commented upon by the State. *People v. Beller*, 54 Ill. App. 3d 1053, 1058 (1977). As a general rule, it is improper for the prosecution to comment on a defendant's failure to present witnesses when such witnesses are equally accessible to both parties. *People v. Eddington*, 129 Ill. App. 3d 745, 777 (1984).

¶ 42 In rebuttal, the State argued that Gregory's testimony was incredible because it had "little truth detectors." Including the following:

> "Also telling, and I want you to think about this, Kenesha Sheridan is with the defendant. Now I know Myron Cribbs and Ashley came – Myron Cribbs, Ashley and Brandon Smith came together so they know each other. They're all standing there. Nobody runs from the scene. But isn't it interesting that you never heard that the person that Gregory Hych is with, his friend Kenesha Sheridan, if she saw a gun, saw somebody reaching into their waistband, saw Myron Cribbs with the gun. There's no testimony she ever moved. Apparently she didn't see the same thing that Mr. Hych saw because what Mr. Hych saw didn't happen. It's made up."

¶ 43 Although defendant argues that these remarks were improper, the record reveals that the State was properly responding to defendant's closing argument in which he criticized the State's failure to present the testimony of Cribbs to corroborate Smith's testimony. Defense counsel specifically stated during his closing argument, "[w]ho was at the scene that wasn't here in court? Who was giving support to Brandon Smith and never testified?" Thus, we believe the State, with the above comments, was attempting to show that codefendant, who could have possibly provided corroborating evidence to substantiate defendant's claim, was also an individual who was at the scene whose testimony was missing at trial. Thus, we do not find that the prosecutor shifted the burden to the defendant, but responded to the defendant's argument regarding missing witness testimony. See *Glasper*, 234 Ill. 2d at 204 (holding that statements made during rebuttal argument are proper if invited or provoked by the arguments of defense counsel).

¶ 44 Third, defendant argues that the State misstated the law and the defense's theory concerning defendant's convictions, and improperly appealed to the jury's emotions. A prosecutor may not misstate the law during closing arguments, as it can be grounds for reversal. *People v. Young*, 347 Ill. App. 3d 909, 925 (2004).

¶ 45 Here, the prosecutor argued the following:

> "And we have heard a lot about convicted felons. Well, you can be sure when Judge Daleo gives you a packet of instructions there is going to be no instruction that convicted felons are treated different under the law. And that would seem to be as it should be. But somehow the defense wants to makes an argument that for some reason if you have a felony you're not as important. If you have a felony you're expendable. It's okay to shoot him. He had a felony. Even though he couldn't have known at the time. It's not okay and the law recognizes that. If you're King of LaSalle Street or Joe Regular Guy the law affords the same protections. We, from the time we're children in kindergarten we learn

> the Pledge of Allegiance. I'm not sure if they say the Pledge of Allegiance anymore but what are the final words? With liberty and justice for all. And this case is about justice and this case is about justice for all people, for Brandon Smith."

¶ 46 Defendant argues that these comments were improper because: (1) the State's suggestion that Smith's felony convictions and his domestic battery conviction were largely irrelevant to the case was blatant misstatements of the law; (2) the State engaged in a blatant mischaracterization of the defense's argument by suggesting that the defense wanted the jury to conclude that "[i]f you have a felony you're not as important. If you have a felony you're expendable. It's okay to shoot him. He had a felony;" and (3) the State's appeal to the Pledge of Allegiance and "justice for all" was an improper play to the jury's emotions that had nothing to do with the issue before the jury: defendant's self-defense claim." We reject defendant's contentions.

¶ 47 A review of the record reveals that the State's comments were in direct response to defense counsel's reference to Smith's criminal record. Particularly, counsel argued:

> "[w]hy did we have a stipulation about a domestic battery? It was the last thing I did. What does it mean? Well, that domestic battery conviction means that Brandon Smith has a propensity for violence. Okay? And that means when he got convicted of that domestic battery, you can decide if that conviction happened and you heard the stipulation, we read it into the record, and you can determine whether he is violent. And you can use that in determining violence at the scene of the 711 on April 28th 2012. Use that as a tool to help you justify self defense."

¶ 48 It is undisputed that Smith admitted during his testimony that he had been previously convicted of five felonies, and that the parties stipulated that he had a 2006 domestic battery conviction. In light of defense counsel's comments that Smith's criminal record reveals that he has a "propensity for violence," and should be used to determine the outcome of the instant case,

it is clear that the prosecutor was urging the jury not to reject Smith's testimony simply because he had a criminal record. See *Hudson*, 157 Ill. 2d at 441 (finding that the prosecutor may properly respond to comments made by defense counsel which clearly invite a response). In her response, nowhere did the prosecutor misstate the law or mischaracterize defendant's argument. Moreover, given the fact that prosecutors have wide latitude in closing argument (*Kitchen*, 159 Ill. 2d 1, 38 (1994)), we do not find that her reference to the Pledge of Allegiance was an improper play to the jury's emotions as it was relevant to further explain the fact that Smith's criminal background should not influence whether he should receive justice in this case.

¶ 49 Lastly, defendant argues that the prosecutors misstated Smith's injuries and improperly speculated that defendant wanted to hide from the camera to cast doubt on defendant's self-defense claim. A prosecutorial misstatement does not necessarily deprive a defendant of a fair trial. *People v. Patrick*, 205 Ill. App. 3d 222, 228 (1990). A reviewing court will reverse a jury's verdict based upon improper comments during closing arguments only if such remarks "resulted in substantial prejudice to the defendant and constituted a material factor in his conviction." *People v. Brooks*, 345 Ill. App. 3d 945, 951 (2004).

¶ 50 During closing argument, the prosecutor stated that defendant "took out a gun and shot [Smith] in the back in the middle of a parking lot." Then, during its rebuttal the prosecutor stated that defendant was not scared of Smith because he "was trying to move them into the alley. Perhaps away from the busy 711 parking lot intersection. Perhaps away from the cameras."

¶ 51 Here, we agree with defendant that the prosecutor incorrectly stated that Smith was shot in the back, as the record reflects that he was shot in the neck; however, we do not believe that this remark resulted in substantial prejudice. The record reveals that during the altercation between defendant and Smith, defendant took a small gun from the upper part of his jacket and pointed it at Smith, who was standing about 2-3 feet away. Smith tried to turn around and run but

defendant shot him on the lower right side of his neck. Although defendant was not shot in the back, the prosecutor's comment may be read as an attempt to highlight the fact that when defendant started shooting, Smith was turning around and trying to run away from defendant, which is amply supported by the record. Regardless, whether Smith was shot in the neck or the back was not such a material factor in defendant's conviction that it necessitates reversal of the jury's verdict. See *Brooks*, 345 Ill. App. 3d at 951. In regards to the prosecutor's comment that defendant wanted to move to the alley "perhaps away from the cameras," we find no error. Smith testified that after defendant rejected both his $25 and $50 offers for his phone, defendant suggested that the two move to the alley to fight. It is a completely reasonable inference from Smith's testimony that defendant wanted to move away from the busy parking lot and away from the cameras. See *Hudson*, 157 Ill. 2d at 441.

¶ 52 Finding no instances of reversible error, we reject defendant's claim that the prosecutor's remarks denied him a fair trial. As a final note, even if we found that the State's comments were improper, we acknowledge that immediately preceding closing arguments, the trial court cautioned the jury that, "[w]hat the lawyers say during argument is not evidence and should not be considered by you as evidence." Additionally, at the close of arguments, the court issued jury instructions which stated "neither opening statements nor closing arguments are evidence and any statement or argument made by the attorneys which is not based on the evidence should be disregarded." Thus, we cannot say that these remarks affected the outcome of the defendant's trial, as the court provided sufficient instructions to preempt consideration of potentially improper comments as evidence. See *People v. Taylor*, 166 Ill. 2d 414, 438 (1995) ("The jury is presumed to follow the instructions that the court gives it.").

¶ 53 Alternatively, defendant contends that any failure by trial counsel to preserve his closing argument claims of error was ineffective assistance of counsel. As noted above, to prove a claim

of ineffective assistance of counsel defendant is required to show both that his attorney's performance was deficient, and that, but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Given our review of the comments and the trial judge's admonition to the jury, we conclude that defendant was not prejudiced by counsel's failure to preserve the claimed errors. Accordingly, defendant's ineffective assistance claim fails under Strickland's first prong.

¶ 54 Jury Instructions

¶ 55 Defendant next contends that the trial court erred in giving certain jury instructions. He first argues that the judge erroneously gave the jury IPI Criminal 4th No. 24-25.09 and IPI Criminal 4th No. 24-25.11 regarding the limits on an initial aggressor's use of force in self-defense, where no evidence supported these instructions. Defendant also argues that the judge erred in refusing to give the jury IPI Criminal 4th No. 5.01A, defining intent. The State responds that the trial court properly gave the jury IPI Criminal 4th No. 24-25.09 and IPI Criminal 4th No. 24-25.11 because the evidence established that defendant was the initial aggressor and correctly refused defendant's request for IPI Criminal 4th No. 5.01A because the definition of intent is commonly understood. Furthermore, the jury did not express any confusion about the definition of intent or request guidance.

¶ 56 Initially, we note that although defendant properly preserved his claim regarding jury instruction IPI Criminal 4th No. 24-25.11, he acknowledges that he failed to similarly preserve his claim regarding IPI Criminal 4th No. 24-25.09 by not including it in a posttrial motion. Thus, in regards to his objection to IPI Criminal 4th No. 24-25.11, we review the issue *de novo*. See *People v. Hammonds*, 399 Ill. App. 3d 927, 938 (2010) (we review the trial court's decision that an instruction applies to a case and thus, should be submitted to the jury, for an abuse of

discretion; however, we review *de novo* whether the applicable law was accurately conveyed). As to defendant's objection to IPI Criminal 4th No. 24-25.09, we grant defendant's request to review the issue for plain error.

¶ 57 Both the State and the defendant are entitled to have the jury instructed on their theories of the case, and an instruction is warranted if there is any evidence, no matter how slight, to support it. *People v. Floyd*, 262 Ill. App. 3d 49, 55 (1994). An initial aggressor instruction is warranted by the evidence when the State presents evidence showing the defendant to be the aggressor or, where the case involves a question of whether he was the aggressor. *People v. Brown*, 406 Ill. App. 3d 1068, 1079 (2011). When the jury is given the initial aggressor instruction along with instructions concerning when a person is justified in the use of force to defend himself, the jury may resolve the evidence pursuant to either hypothesis. *Floyd*, 262 Ill. App. 3d at 56. Thus, submitting such an instruction to the jury does not erroneously assume that the defendant was in fact the initial aggressor (*Id.*) but, rather, permits the jury to identify the initial aggressor. *People v. Toney*, 337 Ill. App. 3d 122, 138 (2003).

¶ 58 Here, the trial court gave the following jury instruction:

> "A person who initially provokes the use of force against himself is justified in the use of force only if the force used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person." IPI Criminal 4th 24-25.09

¶ 59 The court also gave the following instruction:

> "A person is not justified in the use of force if he initially provokes the use of force against himself with the intent to use that force as an excuse to inflict bodily harm upon the other person." IPI Criminal 4th No. 24-25.11

¶ 60 Here, although defendant contends that no evidence shows that defendant was the initial aggressor, our review of the record convinces us that a jury question existed in this regard and the challenged instructions were proper. At trial, defendant testified that Smith offered him $100 in exchange for the return of his cell phone, but Smith reneged on his offer when they met to complete the transaction. Defendant refused to return Smith's cell phone because Smith "wasn't a man of his word." Smith then became angry and cursed at defendant and eventually charged at him with his hand in his waistband. Defendant became scared, and shot defendant in self-defense. The State, of course, gave a different version of events leading up to the shooting. According to Smith's testimony he did not offer defendant any money for the return of his cell phone prior to meeting with defendant. When they met, however, defendant withheld Smith's cell phone and demanded that Smith give him $100 before he could retrieve it, rejecting Smith's reasonable offers of $25 and $50. When Smith refused and became angry, defendant suggested that they go fight in an alley. Accordingly, we believe that the conflicting testimony presented a question regarding whether Smith or defendant was the initial aggressor, and this issue was for the jury to resolve. Given that the jury was instructed on defendant's theory of self-defense, the State was similarly entitled to have the jury instructed on its theory that, because defendant was the initial aggressor, his right to use force in self-defense was limited. See *Floyd*, 262 Ill. App. 3d at 56.

¶ 61 Defendant also argues that that trial court erred in giving IPI Criminal 4th No. 24-25.11 because there was "no evidence that defendant intended to use Smith's response as an excuse to shoot him." However, the State presented testimony that after defendant refused to return Smith's cell phone, Smith became angry. Defendant responded to Smith's anger by inviting Smith to go fight in the alley. Then, without warning, defendant shot Smith. We find this evidence, although slight, is sufficient to raise the question of whether defendant provoked a fight with Smith with

the intent to use the fight as an excuse to inflict harm upon Smith. Thus, the instruction was proper.

¶ 62 Accordingly, we find defendant's challenges to IPI Criminal 4th No. 24-25.09 and IPI Criminal 4th No. 24-25.11 to be without merit.

¶ 63 We similarly find defendant's claimed error regarding the trial court's denial of his request to give the jury IPI Criminal (4th) No. 5.01A, defining intent to be without merit.

¶ 64 The purpose of jury instructions is to inform the jury of the applicable legal rules and guide it in reaching a verdict. *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 71, citing *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). The court need not define a term that is within the common knowledge of the jury but has a duty to clarify the law where the jury demonstrates confusion over the law, so that the court must instruct a jury that asks it to define a mental-state term or manifests confusion or doubt regarding a term's meaning. *People v. Chai*, 2014 IL App (2d) 121234, ¶ 46; *Le Mirage*, 2013 IL App (1st) 093547, ¶ 100.

¶ 65 According to IPI Criminal 4th No. 5.01, "[a] person [acts with intent] to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct." As to when this instruction is appropriate, the Committee Note to IPI 5.01A states that:

> "The Committee takes no position as to whether this definition should be routinely given in the absence of a specific jury request. See *People v. Powell*, 159 Ill. App. 3d 1005 (1987), for the general proposition that the words 'intentionally' and 'knowingly' have a plain meaning within the jury's common understanding. If given, it should only be given when the result or conduct at issue is the result or conduct described by the statute defining the offense." IPI 5.01A Committee Note.

¶ 66 As the State notes, our supreme court has consistently held that the word "intent" has a plain meaning within a jury's common understanding. *People v. Chapman*, 194 Ill. 2d 186, 233, (2000); see also *People v. Hope*, 137 Ill. 2d 430, 493 (1990) (holding that the term intent has a commonly understood meaning, and, because other, adequate instructions were given, definitions would not have aided the jury in its task). Moreover, the jury in this case did not express confusion over the law or request that the court define the term such that it would necessitate a jury instruction. See *Chai*, 2014 IL App (2d) 121234, ¶ 46.

¶ 67 Evidentiary Ruling

¶ 68 Next, defendant argues that the trial court erred in barring him from testifying that he believed Smith was a drug dealer, based on what his friend Bean told him. The State responds that the trial court properly barred defendant's proposed "evidence" that Smith was a drug dealer because it was hearsay of a non-testifying witness.

¶ 69 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). 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. *Id.*

¶ 70 "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception." *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). However, where the out-of court statement is offered to prove its effect on the listener’s mind or to show why the listener subsequently acted as he did, the statement does not constitute hearsay and is admissible. *People v. Anderson*, 407 Ill. App. 3d 662, 673-74 (2011)

¶ 71 Here, a review of the record reveals that defense counsel sought to establish that Bean had told defendant that Smith was a drug dealer; however, because Bean was not a witness at trial, the court excluded the evidence as hearsay. We do not find that the trial court abused its discretion when it made this evidentiary ruling as the State would not have been able to cross-examine Bean regarding a statement that could possibly impugn Smith's credibility. See *Anderson*, 407 Ill. App. 3d at 673 (holding that the primary rationale for the exclusion of hearsay testimony is the inability of the opposition to test the testimony's reliability through cross-examination of the out-of-court declarant)."

¶ 72 Nonetheless, defendant maintains, relying on *People v. Quick*, 236 Ill. App. 3d 446 (1992), that his conversation with Bean was not hearsay because it is relevant to the critical issue of his state of mind, not the truth of the matter asserted. In *Quick*, the defendant was accused of solicitation to commit murder and raised compulsion and entrapment as defenses. *Id.* at 447. The defendant attempted to show that she executed a plan to kill her husband only because the friend who introduced her to the hitman told her that she or her children would be harmed if she did not go through with the murder. *Id.* at 453. The trial court barred the defendant from testifying as to any statements made by the friend, finding that they were hearsay statements. *Id.* at 453. On review, this court found that the out-of-court statements made by defendant's friend were admissible as they were "crucial to [the] defendant's defense," and were offered to show the defendant's state of mind after she heard them. *Id.*

¶ 73 Even accepting that the statement was not hearsay, we find no error in the court's ruling to bar. In this case, unlike in *Quick*, the alleged statement by defendant that Bean told him that Smith was a drug dealer was not crucial to his defense. Defendant was able to provide the jury with detailed testimony that he shot Smith because when Smith angrily rushed toward him with his hand in his waistband, defendant believed that Smith had a gun. Thus, unlike the defendant in

Quick, defendant in the instant case was able to provide the jury with the crucial details regarding both his state of mind and thus, his defense. Moreover, a review of the record reveals that defendant testified that, prior to meeting up with Smith, Smith offered him $100 and told defendant that he "gets it in the street," which indicated to defendant that Smith was a drug dealer. Accordingly, although defense counsel was not allowed to present evidence that Bean told defendant that Smith was a drug dealer, defendant was still able to testify that he believed that Smith was a drug dealer in support of his self-defense claim. Thus, we find *Quick* unavailing.

¶ 74 Sentencing Issues

¶ 75 Defendant challenges the constitutionality of his sentence on several grounds. First, he argues that his sentence for attempted first-degree murder is grossly disproportionate to the offense of attempted first degree murder as applied to him. Second, he argues that, as applied to him, his sentence for attempted murder violates equal protection and due process by imposing a harsher sentence than he would have received had he killed the victim. Third, defendant argues that, as applied to him, the firearm enhancement violates his due process rights. The State responds that defendant's constitutional rights were safeguarded when he was sentenced to the minimum term of 31 years in prison.

¶ 76 We begin by noting that defendant did not raise these specific challenges to the constitutionality of his sentences in the trial court or in his posttrial motion. However, his claims center on determining the constitutionality of the sentencing statute as applied to him. A constitutional challenge to a statute may be raised at any time and is subject to *de novo* review. *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 12.

¶ 77 Proportionate Penalties Challenge

¶ 78 First, defendant contends that his sentence of 31 years was "grossly disproportionate" to the offense of attempted first-degree murder, as applied to him, because he "received an additional 25 years in prison for not killing Smith." Specifically, he argues that had defendant actually killed Smith and been charged with first degree murder (instead of attempted first degree murder), a trier of fact could have concluded that defendant had an unreasonable belief in self-defense, yielding a conviction for second-degree murder, an offense which carries no firearm enhancement and no "day-for-day good time" credit.

¶ 79 Defendant's argument appears to be premised on the assumption that the evidence in this case was sufficient for the jury to find that he acted with an unreasonable belief in self-defense which would have entitled him to a second degree murder conviction had he been charged with first degree murder. However, because our function as a reviewing court is not to retry defendant on appeal or to consider theories that were never presented to the jury, we decline to speculate on whether the jury would have found mitigating circumstances in this case; particularly, whether defendant's imperfect self-defense claim has merit. See *People v. Evans*, 209 Ill. 2d 194, 209 (2004). As explained above, defendant was convicted of attempted first degree murder, which cannot be mitigated based on an unreasonable belief in self-defense. We now turn to the question of whether defendant's sentence for attempted first degree murder was constitutionally valid.

¶ 80 As the constitutionality of a statute is purely a matter of law, we review defendant's claim *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Statutes are presumed to be constitutional. *Id.* "To overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution." *Id.* Great deference is given to the legislature's determination of the seriousness of various offenses and the sentences that the legislature has deemed appropriate for those offenses. *Id.*

¶ 81 A penalty is unconstitutional if it is cruel, degrading, or so disproportionate to the crime that it "shock[s] the moral sense of the community." *People v. Moss*, 206 Ill. 2d 503, 522 (2003). A defendant's sentence violates the proportionate penalties clause of the Illinois Constitution when: (1) the penalty is "cruel, degrading, or wholly disproportionate to the offense committed as to shock the moral sense of the community;" or (2) the penalty is "harsher than the penalty for a different offense that contains identical elements." *People v. Williams*, 2012 IL App (1st) 100126, ¶ 48.

¶ 82 A conviction for attempted first-degree murder carries a sentencing range of 6 to 30 years, with a mandatory 25-year firearm enhancement added to the sentence if, during the commission of the crime, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death. 730 ILCS 5/5-8-1(a)(3) (West 2012); 720 ILCS 5/8-4(c)(1)(D) (West 2012). Here, the trial court sentenced defendant to 6 years in prison for the attempted first-degree murder of Smith and imposed a mandatory 25-year firearm enhancement because defendant discharged a firearm that proximately caused Smith great bodily harm, for a total sentence of 31 years. Based on the relevant sentencing statutes, we find that the trial court's imposition of the defendant's sentences was within the statutory range allowed by the legislature.

¶ 83 Nonetheless, defendant challenges the imposition of the firearm-enhancement sentence on the basis that it was so disproportionate to the crime of attempted murder as to shock the moral conscience; however, our supreme court has repeatedly rejected this argument. In *Sharpe*, 216 Ill. 2d at 487, the court, citing its previous ruling in *People v. Morgan*, 203 Ill. 2d 470 (2003), reiterated that firearm enhancements applied to attempted first-degree murder convictions are "neither cruel nor degrading, nor would [they] shock the moral sense of the community." *Sharpe*, 216 Ill. 2d at 524. The *Sharpe* court explained that, "[t]he sentence

enhancements were put in place because of the legislature's recognition of the significant danger posed when a firearm is involved in a felony." *Id.* at 524. The court then concluded that "it would not shock the conscience of the community to learn that the legislature has determined that an additional penalty ought to be imposed when murder is committed with a weapon that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon bystanders." *Id.* at 525. Thus, based upon precedent set in this state, we do not find that defendant's sentence violated the proportionate penalties clause of the Illinois Constitution as applied to him.

¶ 84 We also reject defendant's reliance on *People v. Miller*, 202 Ill. 2d 328, 340 (2002), for the proposition that his sentence violates the proportionate penalties clause because the "shocks the conscience test is satisfied when the case involves multiple statutes leading to a profound unjust sentence." In *Miller*, the 15-year-old defendant was convicted, under an accountability theory, of two counts of first degree murder, and he was sentenced to mandatory natural life imprisonment under the statute requiring such a penalty for defendants convicted of multiple murders. *Id.* at 330. The trial court stated that, even though it did not doubt the defendant's guilt, mandatory life imprisonment without the possibility of parole would be "blatantly unfair and highly unconscionable," where the defendant "never picked up a gun" yet was "in the same situation as a serial killer for sentencing purposes." (Internal quotation marks omitted.) *Id.* at 331-32. The trial judge declined to impose life imprisonment because the "three converging statutes" violated the proportionate penalties clause. *Id.* at 332. In striking down the defendant's sentence as shocking to the moral sense of the community, the *Miller* court highlighted the defendant's age, his diminished culpability as an accomplice, and defendant's "greater rehabilitative potential" as a juvenile. *Id.* at 341.

¶ 85 Even if defendant could somehow overcome the reasoning and holding in *Sharpe*, we find *Miller* distinguishable. First, the *Miller* court focused on the fact that the defendant was a juvenile; however, defendant's pre-sentence investigation report reveals that he was 31 at the time of this offense. Therefore, defendant lacks the degree of rehabilitative potential as the juvenile defendant in *Miller*. Second, the *Miller* court noted that the defendant was an accomplice, and therefore, less culpable because he did not actually perform the acts underlying his conviction. In the instant case, however, there is no doubt that defendant shot Smith. Lastly, the juvenile offender in *Miller* was sentenced to a mandatory minimum of life in prison without parole. Defendant in the instant case was not given a life sentence without the possibility of parole. Given that the facts that supported the *Miller* court's rationale are wholly absent from the instant case, we reject defendant's reliance on *Miller*.

¶ 86 Equal Protection and Due Process Challenge

¶ 87 Second, defendant argues that his sentence for attempted murder violates equal protection and due process because he received a harsher sentence than he would have received had he killed Smith, particularly; he argues that he received the "harsher treatment of the 25-year firearm add-on and much less good-time credit."

¶ 88 Equal protection requires that similarly situated individuals will be treated in a similar manner. *People v. Reed*, 148 Ill. 2d 1, 7 (1992). The equal protection clauses of the United States and Illinois Constitutions do not deny the State the power to draw lines that treat different classes of people differently, but prohibits the State from according unequal treatment to persons placed by a statute into different classes for reasons wholly unrelated to the purpose of the legislation. *People v. Shephard*, 152 Ill. 2d 489, 499 (1992).

¶ 89 Defendant acknowledges that this court has rejected his equal protection argument in *Guyton*. In *Guyton*, the defendant challenged his 36-year sentence for attempted first-degree

murder, which included a 20-year add-on because he personally discharged a firearm during the offense, arguing that the sentence violated principles of equal protection and due process because it was a harsher sentence than if he had killed the victim. This court acknowledged that in order to state a cause of action for a violation of equal protection, "a plaintiff *must* allege that there are other people similarly situated to him, that these people are treated differently than him, and that there is no rational basis for this differentiation." (Emphasis added.) *Guyton*, 2014 IL App (1st) 110450, ¶ 64. The court concluded that because defendant, who was not a member of a protected class, had failed to identify others who were similarly situated to him, he could not establish that his guarantee of equal protection was violated. *Id.* at ¶ 69.

¶ 90 Defendant nonetheless rejects the holding in *Guyton*, and argues that his claim "is based on the irrationality of the law's distinction, not on a protected class including [defendant] and other similarly-situated defendants." We reject defendant's novel attempt to evade the constitutional requirements necessary to state a cause of action for a violation of equal protection. Similar to the defendant in *Guyton*, in the instant case, defendant cannot show that he is a member of a protected class nor does he attempt to identify similarly situated defendants in order to state a cause of action for an equal protection violation. Therefore, defendant has not established that his guarantee of equal protection was violated.

¶ 91 Constitutionality of the Firearm Add-on

¶ 92 Lastly, defendant argues that, as applied to him, the sentence for attempted murder violates due process because the firearm add-on imposed is not reasonably related to the aim of deterring firearm use where he, at a minimum, unreasonably believed that he needed to act in self-defense. We acknowledge that to pass muster under the due process clause, a penalty must be reasonably designed to remedy the particular evil that the legislature was targeting. *Sharpe*, 216 Ill. 2d at 531.

¶ 93 In 2000, the legislature enacted Public Act 91-404, which amended the sentencing provisions of each of several different felonies when a firearm is involved in the commission of the felony. See Pub. Act 91-404, § 5, eff. January 1, 2000. The purpose was "to deter the use of firearms in the commission of a felony offense." Pub. Act 91-404, § 5 (eff. Jan. 1, 2000) (adding 720 ILCS 5/33A-1(b)(1)). Defendant's constitutional challenge is not novel and we may simply, again, look to *Sharpe* for its disposition. In *Sharpe*, 216 Ill. 2d at 531-32, our supreme court reasoned that:

> "The legislature has determined that firearm use is a serious problem because of the real danger that such weapons can cause accidental lethal injury. In order to combat this problem the legislature has decided to impose a sentencing enhancement of 25 years to life when a perpetrator discharges a firearm during the commission of a serious felony and causes serious harm to another person by doing so." *** The legislature clearly spelled out its intent in enacting the firearm enhancements in a codified statement of legislative intent. See 720 ILCS 5/33A-1(a), (b) (West 2000). In this statement, the legislature notes the serious threat to the public health, safety, and welfare caused by the use of firearms in felony offenses. The legislature states that its intent is to impose particularly severe penalties in order to deter the use of firearms in the commission of felonies, and that it believes that the use of firearms in the commission of felonies needs to be punished even more severely than offenses such as aggravated battery with a firearm and aggravated discharge of a firearm. Unquestionably, the 15/20/25-to-life enhancements are reasonably designed to remedy the particular evil the legislature was targeting. We find no due process violation in the legislature's determination that the social ill being addressed merits the penalty imposed."

¶ 94 Although our supreme court is clear that the add-ons are constitutionally permissible, defendant argues that the add-on imposed in his case has no reasonable relationship to the goal of deterrence because he at worst acted with an unreasonable belief in self-defense. In support of his argument defendant cites *People v. Alejos*, 97 Ill. 2d 502 (1983). The *Alejos* court held that voluntary manslaughter, the predecessor of second degree murder where either provocation or imperfect defense is present, could not serve as the predicate felony to a charge of armed violence, because the legislature did not intend for the statute to apply to conduct that is not a deliberate or deferrable offense *Id.* at 507-09. Defendant maintains that the analysis in *Alejos* controls the due process challenge here because both the attempted murder of Smith and the killing in *Alejos* were accompanied by a mitigating fact. However, the fact of the matter is the jury in the instant case did not find any mitigating factors and we decline defendant's invitation to advance an argument not presented before the trial court and reweigh the evidence in this case. The jury in the instant case found defendant guilty of attempted first degree murder, which is distinguishable from the voluntary manslaughter conviction in *Alejos*. Thus, *Alejos* is inapposite.

¶ 95 Accordingly, we reject defendant's argument that his sentence is unconstitutional, and conclude that his sentence for attempted first degree murder was proper as the sentencing statutes are valid as applied to him.

¶ 96 One-Act, One-Crime Rule

¶ 97 Finally, defendant contends that although he was convicted of only one count of attempted murder, his mittimus incorrectly reflects two counts of attempted murder, and one conviction must be vacated pursuant to the one-act, one-crime rule. He further argues that his aggravated battery with a firearm conviction must be vacated pursuant to one-act, one-crime rule, as only the most serious conviction may stand. The State concedes that one conviction for attempted first-degree murder should be vacated; however, it argues that defendant is incorrect

that his "conviction" for aggravated battery with a firearm should be vacated, as the trial court never entered judgment on the jury's finding of guilty and it is not included on the mittimus.

¶ 98 We agree with both parties that defendant's mittimus improperly reflects that he was convicted of two counts of attempted murder. Thus, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we vacate the conviction and correct the mittimus to reflect one conviction for attempted murder with one correlating sentence. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). In regards to the aggravated battery conviction, however, the State is incorrect that the court never imposed a sentence for the offense as the record reveals that the court sentenced defendant to "25 years to merge." Nevertheless, because the court merged the aggravated battery conviction into the attempted murder conviction, the conviction of record is attempted murder, and thus, there is no aggravated battery conviction for this court to vacate.

¶ 99 Conclusion

¶ 100 Accordingly, we affirm the judgment of the circuit court of Cook County and order the mittimus be corrected to reflect that defendant was convicted of one count of attempted first degree murder.

¶ 101 Affirmed; mittimus corrected.