2016 IL App (1st) 133568-U

SECOND DIVISION
Order filed on March 1, 2016
Modified upon denial of rehearing March 22, 2016

No. 1-13-3568

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 CR 7473
	)	
JOSE GALLEGOS,	)	Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt. The trial court did not err when it refused defendant's jury instructions on reckless discharge of a firearm and self-defense. The use of the Illinois Pattern Jury instruction on attempt murder was proper. The trial judge's comments did not exhibit bias and were not prejudicial.

¶ 2 Following a jury trial, defendant Jose Gallegos was convicted of attempt first degree murder, aggravated discharge of a firearm, and unlawful possession of a firearm by a street gang member and was sentenced to 30 years' imprisonment for the attempt murder (720 ILCS 5/9-1(B)(1) (West 2012)) and a concurrent 14 years' imprisonment for the unlawful possession of a

firearm by a street gang member (720 ILCS 5/24-1.8(A)(1) (West 2012)). The aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(4) (West 2012) charge merged with the attempt murder. On appeal, defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred when it refused to instruct the jury on reckless discharge of a firearm as a lesser-included offense of attempt murder; (3) the trial court erred when it refused to instruct the jury on self-defense; (4) the trial court erred when it instructed the jury that the State only had to prove that defendant performed some substantial step towards the killing of an individual, not that defendant shot at Officer Vieyra as the indictment alleged; and (5) Judge Cannon was inappropriately biased against him and his counsel. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Officer Vieyra of the Chicago Police Department testified that on March 23, 2010, at about 10 p.m., he was conducting surveillance of a house on the 4200 block of South Mozart in a covert vehicle with his partner Officer Daly. Officer Vieyra was in the front passenger seat of the vehicle and Officer Daly was in the driver's seat. The officers were parked on the west side of Mozart and the vehicle was facing south so that Officer Vieyra was closest to the curb. The officers noticed two men, who they later identified as defendant and Estoquio Agustin, walking north on the sidewalk next to their car. Officer Vieyra testified that when defendant came near the front of their car, defendant bent over at the waist to look through the window of the car before continuing to walk toward the corner. The officers were suspicious of defendant's conduct and both unholstered their weapons while remaining inside the car. Officer Vieyra testified that he had 18 bullets in his gun and an additional bullet in the chamber. He also

testified that he placed his gun in his right hand between his right knee and the passenger door. Officer Daly testified that both officers held their guns in their laps.

¶ 5 Two minutes later defendant and Agustin again walked toward the officers' vehicle and approached. Defendant stopped near the hood of the car and, keeping his left hand inside the pocket of his sweatshirt, used his right hand to make a "bunny" gang sign, which represents the Two Six gang. Later, both defendant and Agustin admitted to being part of the Two Six gang. Defendant then walked onto the grass closer to the car and used his right hand to make an upside down "pitchfork" hand signal, which showed disrespect for the rival Satan Disciples gang. Officer Vieyra attempted to waive off defendant, using his left hand to indicate that he was not affiliated with any gang. Defendant walked within inches of the passenger door and used his left hand, on which he wore a white glove, to remove a dark handgun from his pocket. Defendant pointed that gun at Officer Vieyra's head through the window.

¶ 6 Officer Vieyra leaned back in his seat so he could raise his gun to the window and began firing at Gallegos while Officer Daly attempted to exit the car through the driver's side door. Defendant backpedaled several steps and turned his body sideways, but kept the gun pointed at the car. Both officers testified that they saw a muzzle flash from defendant's gun. Officer Vieyra testified that the muzzle flashed as defendant backpedaled and pointed his gun at the car. Officer Vieyra testified he fired all 19 of the bullets in his gun before reloading and exiting the vehicle. He stated he fired approximately five times before defendant fired his gun. Officer Daly fired his gun at defendant three times after he exited the car. Defendant fell to the ground and dropped his gun near his left hand. Officer Vieyra moved with his gun in hand to where defendant was laying and said "Police. Dropped [sic] the gun." Officer Vieyra testified that while defendant

was on the ground, defendant used his right hand to remove the white glove from his left hand. Officer Vieyra then radioed dispatch about the shots fired and requested an ambulance.

¶ 7 On cross examination, Officer Vieyra testified he did not see any shots strike defendant. Defendant kept the gun aimed at Officer Vieyra as he backpedaled. He further added that defendant did not turn his back to Officer Vieyra, but he angled his body, and Officer Vieyra did not know if any bullets entered defendant's back. When defendant took the white glove off of his left hand, Officer Vieyra did not see any bullet holes in defendant's left hand. Officer Vieyra testified that he saw blood but did not know where it was coming from.

¶ 8 When defense counsel asked the court's permission to have Officer Vieyra leave the witness stand to examine defendant's hand, the State objected and the court sustained the objection. Defense counsel requested a sidebar, to which the court responded she did not hold sidebars. Defense counsel then requested another sidebar, which was denied by the court. Defense counsel then asked Officer Vieyra if he remembered speaking to anyone from the Independent Police Review Authority (IPRA). The State's objection was again sustained as defense counsel's request violated a motion *in limine* that precluded introduction of any evidence of the IPRA investigation. Defense counsel told the court that "without a sidebar I need to make an offer of proof later."

¶ 9 Officer Vieyra testified that he fired 18 rounds from his gun because he was attempting to stop the threat. Officer Vieyra testified that defendant continually pointed the gun at him, even when he was moving diagonally. Officer Vieyra added that maybe five to seven seconds elapsed before he ran out of ammunition and reloaded. This was the first time Officer Vieyra had been shot at while on duty and while he didn't see defendant pull the trigger, he saw the muzzle flash

from defendant's gun.

¶ 10 Defense counsel then made an offer of proof that Officer Vieyra told IPRA that he did not think defendant's gun was cocked sideways. The court reiterated that defense counsel could have asked how the gun was held, but failed to do so, and it was therefore improper for him to try to impeach Officer Vieyra based on the IPRA statement.

¶ 11 Officer Edmund Daly testified that he was working on March 23, 2010, as a gang enforcement officer with his partner Officer Carlos Vieyra. He and Officer Vieyra were dressed in civilian clothes and were in a covert vehicle conducting surveillance on the 4200 block of South Mozart. Officer Daly was the driver and Officer Vieyra was the passenger. At approximately 10 p.m., Officer Daly noticed two Hispanic men through his rear-view and side window, walking northbound on Mozart approaching their vehicle. Officer Daly identified the men as defendant and Agustin. The men walked past, about five to six feet away from the vehicle, bending down at the waist trying to look into the car. Defendant and Agustin then walked away and continued to walk northbound on Mozart out of sight. Officers Daly and Vieyra became uncomfortable and notified their enforcement officers that something may be about to happen.

¶ 12 Approximately two to three minutes later Officer Daly regained sight of defendant and Agustin. The men approached the vehicle and stopped parallel to the vehicle approximately five to six feet away. Agustin stopped near the trunk and defendant walked closer and said something inaudible, while holding his hand inside his hooded sweatshirt. Defendant walked closer to the vehicle and made gang signs with his right hand. He then walked the dividing line between the grass and the vehicle. Defendant came so close to the vehicle that his waist touched the side

view mirror, less than a foot from the car. Officer Daly testified that he did not recall if defendant represented the Two Six gang with his hand signals but did remember him making the upside down "pitchfork" sign to insult the Satan's Disciples gang. While defendant was doing this, Officer Vieyra was waving him off saying "no" to indicate they were not in a gang. Defendant then removed his left hand from the pocket of his sweatshirt and pointed a handgun at the passenger side window and Officer Vieyra's head. Officer Vieyra fired his weapon through the closed window and defendant backed up with his gun still pointed at the vehicle.

¶ 13 Officer Daly saw the muzzle of defendant's gun flash within "milliseconds" of the first bullet hitting the window. Officer Vieyra fired multiple shots and Officer Daly exited the vehicle and fired his weapon three times. Officer Vieyra reloaded his weapon and then stood over defendant, while defendant's gun lay on the ground near him. Officer Daly couldn't remember if Officer Vieyra yelled anything during the gunfight, but did remember he heard his partner yell "police." Officer Daly stated that the whole incident lasted three to four seconds.

¶ 14 Once defendant was secured, Officer Daly chased Agustin as he ran northbound on South Mozart. Officer Daly yelled "Police. Stop. Police. Police.," as he pursued Agustin. Officer Daly approached Agustin as he ducked between two vehicles and then handcuffed him. Other law enforcement officers then arrived on the scene. Officer Daly found no weapons on Agustin and he brought him back to where defendant was laying on the sidewalk. Officer Daly then went over to defendant's weapon and kicked it away with his foot. At this time, Officer Daly noticed Gallegos had removed the white glove he had been wearing.

¶ 15 On cross examination, Officer Daly testified when defendant fired his weapon, he was tilted with his side to them with the gun in his left hand. Officer Daly added he met with IPRA

on March 23, 2010, about the shooting and he did not indicate to IPRA that he saw defendant fire the gun. Officer Daly testified that Officer Vieyra took his gun out as defendant was approaching the vehicle, before defendant had taken his gun out. Officer Daly also admitted he would be subject to punishment and possibly be fired if he failed to give a complete and accurate statement to IPRA. When defense counsel later referred to Officer Daly's answers to IPRA as a "statement," the court admonished him that it was not a statement, but only answers to questions asked by IPRA, and if he referred again to Officer Daly's answers as "Daly's statement," the court would "ask you to sit down."

¶ 16 On redirect, Officer Daly testified that IPRA did not ask him if he saw defendant fire his weapon. On re-cross, Officer Daly testified that he never told IPRA that defendant fired a gun at him and Officer Vieyra.

¶ 17 Estoquio Agustin testified that he plead guilty to the charges against him in relation to this incident. He further testified that as part of his plea agreement, he would receive eight years' imprisonment in exchange for his truthful testimony at defendant's trial. Agustin testified that he and defendant were members of the 46th and Mozart faction of the Two Six street gang. He and defendant were both foot soldiers and did not have a rank, but defendant had more time in the gang. On March 23, 2010, from 8:30 to 10:00 p.m., Agustin and defendant were at a fellow gang member's house at 44th and Mozart. While there, Agustin saw another gang member pass a black semi-automatic gun to defendant. Defendant took the gun and placed it in his waistband on the left side of his body. At 10 p.m. defendant suggested to Agustin that they take a walk, meaning they should patrol the neighborhood looking for members of the rival gang, Satan Disciples. They were supposed to shoot Satan Disciples if they saw them. Defendant had the

gun and Agustin was to be the lookout to let defendant know if he saw anyone suspicious.

¶ 18 Agustin and defendant were on the 4200 block of South Mozart when they saw a silver car on the west side of the street. Defendant and Agustin went past the silver car towards 42nd Street and then doubled back and stopped right next to the car. When they got near the car, defendant approached the car, while Agustin stayed back on the sidewalk. Agustin could see the people in the car were male, and the man in the passenger's seat was Hispanic. Agustin saw defendant make a "bunny" hand sign representing their gang, while aggressively saying "Two Six. Two Six." Defendant's left hand was by his waist, in the same place Agustin saw defendant place the gun. The passenger waived defendant off, indicating he was a "neutron" and was not in a gang. Defendant then made a pitchfork hand signal to disrespect the Satan Disciples.

¶ 19 Defendant took his gun from his waist and pointed it at the passenger's face, less than a foot away from the passenger window. While seated in the car, the passenger took out a gun from his lap and pointed it at defendant. Agustin saw a shootout and ran away, but did not see who fired first. As he was running, he looked back twice and heard a lot of shots coming from more than one gun. While looking back, he saw defendant was on the ground and heard somebody yell, "Police." He saw the driver of the vehicle chasing him and heard him yell "Police" at him one or two times. The driver shot at him, so Agustin stopped and was arrested. Agustin was handcuffed and brought back to the scene. He could see injuries on defendant's torso and he saw a gun near defendant's left hand, out of reach.

¶ 20 On cross-examination, Agustin testified that he never told detectives about the gathering that happened before the shooting, where defendant received the gun. At the scene after he was arrested, Agustin saw a gun on the ground, but did not see a white glove. He never saw

defendant shoot.

¶ 21 Chicago Police Officer James Vin, an expert in gang crimes, responded to the shooting at the 4200 block of South Mozart at 10:30 p.m. on March 23, 2010. He secured the scene and guarded the weapon that was lying in the grass. He was familiar with that block as it was claimed by the Two Six gang. The Satan Disciples territory bordered the Two Six gang on California Avenue. In March 2010, there was escalating conflict between the gangs, with casualties on both sides.

¶ 22 Police forensic investigator Brian Smith testified that on March 23, 2010, he processed the scene at 4828 South Mozart and recovered a 9-millimeter gun and an inside-out glove at that location. There were four cartridges in the magazine and one cartridge in the chamber. Smith also recovered a Winchester 9-millimeter Luger fired cartridge case on the sidewalk near the gun, and a 45-caliber fired cartridge casing. Smith recovered a Glock 9-millimeter magazine from under the front passenger seat of the vehicle. He also recovered 16 fired cartridge cases, from inside and outside the officers' vehicle. A metal fragment was found on the ground in the yard in front of a house at 4232 South Mozart, next to the front steps.

¶ 23 Smith went to the hospital to conduct a gun-shot residue test on defendant. Smith only tested defendant's right hand because his left hand was bandaged. Smith also recovered a fired metal bullet fragment from one of the nurses.

¶ 24 Illinois State Police forensic scientist Dana Inempolidis testified that she conducted an analysis of three separate firearms. Two of those firearms were police service weapons, one of which was an operable Glock Model 30, 45-caliber semiautomatic, which contained eight unfired cartridges and a magazine. The other police service weapon was an inoperable Glock

Model 17, 9 millimeter Luger caliber semiautomatic that had seventeen unfired cartridges and a magazine. A third weapon, a Winchester Star Model 9-millimeter Luger caliber, semiautomatic firearm containing five unfired cartridges and a magazine, was not a police weapon.

¶ 25 Inempolidis also examined the fired evidence in the case which included a Winchester 9-millimeter Luger caliber fired cartridge case which was fired from the Star firearm, a non-police weapon. She also examined 16 Winchester 9-millimeter Luger caliber fired cartridge cases that she matched to the Glock Model 17, 9-millimeter Luger caliber semiautomatic, one of the police weapons. She examined one Remington .45 automatic fired cartridge case which she matched to the Glock Model 30, 45-caliber semiautomatic, the other police weapon. One fired bullet, a 9-millimeter 38 caliber, did not match the Glock Model 30 police weapon or the Star 9-millimeter non-police weapon, and it was inconclusive if it came from the Glock Model 17 police weapon. The bullet fragments recovered from the hospital were inconclusive and she could not identify or eliminate them as being fired from the Glock 9-millimeter Luger police weapon or the Glock 45 automatic police weapon.

¶ 26 Illinois State Police forensic scientist, Scott Rochowicz, testified that he tested the gunshot residue kit that was performed on defendant's right hand and he also tested a white glove. Although the glove was an ambidextrous cotton knit glove that was partially inside out, with no definitive palm or back, Rochowicz "assume[d] it was a right-handed glove[.]" The glove was positive for gun-shot residue particles, on both the palm and on the back of the glove. Rochowicz also found gunshot residue on defendant's right hand.

¶ 27 Defendant testified that on March 23, 2010, he was a member of the Two Six street gang. He and Agustin were on their way to get drunk at Agustin's house when Agustin thought he saw

someone carrying a gun. He and Agustin went towards Agustin's house and Agustin gave defendant a gun to hold and a glove so he wouldn't leave fingerprints. They were walking on the west side of Mozart when they saw a car with two men inside. They walked past, but then returned because Agustin said he had "seen something." Defendant had the gun and glove in his possession when he tried to see who was inside the car. As he got closer to the car, he "threw" a gang sign because he thought he knew the people in the car. He also "threw down" the pitchfork to disrespect the Satan Disciples. Agustin did the same. Defendant thought the people in the car "were somebody."

¶ 28 Defendant could see that the people inside the car were saying something but he couldn't hear because the window was rolled up. Defendant did not see them make any gestures or waive them off. Defendant was about a foot away and was looking into the car when he saw the passenger had a gun in his lap. Defendant testified he pulled out his own gun with his right hand because he was in fear for his life. The passenger then shot him and he was hit in the stomach. Defendant tried to back up, and then turned to his right with his left side facing the car and his left hand in the air. At that time, defendant "noticed [his] hand vibrate and when [his] gun was fired[,][] he dropped it." His body was hit in numerous places. He heard gunshots after he hit the ground.

¶ 29 On cross-examination defendant testified that when he went up to the officers' car he thought they were fellow gang members but from a different faction. When they walked back down Mozart a second time, defendant saw the passenger had a gun so defendant pulled out the gun Agustin gave him and the person in the car started shooting. He testified that he did not know how to use the gun and that he did not know the gun was loaded. Defendant testified that

when his gun discharged, it was pointed at the sidewalk. He did not remember pulling the trigger and he did not intentionally shoot the gun. Defendant stated that he was not acting in self-defense when the gun went off.

¶ 30 The trial court refused defense counsel's request to have Gallegos leave the witness stand and remove his shirt for the jury. The court told defense counsel that defendant could display the injuries on his hand to the jury, but he could not take his clothes off, and if counsel wanted to submit photographs or medical records, he could do so. Defense counsel then elicited detailed testimony from Gallegos regarding all the gunshot wounds he sustained in the shooting, and he also displayed bullet wounds to his hand to the jury.

¶ 31 Defense counsel sought to admit IPRA interviews, but the court denied the request because the evidence was inadmissible. The court referred to the interviews as police reports and as prior inconsistent statements.

¶ 32 ANALYSIS

¶ 33 Defendant alleged that the State failed to prove him guilty of the attempt murder of Carlos Vieyra beyond a reasonable doubt. Specifically, defendant argues that the State failed to prove that defendant had the intent to kill Officer Vieyra while he committed a substantial step toward the offense. While defendant does admit he removed a gun from his sweatshirt and pointed it at Officer Vieyra, he argues that this action does not indicate an intent to kill. Furthermore, defendant argues that although he later fired a bullet in Officer Vieyra's direction, the firing of his gun was an involuntary response to being shot by the officers. In contrast, the State contends defendant was proven guilty of attempted murder beyond a reasonable doubt where the evidence showed he fired his gun at Officer Vieyra with the intent to kill, and the jury

properly concluded that defendant had taken substantial steps toward the commission of murder.

¶ 34 On appeal, when the defendant challenges the sufficiency of the evidence, the reviewing court must determine, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "A reviewing court affords great deference to the trier of facts and does not retry the defendant on appeal." *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). "A reviewing court must allow all reasonable inferences from the record in favor of the State." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *People v. Graham*, 392 Ill. App. 3d 1001, 1009 (2009).

¶ 35 "It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Id.* It is not the duty of the trier of fact to accept any possible explanation that favors the defendant's innocence and "elevate it to the status of reasonable doubt." *People v. Siguenza-Brito, 235 Ill. 2d 213, 229 (2009).* "A reviewing court will not substitute its judgment for that of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 36 To prove a defendant guilty of attempted murder, the State must prove: (1) that defendant performed an act that constituted a substantial step toward committing a murder; and (2) that he had the criminal intent to kill the victim. 720 ILCS 5/8-4 (West 2010). *People v. Carlisle,* 2015 IL App (1st) 13114. Here, defendant asserts that he did not have the specific intent to kill Officer Vieyra when he fired his gun at him while moving away from the vehicle.

¶ 37 "The question of [a] defendant's state of mind at the time of the crime [is] a question of

fact to be determined by the jury." *Id*. Intent to kill may be established from circumstances surrounding the crime and the character's conduct. *Id*. "These surrounding circumstances may include the character of the assault, the use of a deadly weapon, and the nature and extent of the victim's injuries." *Id*; *People v. Green*, 339 Ill. App. 3d 443, 451 (2003). Intent to kill may also be "inferred if one willfully does an act, the direct and natural tendency of which is to destroy another's life." *People v. Cavazos*, 2015 IL App (2d) 120171.

¶ 38 In this case defendant's specific intent to commit murder may be inferred from his conduct and circumstances surrounding the incident. The evidence at trial, viewed in the light most favorable to the State, established that defendant and Agustin were out patrolling the area of the 4200 block of South Mozart. The two men walked by the car where undercover police officers Vieyra and Daly were sitting. Defendant bent at the waist and peered in the car to see who was inside. Defendant and Agustin then walked away and continued down Mozart toward 44th Street. Defendant then returned and again approached the officers' vehicle. The testimony showed that defendant was standing inches away from the vehicle and was using his right hand to make the "Two Six" street gang signal and an upside down pitchfork signal with the intent to disrespect members of the Satan Disciples, a rival street gang. Officer Vieyra attempted to waive away defendant and tried to indicate that he and his partner were not gang members. However, defendant became more aggressive and began yelling. Agustin testified that defendant was repeatedly yelling "Two Six. Two Six," again in order to represent his street gang.

¶ 39 Officers Vieyra and Daly, and Agustin all testified that defendant then pulled out a dark handgun from his sweatshirt, which he held in his left hand, and pointed the gun at Officer Vieyra's head. Officer Vieyra then shot through the window at defendant. Defendant angled his

body sideways with his gun still aimed at the vehicle, began retreating from the vehicle and fired his weapon at the officers. At some point, within seconds of Officer Vieyra shooting at defendant, both Officers Vieyra and Daly saw the muzzle of defendant's gun flash indicating that the gun was fired in their direction. Gun-shot residue as well as ballistics examinations also showed that Gallegos's gun was fired.

¶ 40 Defendant relies on *People v. Okundaye*, 189 Ill. App. 3d 601, 605-606 (1989), for the proposition that pointing a gun at a victim is not necessarily indicative of a defendant's specific intent to kill, nor is it *per se* a substantial step towards the commission of murder. In *Okundaye*, the defendant was charged by indictment that alleged that he "intentionally and knowingly attempted to kill [the victim] by pointing a loaded handgun in his face." This court noted that the charging instrument lacked the allegation that the defendant committed a specific act that constituted a substantial step towards the commission of murder rendering the charging instrument potentially deficient. *Id*. at 605. The *Okundaye* court found that merely pointing a gun at a police officer's head did not *per se* demonstrate a defendant's intent to kill and did not satisfy the specific intent requirement of attempt first degree murder. *Id*. The court reversed the defendant's attempted murder conviction on a separate jury instruction issue because the parties had not briefed the issue of the validity of the charging instrument. *Id.* at 606, 609.

¶ 41 Defendant's reliance on *Okundaye* is misplaced. In this case, there was no alleged or actual deficiency in the indictment. The indictment alleged that defendant, "with intent to kill, without lawful justification, did an act, to wit: shot at Carlos Vieyra which constituted a substantial step towards the commission of first degree murder," and the evidence conformed to the allegations. Viewing the evidence in the light most favorable to the state, there was sufficient

evidence to show that defendant had the specific intent to kill Vieyra when he removed a gun from his sweatshirt, pointed it at Officer Vieyra and fired. While the testimony established that defendant shot at Officer Vieyra's head, defendant asserted that he did not intentionally pull the trigger and he believed that the officers were part of a different faction of the Two Six street gang, it is the responsibility of the trier of fact to judge the credibility of witnesses and to assess the proper weight to be given to the testimony. A rational trier of fact could have found that defendant's physical acts and the circumstances surrounding the incident proved an intent to kill and a substantial step towards the commission of attempt first degree murder beyond a reasonable doubt.

¶ 42 The defendant next asserts that the trial court erred by failing to instruct the jury on the lesser-included offense of reckless discharge of a firearm. Defendant argues that the facts of the case support a finding on the lesser charge.

¶ 43 Where there is even slight evidence which, if believed by the jury, would reduce a charged crime to a lesser-included offense, the instruction on the lesser offense should be given. *People v. Roberts*, 265 Ill App. 3d 400, 402-403 (1994). However, even where a lesser-included offense is identified, the defendant is not automatically entitled to an instruction to the jury on such offense. The instruction is only warranted where a jury could rationally find him guilty of the lesser offense and acquit him of the greater offense. *People v. Kolton*, 219 Ill.2d 353, 360 (2006). Whether a defendant has met the evidentiary minimum for a certain jury instruction is a matter of law and is reviewed *de novo*. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008). Where some credible evidence exists to support an instruction for a lesser offense, it is an abuse of discretion to fail to give that instruction. *People v. DiVincenzo*, 183 Ill. App. 3d 1024, 1030

(2008).

¶ 44 Whether an instruction should be given for lesser-included offense turns on whether the uncharged offense was a lesser-included offense of that charged in the indictment and whether there was enough evidence presented at trial to rationally support a conviction on the lesser-included offense and an acquittal on the greater offense. *Kolton*, 219 Ill. 2d at 360-361 (2006). An offense may be determined to be a lesser-included offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of a lesser offense and any elements not explicitly set forth in the indictment can be reasonably inferred. *Id*. at 367. A defendant is entitled to have the jury instructed on a lesser-included offense when it is determined that a particular offense is a lesser-included offense of a charged crime, the court must then examine the evidence adduced at trial to decide whether the evidence rationally supports a conviction on the lesser offense. *Id.* at 362. "Accordingly, an inquiry into whether a defendant may be convicted of an uncharged offense is a two-tiered process." *Id.* "However, the second step-examining the evidence adduced at trial-should not be undertaken unless and until it is first decided that the uncharged offense is a lesser-included offense of a charged crime." *Id.*

¶ 45 A lesser-included offense is an offense established by proof of lesser facts or mental state, or both, than the charged offense. 720 ILCS 5/2-9 (West 2010). A person commits attempt murder when, with the specific intent to kill, he commits any act which constitutes a substantial step toward the commission of murder. 720 ILCS 5/8-4 (West 2010). Here, defendant was charged with the attempt first degree murder of Carlos Vieyra. The indictment alleged that defendant, "with intent to kill, without lawful justification, did an act, to wit: shot at Carlos Vieyra which constituted a substantial step towards the commission of first degree murder." A

person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual. 720 ILCS 5/24-1.5 (West 2012). In this case reckless discharge of a firearm is a lesser-included offense of the charged crime, attempt murder, because reckless discharge is an offense established by proof of lesser facts and mental state.

¶ 46 We now look to the evidence presented at trial to determine whether the evidence rationally supports a conviction on the lesser offense or reckless discharge. Defendant argues that a rational jury could have concluded that defendant recklessly removed the gun from his sweatshirt and recklessly pointed the gun at Officer Vieyra after seeing the gun in Officer Vieyra's lap.

¶ 47 After he recognized that Officer Vieyra had a gun in his lap, defendant made the conscious choice to withdraw his own weapon and point it at Officer Vieyra's head. Defendant's actions clearly do not constitute reckless conduct but instead establish that defendant acted intentionally. In addition, the facts surrounding the incident lend support to the finding that defendant acted intentionally rather than recklessly.

¶ 48 Defendant first encountered Officers Vieyra and Daly sitting in their vehicle, he bent down in order to look in the car, and then walked away. Within minutes he returned and again approached the vehicle, this time just standing inches away from the passenger's side window. He then became aggressive and began throwing gang signs and shouting at the plain clothes officers in the car. Defendant pulled out a handgun and pointed the gun at Officer Vieyra's head. Even defendant's own testimony supports nothing more than his removing a gun from his sweatshirt and pointing the gun in the direction of the officers. He contends that his gun went off but did not recall pulling the trigger. Without his testimony that he actually fired the weapon, he

cannot logically contend that he recklessly discharged the weapon. The evidence did not support a jury instruction on the lesser-included offense of reckless discharge and the trial court did not abuse its discretion in denying defendant's request for such an instruction.

¶ 49 Defendant next alleges that the trial court erred by refusing to instruct the jury on self-defense where there was evidence in the record to support such an instruction. A trial court's refusal to issue a specific jury instruction is reviewed under an abuse of discretion standard. *People v. Douglas*, 362 Ill. App. 3d 65, 76 (2005). "A defendant is entitled to an instruction on his theory of the case if the instruction has some foundation in the evidence." *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). Whether a defendant has met the evidentiary minimum for a certain jury instruction is a matter of law and is reviewed *de novo*. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008). "An instruction for self-defense should be given in a homicide case where there is some evidence in the record, however slight, which if believed by the jury, would support a claim of self defense." *People v. Davis*, 254 Ill. App. 3d 651, 668 (1993). However, a self-defense instruction may be properly refused if there is no evidence upon which a jury might find that the defendant acted in self-defense, and it will not be given "based upon the merest factual reference or witness' comment." *Id.*

¶ 50 Self-defense is an affirmative defense and the defendant has the burden of presenting evidence sufficient enough to raise that issue. *People v. Everette*, 141 Ill. 2d 147, 157 (1990). In order to be entitled to a self-defense instruction the defense is required to present some evidence on each of the following elements: (1) that force had been threatened against the defendant; (2) that the defendant was not the aggressor; (3) that the danger of harm to the defendant was imminent; (4) that the force threatened to the defendant was unlawful; (5) that the defendant

actually believed that danger existed; (6) that all of the defendant's beliefs were reasonable. *Davis*, 254 Ill. App. 3d at 668.

¶ 51 We find that the trial court's refusal to give a jury instruction on self defense was proper as there was no evidence in the record that supports giving a self-defense instruction. The evidence established that defendant was the aggressor. After peering in the car window once, he returned a second time and aggressively yelled his gang affiliation while making hand gestures denouncing the rival gang. Defendant then pulled a gun out of his sweatshirt and pointed it at Officer Vieyra's head. Officer Vieyra then fired his weapon in order to protect himself and his partner. Additionally, the evidence does not support defendant's claim that he was threatened by unlawful force. Defendant argues that the officers' testimony showed that Officer Vieyra had an unholstered gun in his lap that was visible to defendant when defendant aggressively advanced on the officers' car the second time was evidence that defendant acted in self-defense. However, this claim is defeated by defendant's own testimony. On cross examination the defendant testified that he was not acting in self-defense when the gun went off. In fact, defendant emphatically testified that he did not know the gun was loaded, did not intentionally shoot his gun and that this action was an involuntary response to being shot by the officers. The defendant claimed that he fired his weapon unintentionally. Defendant testified that when the gun was fired he, "noticed [his] hand vibrate and when [his] gun was fired[,][] he dropped it." Defendant added that he did not remember pulling the trigger, did not point the gun at the officers and did not intentionally shoot the gun.

¶ 52 Defendant's testimony establishes that he was not acting in self-defense and therefore an instruction on self-defense was not necessary. Accordingly, the trial court's refusal to instruct

the jury on self-defense was proper and was not an abuse of discretion.

¶ 53 Defendant next contends the trial court erroneously instructed the jury regarding attempt first-degree murder. Defendant asserts that his due process rights were violated when the court gave the Illinois Pattern Jury Instructions, Criminal, No. 6.05X (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 6.05X) on attempt murder because the instruction did not mirror the allegation in the indictment that he undertook the substantial step of shooting the victim, and thus he was forced to defend against a factual theory for which he was not put on notice. The State disagrees and argued that the defendant was sufficiently informed of the allegations against him through the indictment and the IPI on attempt murder was properly given.

¶ 54 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). Illinois Supreme Court Rule 451(a) (eff. July 1, 2006) provides that whenever the IPI contains an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the [IPI instruction] shall be used, unless the court determines that it does not accurately state the law." Where no IPI instruction exists on a subject, the court has the discretion to give a nonpattern jury instruction. *People v. Ramey*, 151 Ill. 2d 498, 536 (1992). Whether the trial court properly instructed the jury is a question of law subject to *de novo* review. *People v. Herron*, 215 Ill. 2d 167, 174 (2005).

¶ 55 During the instruction conference, defense counsel objected to IPI Criminal 4th No. 6.05X. Defendant argued that in the indictment, the State alleged that defendant "shot at Carlos Vieyra, which constituted a substantial step towards the commission of first degree murder." Defendant based his defense on this factual allegation and argued that the jury instruction should

mirror the indictment. The trial court rejected defendant's argument and instructed the jury using the IPI version. The court found that defendant "is not charged with a substantial step of shooting. He is charged with attempt first degree murder." The jury was instructed using IPI Criminal 4th No. 6.05X which states in relevant part: "[a] person commits the offense of attempt first degree murder when he, with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual."

¶ 56 Defendant maintains the trial court erred when it instructed the jury that in order to find him guilty of attempt first-degree murder, it need only find that the defendant committed a substantial step toward the killing of Carlos Vieyra, instead of specifically naming the substantial step, *i.e.*, shooting at Carlos Vieyra, as was alleged in the indictment.

¶ 57 The charging instrument in this case relating to the charge of attempt murder alleged that defendant, "with intent to kill, without lawful justification, did an act, to wit: shot at Carlos Vieyra which constituted a substantial step towards the commission of first degree murder. " Although the indictment alleged that defendant "shot at" the victim, this language is mere surplusage. "Shot at" is not an element of the offense of attempt murder. Instead, the State was required to prove: (1) that defendant performed an act that constituted a substantial step toward committing a murder; and (2) that he had the criminal intent to kill the victim. 720 ILCS 5/8-4 (West 2010). The only required elements in an attempt murder indictment are performance of a substantial step towards committing murde**r** and the specific intent to commit murder, while the manner in which defendants took a substantial step toward the commission of the crime is surplusage. *People v. Reynolds*, 178 Ill. App. 3d 756, 763 (1989) (citing *People v. Mullinax* , 67 Ill. App. 3d 936, 941 (1979); *People v. Drink*, 85 Ill. App. 2d 202, 207-208 (1967). "Where an

indictment charges the elements essential to an offense under the statute, other matters unnecessarily appearing in the indictment may be rejected as surplusage." *People v. Adams*, 46 Ill.2d 200, 204 (1970); *People v. Figgers*, 23 Ill.2d 516, 519 (1962).

¶ 58 The jury instruction given here properly apprised the jury of the statutory definition of attempt murder. 720 ILCS 5/8-4 (West 2010). The trial court properly rejected defendant's modified IPI instruction for attempt murder.

¶ 59 Defendant argues multiple instances of inappropriate bias against him and defense counsel by the trial judge. Defendant asserts Judge Cannon "throughout trial and sentencing, repeatedly reprimanded and belittled the defense and Gallegos's arguments, often in the presence of the jury." We find the complained of comments to be harmless error where defendant has not shown, and we do not discern, that he suffered any prejudice from these comments.

¶ 60 A trial judge "must not interject opinions or comments reflecting prejudice against or favor toward any party." *People v. Williams*, 209 Ill. App. 3d 709, 718 (1991); *People v. Lopez*, 2012 IL App (1st) 101395, 57 "Improper comments include those which reflect disbelief in the testimony of defense witnesses, confidence in the credibility of the prosecution witnesses or an assumption of defendant's guilt." *Williams*, 209 Ill. App. 3d at 718. "In addition, a hostile attitude toward defense counsel or remarks that defense counsel has presented his case in an improper manner may also be prejudicial and erroneous." *Id.*

¶ 61 A defendant must show that comments by the trial judge were prejudicial and that he was harmed by the comments for them to constitute reversible error. *Id.* "Where it appears that the comments do not constitute a material factor in the conviction, or that prejudice to the defendant is not the probable result, the verdict will not be disturbed." *Id.* at 718-19. Thus, even improper

remarks may be harmless error. *Id*. at 719. "[I]n each case an evaluation of the effect upon the jury of a trial court's interjections must be made in the light of the evidence, the context in which they were made and the circumstances surrounding the trial." *Id.*

¶ 62 Defendant points out several instances that demonstrate proof of bias and inappropriate conduct on the part of Judge Cannon beginning at a pre-trial conference that took place on March 20, 2012. Judge Cannon reprimanded counsel for filing a motion to sever from defendant's co-defendant, Estoquio Agustin, almost two years after defendant's arrest. Defense counsel responded that he had only been defendant's counsel for approximately six months. At this hearing Judge Cannon also complained that it should not take the public defender's office two years to file a motion to sever to which defense counsel responded that he was in private practice and no longer worked for the public defender's office. Judge Cannon responded "Oh." This conversation wherein Judge Cannon merely expressed her annoyance at the two-year delay in filing the motion was outside the presence of the jury and therefore could not have prejudiced the defendant or his defense counsel's arguments to the jury.

¶ 63 Defendant further asserts that he was prejudiced in front of the jury when the court denied counsel's request to have defendant remove his shirt before the jury in order to show them scars from the bullet wounds on his torso and his left hand. The State objected to this display and the court sustained the objection. In front of the jury, Judge Cannon told counsel "[t]here is something called a camera, Counsel. You want to take a photograph of his hand and submit to the jury as evidence. If you have his medical records***[t]hat can certainly come in." The defendant was then given an opportunity to explain all of his injuries in detail from the witness stand. During cross-examination the State was permitted to pursue a line of questioning focusing

on the fact that defendant could have taken pictures of his injuries and medical personnel could have testified. Defense objected and his objections were overruled.

¶ 64 While this court does not approve of the use of sarcasm, in this instance the trial court's statement to defense counsel that "there is something called a camera" did not unfairly prejudice the defendant in the presence of the jury. Putting aside the question of relevancy his injuries may have had to either the prosecution or the theory of defense, defendant was not precluded from presenting medical evidence, medical testimony or photographs of the injuries to his torso as evidence. The trial court allowed defendant to show the jury the wound on his hand but did not allow him to remove his clothes in front of the jury. Defendant has not demonstrated how this prejudiced him before the jury and we see no prejudice in this regard.

¶ 65 Prior to trial, the parties agreed *in limine* that the investigation completed by the IPRA would not be presented as evidence. Nevertheless, during trial defense counsel sought to introduce the interviews Officers Vieyra and Daly gave to the IPRA. When defense counsel attempted to introduce this evidence, the State's objections were repeatedly sustained. When defense counsel made a motion to provide the jury with the statements made by Officers Daly and Vieyra to IPRA, the court denied the motion. Judge Cannon stated, "[t]he questions and answers, they are not impeachment. They are hearsay. Just so you know, ladies and gentlemen, you don't get police reports. If police reports were evidence, we'd give you the police reports and go home, so." When defense counsel objected, Judge Cannon responded, "You may disagree, Counsel. That's why there are higher courts. You are not getting that statement, it is not admitted into evidence, okay?"

¶ 66 Judge Cannon's responses to defense counsel in the presence of the jury on this

evidentiary issue should be looked at in the context in which they were made and the surrounding circumstances**.** Judge Cannon was ruling on evidence defendant was attempting to introduce at trial directly violating an agreement reached during a hearing on an *in limine* motion. It is understandable that she would be exasperated in repeatedly instructing defense counsel on this issue and would also desire to advise the jury of an explanation of what had transpired before them. The judge has a responsibility to conduct the proceedings so that each party received a fair trial such that it may be necessary to explain to the jury the reason for a ruling. We do not see how defendant was prejudiced by the court curtailing questioning that violated the court's order.

¶ 67 Shortly after the above incident, a jury instruction conference was held outside the presence of the jury. Defense counsel suggested that the jury instruction conference should have been held earlier in order to save time. Judge Cannon responded that idea was "ludicrous" and that all the evidence needed to be heard before the decisions on proper jury instructions could be made. The trial court also admonished counsel,

> "I am going to caution you not to attempt to act like you are not- like you don't know what you are doing. Please do not play the ineffective role on me now as we do jury instructions or as during closing arguments because should there be a conviction, as God is [sic] my witness, you are not ineffective. You have thought this case out for years. You are not a public defender. You were a public defender. You work for the State Appellate Defender. You are being paid. You have been in court. You know what you are doing. So do not play the ineffective role with me."

¶ 68 Although this comment appears to be somewhat hostile, it occurred outside the presence of the jury and therefore we do not deem it prejudicial to the defendant where it had no influence on the verdict.

¶ 69 At another point during the conference, also outside the presence of the jury**,** both parties were disputing the tendered instructions. The following colloquy occurred:

> "COURT: Folks, let me get something clear. It is 6:15. The jury is going to hear arguments today, and they are going to deliberate today. If you want me to break for an hour, hour and a half, and you guys can bicker, and go back and forth, and talk amongst yourself, I am very happy to get off the bench.
>
> PROSECUTOR: We are ready.
>
> COURT: If you are ready for this and can both conduct yourselves properly, we will do the instructions now. You really have mistaken me for a babysitter. So both of you better..
>
> DEFENSE COUNSEL: All right. I think we are both—
>
> COURT: Well, I don't want to hear chitter-chatter of what you think. I want to do these instructions or not do them. If you need time, I will give you all the time you need. If you need time to gather your thoughts, if you need a bathroom break, if you need a piece of sugar, whatever it takes for you two to behave civilly I'm on board with. Counsel what did you just write to your client?
>
> DEFENSE COUNSEL: I wrote Defense Exhibit 3 on Defense Exhibit 3.
>
> COURT: All right. If you want to talk to your client, you let me know when you are ready. You want to pass notes, you want to talk to people, we will take a recess. Let

me know whenever you are ready."

¶ 70 The court's comments here are directed at both the prosecutor and defense counsel. The only part of the conversation where defense counsel is singled out is when he is asked what he is writing. The above exchange is evidence of Judge Cannon's frustration with both parties who assumedly could not agree on matters including jury instruction. These comments were made outside of the presence of the jury and do not demonstrate any bias or unfair prejudice to the defendant.

¶ 71 Defendant also argues that the trial judge blamed him when the jury sent out a note asking to be excused for the day. Counsel was admonished by the court for being an hour and a half late that morning. The court asked counsel if he needed a phone in order to call and notify the court that he was going to be late. These comments also took place outside the presence of the jury.

¶ 72 Without the benefit of knowing the tone or tenor of these comments, hindsight or further reflection may have resulted in different verbiage. However, this admonishment occurred because of defense counsel's own conduct and perhaps could have been avoided. These comments do not rise to the degree of bias or prejudice that warrant a new trial.

¶ 73 Finally, defendant contends that during the posttrial motion hearing Judge Cannon "attacked him in a six-page diatribe that destroyed any illusion of her impartiality." Judge Cannon told defense counsel that "not only is this motion disingenuous, to make these arguments today when stating that I erred on a ruling on a motion that you withdrew years ago * * * is ridiculous." Judge Cannon then remarked that her "favorite point" in defendant's motion was the suggestion that she was "somehow not doing my job because I did not know that you had left the

public defender's office." The court admonished defense counsel that despite his attempts to provoke a fight that she was not going to participate, stating:

> "This is a trial, Counsel.*** We do not fight during trials, before or after trials. There is no fighting going on here. Okay? No fighting. [Y]ou can try to make me be mad at you. You can try to make me get in your face. You can try to fight with me, but I will not fight with you Counsel. And this is trial strategy. So when this case does go to a higher court , which I am quite sure it will, I am stating now for the record that you have attempted to fight, no one would fight with you, and that was your trial strategy. And you have had years of experience. Perhaps it has worked in other venues. Perhaps it hasn't, but the evidence in this case was proof beyond a reasonable doubt. Your motion for a new trial is respectfully denied."

¶ 74 The trial court's comments here express her belief that defense counsel was asserting ground that would entitle defendant to a new trial in terms that were inaccurate and demeaning to the judge and her conduct during the proceedings. In this instance, the trial court certainly had the right to comment on the allegations made against her. These comments taken as a whole do not evidence judicial bias against the defendant and were not unfairly prejudicial.

¶ 75 At the conclusion of the sentencing hearing the State moved to impound two photographs of Gallegos's torso to prove that it was covered in tattoos, the trial court reprimanded the defense for previously claiming that Gallegos had no tattoos. She noted that Gallegos did not have these tattoos prior to his arrest, which was "one more reason I did not allow him to take off his shirt, but I guess you want to go under the assumption that I didn't want him to take off his shirt in front of the jury because I do not like you, and that's not true." We find this statement by the trial

court was a further reason why she did not allow Gallegos to step down in front of the jury and remove his shirt to show his injuries. If she allowed him to do so, it could have potentially been prejudicial to allow the jury to see defendant's tattoos, especially depending what the tattoos depicted.

¶ 76 The defense relies on *People v Johnson*, 2012 IL App (1st) 091730, as precedent for this court to find the trial court's comments in this case to be *per se* prejudicial. *Id*. at 72. We do not find *Johnson* to be applicable to this case and we observe that the *Johnson* court noted,

> "Our appellate courts will permit a limited amount of impatience, but the closer the case, the more partial or biased the remarks will appear, and the greater the total effect of [the judge's] conduct, the more likely that the case will be reversed on appeal, particularly if there is other error in the record that is close to being reversible error in and of itself." *Id*. (quoting 1 Robert S. Hunter, Trial Handbook for Illinois Lawyers-Criminal § 3:19 (8th ed. 2002)).

¶ 77 Although Judge Cannon did repeatedly express her frustration with defense counsel, in light of the evidence presented at trial and the lack of error otherwise, this court does not believe that the trial court's comments or conduct prejudiced or biased the jury towards Gallegos or his counsel. Nor do we believe that Judge Cannon's comments undermined the fairness of the 44-year sentence she imposed.

¶ 78 The few comments that were made in front of the jury were not prejudicial and did not impact the outcome of the trial. Additionally, many of the admonishments by the trial court were based on specific conduct that occurred and were aimed at both parties not just defense counsel. For the above reasons this court finds that the trial court's comments did not unfairly prejudice

the defendant's right to a fair trial.

¶ 79 With respect to defendant's argument that Judge Cannon's "disgust with the defense plainly undermined the fairness of [his] sentence," we find no evidence in the record before us to suggest that Judge Cannon demonstrated prejudice against defendant during sentencing or that the sentence she imposed was anything but fair. In imposing sentence in this case, the court stated that it had considered "factors in aggravation and mitigation, statutory sentencing issues, the facts of this case along with [defendant's] criminal and social history." The court then imposed a 30-year sentence for attempt murder and a concurrent 14 years' imprisonment for unlawful possession of a firearm by a street gang member. We note that both of these sentences fell within the statutory range of imprisonment and are therefore presumptively proper. *People v. Johns*, 285 Ill. App. 3d 849, 856 (1996); see also 720 ILCS 5/9-1(B)(1) (West 2012); 720 ILCS 5/24-1.8(A)(1) (West 2012). In light of the facts of this case and in light of the mitigating and aggravating circumstances, we find that the trial court properly exercised its discretion, free of any prejudice, in sentencing defendant.

¶ 80 CONCLUSION

¶ 81 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 82 Affirmed.