2016 IL App (1st) 141907-U

No. 1-14-1907

FIFTH DIVISION
December 2, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 12958
	)	
TYLER HORTON,	)	The Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶1 *HELD*: Defendant failed to establish resulting prejudice from his counsel's failure to request IPI Criminal 4th No. 3.12X despite the admission of *Lynch* evidence and, therefore, could not demonstrate ineffective assistance of counsel. Defendant was not entitled to have the jury instructed that, if it found he unreasonably believed in the need for self-defense, he should have been acquitted of attempted first degree murder; thus, his counsel was not ineffective for failing to request such an instruction. Defendant failed to support his as-applied constitutional challenge to the mandatory firearm enhancement.

¶2 Following a jury trial, defendant, Tyler Horton, was convicted of attempted first degree murder and aggravated battery with a firearm. Defendant subsequently was sentenced for the attempted first degree murder charge to 32 years' imprisonment. On appeal, defendant contends: (1) his counsel was ineffective for failing to request an Illinois Pattern Instruction, Criminal No. 3.12X (4th ed. 2000) (IPI Criminal 4th No. 3.12X) to inform the jury that admitted evidence under *People v. Lynch*, 104 Ill. 2d 194 (1984), could be considered in evaluating whether the State disproved his self-defense claim beyond a reasonable doubt; (2) his counsel was ineffective for failing to require that the jury be instructed to acquit him of attempted murder if it found he acted with an unreasonable belief in the need for self-defense; and (3) the mandatory 25-year firearm enhancement was unconstitutional as applied to him where the trial court was deprived of the ability to consider his youth at the time of the offense. Based on the following, we affirm.

¶3 FACTS

¶4 There is no dispute that, on March 15, 2012, defendant shot Denikos Hawkins at the Lowden Homes Chicago Housing Authority complex. Defendant presented a theory of self-defense at trial. Prior to trial, defendant was granted a motion for leave to admit *Lynch* evidence.

¶5 Defense counsel provided the following opening statement, in relevant part:

> "[Hawkins came] up to the basketball court that day. He got into the face of [defendant], so much so, that he put his hand in [defendant's] face. You'll hear about it. You'll hear from witnesses who saw that. You'll hear how Darnell [Fishback, a friend from the neighborhood,] and Tyrrell [*sic*] Horton, defendant's brother,] held onto [defendant] and got off the court, walked off the court. Who followed [defendant]? [Hawkins]. He wasn't quiet about it. He threatened him. He made sure he knew that you can't mess with me like that. You know I got that gun.

***

Then you'll hear about [Hawkins] [later] coming up to [defendant] and confronting [defendant]. When they walked around the side of the house, [Hawkins] got that gun that he was talking about. It's inside of his pants. So, here's [defendant], who earlier in the day, you will hear it from the witness stand, [Hawkins] pushed, threatened, followed him off the basketball court, and now guess who's getting ready to make good on his threat? [Hawkins].

[Defendant] reacted. They fought over the gun and he shot [Hawkins]. So there's no mistake about that. ***.

You'll hear about that from the witness stand and you're going to hear that [defendant] had no choice but to do what he did."

¶6 Hawkins testified that he knew defendant, who was three of four years younger, from the neighborhood. According to Hawkins, on March 15, 2012, defendant, defendant's brother, Terrell, and Darnell Fishback were playing basketball at the Lowden Home's basketball court. The group was playing "shots for dollars," a gambling game. Hawkins approached the group and requested change so that he could play as well. Defendant refused, saying he did not want Hawkins' "snitch money." He claimed that defendant walked past him, asking whether Hawkins was mad. Hawkins testified that he did not respond, but defendant came "up on [Hawkins] again." Hawkins responded by pushing defendant in the chest. He denied punching defendant in the face or threatening defendant. Hawkins further denied that the pair prepared to fight or that defendant's friends had to escort defendant from the basketball court. Instead, Hawkins testified that he left the basketball court, never having issued the threat "know who you're messing with, don't forget I got those guns."

¶7 Hawkins testified that, later the same day, he went out to dinner with his girlfriend, Keisha Ray, for her mother's birthday. Keisha's mother, Vanessa Ray, attended the celebration, along with Keisha's sisters, Kinisha and Kerissa Ray, and Kinisha's boyfriend, Cordero McKnight. Keisha and her family also lived in the Lowden Homes complex. When the group returned to the Lowden Homes around 9 p.m. in Cordero's car, Cordero parked the vehicle in the parking lot behind Vanessa's house. Keisha quickly exited the vehicle to use the restroom in Vanessa's house. Hawkins testified that he gathered the packages of leftover food and Keisha's purse before exiting the vehicle. Kinisha also exited Cordero's car, while Vanessa attempted to rouse Kerissa from sleep. Hawkins stated that he then walked toward Vanessa's house with the packages while Kinisha walked behind him and Vanessa and Kerissa walked behind him still. Hawkins testified that, while walking, he observed defendant in the parking lot. Defendant approached Hawkins as Hawkins walked toward the front of Vanessa's house. According to Hawkins, defendant bumped his shoulder and swore at him. Hawkins did not respond.

¶8 Hawkins testified that defendant followed him around the corner while defendant kept his hands in his pockets. Hawkins stated that he turned back to look at defendant, who was approximately five feet behind Hawkins at the time, and asked defendant why he was following him. Defendant then removed a handgun from his pocket and began shooting at Hawkins. Defendant shot Hawkins eight times—in the arm, back, and legs, one of which hit an artery in Hawkins' leg. Hawkins testified that he briefly lost consciousness. When he awoke, Hawkins observed defendant running toward his house, also located in the Lowden Homes complex. Hawkins stated that he later was transported to a hospital in an ambulance where he fell into a coma for three days and underwent several surgeries. Hawkins testified that the doctors had to remove seven of the bullets and that he had been at risk of losing his leg.

¶9 Hawkins denied carrying a handgun on his person at any time on the date in question. Hawkins also denied physically struggling with defendant over a gun. Hawkins acknowledged his familiarity with guns and identified himself in two pictures containing guns. The photographs were taken two years after the events in question. Hawkins, however, claimed the guns in the photographs were BB guns, although one of the guns contained a silencer.

¶10 Vanessa testified that, when she exited Cordero's car in the parking lot on the date in question, she followed approximately three feet behind Hawkins. Vanessa observed defendant walk toward Hawkins. The men nodded toward one another. Vanessa stated that defendant continued to approach Hawkins at which time he removed a handgun and shot Hawkins from approximately eight feet away. Vanessa had an unobstructed view of the shooting, observing defendant fire six or seven gun shots. According to Vanessa, defendant fled immediately after the shooting. Vanessa denied observing a struggle between defendant and Hawkins before the shots were fired. Vanessa stated that she did not observe Hawkins with a handgun on the date in question. Vanessa testified that she spoke with the police after the shooting, but was not outside when they initially arrived on the date in question. Vanessa stated that she spoke to the police again in June 2012 to "sign some papers."

¶11 Kinisha testified that defendant was standing near the parking lot when her family returned from dinner on the date in question. Kinisha remained in the car and observed defendant follow Hawkins, who was carrying packages of leftover food and Keisha's purse, around the corner. Kinisha could not be sure whether Hawkins and defendant bumped into one another. After defendant and Hawkins disappeared around the corner, Kinisha heard five or six gunshots. Kinisha then observed defendant back up and shoot the handgun two more times. Kinisha called

the police after hearing Vanessa scream that Hawkins had been shot. Kinisha did not observe Hawkins with a handgun on the date in question.

¶12 Keisha testified that, when her family returned from celebrating Vanessa's birthday on the date in question, she ran out of the car to use the bathroom. As she proceeded to the front of the house, Keisha observed defendant standing in the grass on the side of Vanessa's house. While using the bathroom, Keisha heard gunshots and Vanessa subsequently screaming. When Keisha returned to the scene, she observed defendant leaving the area with a handgun. Keisha identified defendant as the shooter to the police upon their arrival. Keisha testified that she never observed Hawkins with a handgun on the date in question.

¶13 Officer Derrick Duszak testified that defendant was arrested on June 20, 2012, following a multiple-month search.

¶14 Defendant testified that he lived with his mother in the Lowden Homes at the relevant time. Defendant's mother's row house was situated across the street from Vanessa's house. Around 11 a.m. or 11:30 a.m. on the date in question, he went to the Lowden Homes basketball court. Defendant approximated that 10 to 30 people were at the court, but only between three and five people were playing basketball. Terrell and Fishback were at the basketball court, as well. According to defendant, when Hawkins arrived at the basketball court, the group was shooting three-point baskets for money. Hawkins wanted to join, but needed change to do so. After asking others for change, Hawkins asked defendant. Defendant responded that he did not have any change, adding, "money changes itself." According to defendant, Hawkins became aggressive, speaking loudly, gesturing, and walking toward defendant. Defendant acknowledged that Hawkins only became aggressive with him, despite being rejected by everyone else on the basketball court when he asked for change. Defendant explained that the reaction was because he

had all the change. When Hawkins was about 1.5 feet from defendant, Hawkins said, "you just won all this money, how the f*** you ain't got change, you a straight b***." According to defendant, Hawkins then "muffed" him, wherein he used his opened right hand to push defendant's face with enough force to push defendant back. According to defendant, he responded by "t[aking] his tail" and attempting to avoid further escalation. Defendant, however, later testified that he raised his fist toward Hawkins, but Terrell, Fishback, and a couple of other individuals stood between him and Hawkins to prevent a fight.

¶15 Defendant stated that he then walked to the other end of the basketball court with Fishback. Hawkins, however, continued to yell defendant's name and followed defendant, adding, "When I catch you, I'm going to smoke you." Defendant understood what Hawkins said to mean that Hawkins would kill him. Hawkins further told defendant that he had "them bangers, I'm going to catch you and shoot you." According to defendant, he did not feel threatened by Hawkins, but he did feel "kind of nervous." Defendant testified that he did not believe Hawkins' statement was a threat. Defendant did say that Hawkins' statement scared him, but not enough to call the police. According to defendant, Hawkins followed him off the basketball court, but then walked in a different direction.

¶16 Defendant further testified that he went home and remained there for a few hours before leaving to pick up his girlfriend, Briana, from the train station located at 95th Street and Lafayette Avenue. Defendant then took Briana to the bus stop. The pair planned to spend time together later that night. Defendant stated that he walked around the neighborhood after parting ways with Briana, but returned home for dinner between 8 p.m. and 9 p.m. After dinner, defendant proceeded to the Lowden Homes parking lot behind Vanessa's house to wait for Briana to pick him up. While waiting, defendant observed a car enter the parking lot and park.

Defendant observed Keisha exit the car and run to her house. Defendant then observed Hawkins exit the car, which made him nervous and "kind of scared." Defendant stated that he had a cellular phone on his person, but he did not use it. In fact, he was using the phone at the time he observed Cordero's car enter the parking lot. Defendant testified that he did not attempt to leave the parking lot or return to his mother's nearby home. Defendant maintained that he was scared, but he did not think anything was going to transpire.

¶17 According to defendant, he and Hawkins locked eyes and Hawkins walked toward defendant. The men greeted one another. Hawkins said, "Didn't I tell you I was going to catch you?" Defendant testified that Hawkins continued approaching while holding bags and defendant observed a gun in Hawkins' waistband. According to defendant, he was scared at the time. Hawkins then reached for his gun with his free hand, so defendant reached for the gun with both of his hands to gain control over it. The pair struggled over the gun for approximately five to ten seconds. Defendant ultimately gained control over it, and Hawkins dropped his bags to try to hit defendant. At that point, defendant discharged the gun. Defendant testified that he was unsure how many times he fired the gun. Defendant denied shooting Hawkins after Hawkins fell to the ground, but acknowledged that he continued shooting as Hawkins fell toward the ground. According to defendant, he had no other choice but to shoot Hawkins because he was afraid of being shot himself. Defendant stated that he ran away with the gun, which he threw in a sewer. Defendant testified that he did not speak to his mother or return home for three months because he knew the police would be looking for him.

¶18 Terrell testified that he lived with his mother at the Lowden Homes. Terrell admitted to having a criminal record of two felony convictions, one in 2007 and one in 2010. According to Terrell, around noon on the date in question, he was playing basketball with defendant, Fishback,

and about five others when Hawkins arrived. Hawkins and Terrell had been friends since grammar school. Terrell testified that, when defendant told Hawkins he did not have change to give to Hawkins, Hawkins approached defendant while pointing and saying something like, "who do you think you're talking to? You little boy. I'll beat you're a***." Terrell, however, testified during cross-examination that Hawkins never threatened defendant. Terrell stated that Hawkins then placed his hand on defendant's face and pushed with enough force to push defendant's head back. In response, Hawkins and defendant "put their dukes up" like "they was [*sic*] fixin' [*sic*] to fight." Terrell walked between the men and brought defendant to the opposite end of the basketball court. While doing so, Hawkins and defendant were shouting back and forth. Terrell and defendant then left the basketball court and proceeded to their mother's house nearby. Terrell testified that he did not observe Hawkins with a handgun and that no one's life was in danger on the basketball court. Terrell stated that defendant appeared to be scared after Hawkins said that he "got them guns." The parties, however, stipulated that, one week before trial, Terrell told a defense investigator that he did not hear Hawkins say anything about guns.

¶19 Latesha Miller testified that, at approximately noon on the date in question, she was sitting outside her house located in the Lowden Homes watching the basketball court, which was situated directly across the street about 100 feet away. At the time, there were approximately 30 people on the court, including defendant and Hawkins. Miller observed "commotion" during which Hawkins pushed defendant's head really hard. According to Miller, Terrell and Fishback then moved defendant to the other end of the basketball court where they continued playing basketball. Miller did not observe any injuries. Miller then observed Hawkins follow defendant, getting "amped and causing another commotion." In response, Terrell ushered defendant toward their mother's house. Miller stated that Hawkins followed defendant off the court. Miller

testified that she then lost sight of defendant and Hawkins. During the series of events, Miller could not hear anything being said on the basketball court. Miller stated that she did not call the police after the incident, adding that "it was no big deal." Miller was not home at the time of the shooting.

¶20 Defendant filed a subpoena for Fishback to appear to testify, but Fishback did not appear. Defendant then rested his case.

¶21 In closing argument, defense counsel attacked the credibility of the State's witnesses and argued in support of the self-defense theory. The jury was then instructed. The jury instructions included an instruction for self-defense, attempted first degree murder, aggravated battery with a firearm, and the applicable firearm enhancement. In particular, the jury was instructed that:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against imminent use of unlawful force.
>
> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

The jury was further instructed that "reasonably believes" means "that the person concerned, acting as a reasonable person, believes that the described facts exist." The jury was not issued an instruction for IPI Criminal 4th No. 3.12X, expressly dealing with *Lynch* evidence.

¶22 During deliberations, the jury sent a question regarding intent. The jury inquired whether "the definition of intent mean [*sic*] that the shooting was planned prior to the incident or if firing multiple shots constitute [*sic*] intent to kill? Does intent have to be premeditated[?]" The court responded, "Intent does not have to be premeditated. Multiple shots fired are facts that you

should consider in arriving at your verdict along with all the evidence in the case. Please continue to deliberate."

¶23 The jury ultimately found defendant guilty of attempted first degree murder and aggravated battery with a firearm. The jury also found the State proved beyond a reasonable doubt the allegation that defendant personally discharged a firearm which proximately caused great bodily harm to Hawkins while committing the offense of attempted first degree murder. The trial court denied defendant's subsequent motion for a new trial.

¶24 At defendant's sentencing hearing, the State requested that defendant be sentenced to no less than 50 years' imprisonment. The range for attempted first degree murder was 6 to 30 years, which was to be served consecutively with the firearm enhancement ranging from 25 years to natural life. Defense counsel requested that defendant be sentenced to the minimum 31-year prison term. Defense counsel presented testimony and a letter on defendant's behalf, and highlighted defendant's age of 18 at the time of the offense, his lack of any adult convictions with only one juvenile adjudication for criminal trespass, and his close relationship with his family and community. The trial court ultimately found defendant had an "outstanding chance for rehabilitation" and sentenced him to seven years' imprisonment on the attempted first degree murder charge with the consecutive 25-year firearm enhancement for a total of 32 years' imprisonment. The court denied defendant's subsequent motion to reconsider the sentence.

¶25 This appeal followed.

¶26 ANALYSIS

¶27 I. Ineffective Assistance of Counsel

¶28 Defendant first contends his counsel was ineffective for failing to request that the jury be instructed with IPI Criminal 4th No. 3.12X. Defendant additionally contends his counsel was

ineffective for failing to request that the jury be instructed to acquit him of attempted first degree murder if it found he acted with an unreasonable belief in the need for self-defense.

¶29 We begin with the familiar principles for resolving claims of ineffective assistance as provided by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced as a result. *Id.* at 687. To show deficient representation, a defendant must establish his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of a counsel's performance is highly deferential, such that a court must indulge in a strong presumption that the counsel's conduct fell within the wide range of professional assistance. *Id*. at 689. To demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's deficient representation, the result of the proceeding would have been different. *Id*. at 694. The Supreme Court advised that "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome" of the proceeding. *Id*. Moreover, because the defendant must satisfy both parts of the *Strickland* test, if an ineffective assistance claim can be disposed of on the ground of lack of sufficient prejudice, a court need not consider the quality of the attorney's performance. *Id*. at 697.

¶30 Our supreme court has further advised that the right to effective assistance of counsel refers to competent, not perfect, representation. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 101. In other words, *Strickland* only requires a fair trial for the defendant; one that is free of errors so egregious that they, in all probability, caused the conviction. *Id*.

¶31 A. IPI Criminal 4th No. 3.12X

¶32 Defendant argues that, although the trial court admitted defendant's *Lynch* evidence demonstrating Hawkins' prior violent acts, defense counsel failed to request an instruction on

how to weigh that evidence, thereby depriving the jury of the necessary tools to analyze the *Lynch* evidence and reach a verdict based on those facts.

¶33 Pursuant to *Lynch*, where a defendant has raised a theory of self-defense and has presented some evidence in support thereof, evidence of the victim's violent or aggressive character may be admissible to demonstrate the circumstances confronting the defendant, the extent of the apparent danger, and the motive or state of mind that influenced the defendant. *People v. Dennis*, 373 Ill. App. 3d 30, 52 (2007). More specifically, *Lynch* provided that a victim's aggressive or violent character may be admissible to support a theory of self-defense under two circumstances: (1) where the defendant knew of the victim's violent tendencies at the time because that knowledge "necessarily affects his perceptions of and reactions to the victim's behavior;" and (2) where there were conflicting accounts of who was the initial aggressor in the confrontation, even if the defendant was unaware of the victim's violent tendencies, because a victim's propensity for violence "tends to support the defendant's version of the facts." *Lynch*, 104 Ill. 2d at 199-201. The *Lynch* court noted that deadly force may be reasonable in response to behavior by a person known to have violent and aggressive tendencies where such force otherwise would be unreasonable in an altercation with a nonviolent person. *Id*. at 200.

¶34 IPI Criminal 4th No. 3.12X provides:

> "In this case the State must prove beyond a reasonable doubt the proposition that defendant was not justified in using the force which he used. You have [(heard testimony) (received evidence)] of ____'s [(prior conviction of a violent crime) (prior acts of violence) (reputation for violence)]. It is for you to determine whether ___ [(was convicted) (committed those acts) (had this reputation)]. If you determine that ____ [(was convicted) (committed those acts) (had this reputation)] you may consider that evidence

in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in using the force which he used."

¶35 Because defendant was required to satisfy both parts of the *Strickland* test, we first choose to address the prejudice prong of the analysis. See *Strickland*, 466 U.S. at 697. In so doing, we assume defense counsel's conduct in failing to request IPI Criminal 4th No. 3.12X was unreasonable. However, even based on that assumption, we ultimately find defendant cannot sufficiently establish he suffered prejudice as a result of his counsel's deficient performance.

¶36 Defendant's theory of self-defense centered on the events that took place at the Lowden Homes basketball court earlier in the day of March 15, 2012, and later that night in the Lowden Homes parking lot. Defendant argued that he feared for his safety because of Hawkins' verbal statements on the basketball court that Hawkins would shoot him at a later time and because of Hawkins' physical confrontation also while on the basketball court in which he forcefully pushed defendant in the face. Defendant maintained that, based on these earlier events, he was justified in shooting Hawkins in the Lowden Homes parking lot later that evening when he observed Hawkins reach for a handgun. Defendant, however, was the only witness that testified to hearing Hawkins' statements and to observing Hawkins with a handgun at any time on the date in question. Moreover, defendant testified he did not feel threatened by Hawkins on the basketball court. Then, although describing feeling nervous and scared, defendant never contacted the police at any time on the date in question. Instead, later that night, he waited in a parking lot adjacent to the home he knew to be Hawkins' girlfriend's mother. When he observed Hawkins exit a vehicle in the parking lot, he again did not use the phone he had in his hand at the time to call the police or to contact anyone else for help nor did he attempt to run to the safety of his mother's home across the street.

¶37 Terrell, defendant's brother, was impeached by a stipulation in which he told a defense investigator, just one week before trial, that he never actually heard Hawkins issue any threat about a gun. Terrell and Miller did testify to observing Hawkins push defendant's head back during a verbal disagreement or "commotion" on the basketball court earlier in the day; however, Terrell testified that no one's life was in danger and Miller described the "commotion" between Hawkins and defendant as "no big deal." Importantly, Hawkins, Kinisha, and Vanessa all testified that Hawkins walked past defendant toward Vanessa's home while carrying leftover food packages, but defendant followed him and then shot him. Moreover, Kinisha stated that she could not be sure whether the men had any physical contact before the shooting, but Vanessa expressly testified that there was no struggle between the men before the shooting near her house. Furthermore, Hawkins testified that he never had a handgun on his person on the date in question despite his admitted familiarity with handguns and concession that he appeared with some form of a gun in two photographs taken after the events in question. Kinisha, Vanessa, and Keisha all testified that they did not observe Hawkins with a handgun at any time on the date in question.

¶38 It is also relevant to our prejudice prong analysis to recognize the instructions that the jury did receive. When reviewing the adequacy of jury instructions, a court must consider all of the instructions as a unit to determine whether they fully and fairly covered the law. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 110. A claim of ineffective assistance of counsel with regard to jury instructions can be supported only where the absent instruction was "so critical to the defense that its omission 'den[ied] the right of the accused to a fair trial.' " *People v. Falco*, 2014 IL App (1st) 111797, ¶ 16 (quoting *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008)).

¶39 We conclude that IPI Criminal 4th No. 3.12X was not so critical to the defense that its omission denied defendant a fair trial. The jury was instructed on attempted first degree murder, such that:

> "A person commits the offense of attempt first degree murder when he, without lawful justification and with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual.
>
> The killing attempted need not have been accomplished."

With regard to attempted first degree murder, the jury was further instructed that:

> "To sustain the charge of attempt first degree murder, the State must prove the following propositions:
>
> First: That the defendant performed an act which constituted a substantial step toward the killing of an individual; and
>
> Second: That the defendant did so with the intent to kill an individual; and
>
> Third: That the defendant was not justified in using the force which he used.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

Moreover, the jury was instructed on self-defense, such that "a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

The jury additionally was instructed that "reasonably believes" means "that the person concerned, acting as a reasonable person, believes that the described facts exist." Accordingly, in conjunction with the instruction that the jury was to consider all properly admitted evidence, *i.e.*, the *Lynch* evidence, the jury was instructed that it could use the *Lynch* evidence to assess defendant's theory of self-defense and whether he reasonably believed the facts were such that he needed to shoot Hawkins. Contrary to defendant's statement, we do not think it was a "speculative leap" that the jury had the necessary tools to fully analyze the evidence and reach a decision based on those facts.

¶40 Furthermore, while not evidence, defense counsel's opening statement and closing argument reinforced the theory of self-defense, in that defendant was justified in shooting Hawkins where, based on the events on the basketball court earlier in the day on March 15, 2012, defendant reasonable believed he needed to shoot Hawkins to protect himself when Hawkins reappeared later that night.

¶41 In sum, based on the evidence presented and the instructions the jury received, we cannot say there was a reasonable probability the outcome of defendant's trial would have been different had defense counsel requested the jury be instructed that, if it determined that Hawkins committed the prior acts of violence, it could consider the evidence in deciding whether the State proved beyond a reasonable doubt that defendant was not justified in shooting Hawkins. Accordingly, we conclude that defendant failed to sufficiently demonstrate he suffered prejudice as a result of defense counsel's failure to request IPI Criminal 4th No. 3.12X. Defendant's ineffective assistance of counsel claim, therefore, must fail.

¶42 B. Unreasonable Belief in Need for Self-Defense

¶43 Defendant next contends his counsel was ineffective for failing to seek a jury instruction requiring acquittal of attempted first-degree murder if the jury found defendant had an unreasonable belief in the need for self-defense. Defendant relies on *People v. Reagan*, 99 Ill. 2d 238 (1983), and *People v. Lopez*, 166 Ill. 2d 441 (1995), for support.

¶44 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 supreme court explained 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*. The offense of 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*. The supreme court concluded that, because it is impossible to intend an unreasonable belief, the offense of attempted voluntary manslaughter based on an imperfect self-defense could not exist. *Id*. Similarly, in *Lopez*, our supreme court held that the offense of attempted second degree murder does not exist in Illinois because:

> "[T]he crime of attempted second degree murder would require the intent to commit the specific offense of second degree murder. Thus, the intent required for attempted second degree murder, if it existed, would be the intent to kill without lawful justification, plus the intent to have a mitigating circumstance present. However, one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force. Moreover, concerning the mitigating factor of an imperfect self-defense, one cannot intend to unlawfully kill while at the same

> time intending to justifiably use deadly force. Thus, the offense of attempted second degree murder does not exist in this State." *Lopez*, 166 Ill. 2d at 448-49.

¶45 We find *Reagan* and *Lopez* do not support defendant's argument. Neither *Reagan* nor *Lopez* stands for the proposition that a defendant who established an unreasonable belief in the need for self-defense cannot be convicted of attempted first degree murder. Instead, when a jury finds sufficient evidence to convict a defendant of attempted first degree murder, as in this case, the jury necessarily finds that the defendant had the specific intent to commit first degree murder. The offense of attempted first degree murder cannot be mitigated by the defendant's unreasonable belief in the need for self-defense. *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 46.

¶46 In *Guyton*, this court rejected a contention that a jury's verdict of attempted first degree murder of one victim must be vacated where the jury found the defendant guilty of second degree murder of the second victim based on an unreasonable belief in the need for self-defense. *Id*. 40. In so doing, this court explained:

> "Because there is no offense of attempted second degree murder, the jury could not be instructed and could not find the defendant guilty of attempted second degree murder *** based on the *** unreasonable belief in the need for self-defense. In other words, because the defendant did not actually kill [the victim], the legislature determined he could not lawfully mitigate his attempt to murder him because he had the same unreasonable belief in the need for self-defense." *Id*. ¶ 46.

This court found it relevant that 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 resulting from

provocation. *Id*. ¶ 61. The legislature is presumed to know of judicial interpretation of statutes; therefore, by its inaction, it has provided that defendants acting under an imperfect self-defense claim can nonetheless be convicted of attempted first degree murder. *Id*. ¶¶ 45-46.

¶47 Based on the law, as it stands, we reject defendant's argument that the jury should have been instructed to acquit him of attempted first degree murder if it found he unreasonably believed he needed to defend himself against Hawkins. We, therefore, conclude that defendant's ineffective assistance claim based on a faulty jury instruction must fail.

¶48 II. As-Applied Constitutional Challenge to the Firearm Enhancement

¶49 Defendant finally contends the mandatory 25-year firearm enhancement is unconstitutional as applied to him. More specifically, defendant argues the sentencing statute is invalid as applied to him because it did not allow the trial court to consider his youth, "almost non-existent criminal history," and rehabilitative potential.

¶50 The eighth amendment, which is applicable to the states through the fourteenth amendment (see *Robinson v. California*, 370 U.S. 660, 666 (1962)), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., amend. VIII. The eighth amendment, also known as the cruel and unusual punishment clause, has been interpreted by the Supreme Court as prohibiting "inherently barbaric punishments" in addition to those that are disproportionate to the offense. *Graham v. Florida*, 560 U.S. 48, 59 (2010). Moreover, article I, section 11, of the Illinois Constitution of 1970, also known as the proportionate penalties clause, provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11.

¶51 Pursuant to section 8-4(a), (c)(1)(D) of the Criminal Code of 2012 (Criminal Code), defendant was subject to a mandatory 25-years-to-life firearm enhancement. See 720 ILCS 5/8-4(a), (c)(1)(D) (West 2012). This enhancement was added to the Class X sentence of not less than 6 years and not more than 30 years. 730 ILCS 5/5-4.5-25(a) (West 2012).

¶52 The law is clear that a statute is presumed to be constitutional, and the party challenging it bears the burden of demonstrating its invalidity. *People v. Hollins*, 2012 IL 112754, ¶ 13. Moreover, where reasonably possible, we must construe a statute so as to affirm its validity and constitutionality. *Id*. Whether a statute is constitutional raises a question of law, which we review *de novo*. *Id*.

¶53 The United States Supreme Court has issued three eighth amendment cases addressing juvenile sentencing issues. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the eighth amendment bars capital punishment for juvenile offenders under the age of 18. *Id*. at 568. In reaching its conclusion, the Supreme Court identified the key differences between juveniles and adults, such that juveniles lack maturity and have an underdeveloped sense of responsibility, are more vulnerable to negative influences and outside pressures, and have a less developed character. *Id*. at 569-70. The Court stated that juveniles have a "diminished culpability" and, thus, the "penalogical justifications for the death penalty apply to them with lesser force than to adults." *Id*. at 571. Five years later, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court held that a sentence of life without the possibility of parole violates the eighth amendment when imposed on juvenile offenders who commit nonhomicide offenses. *Id*. at 74-75. The *Graham* Court found that life without parole is the "second most severe penalty permitted by law" (internal quotation marks omitted) and "improperly denies the juvenile offenders a chance to demonstrate growth and maturity." *Id.* at 69, 73. Most recently in *Miller v.*

Alabama, 567 U.S. ___, 132 S. Ct. 2455 (2012), the Supreme Court held that the eight amendment prohibits a sentencing scheme that mandates life in prison without parole for juvenile offenders, even for those convicted of homicide offenses. *Miller*, 567 U.S. ___, 132 S. Ct. 2455. The Supreme Court reasoned that mandatory life without parole penalties "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*. at ___, 132 S. Ct. at 2467. The Court added that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id*. at ___, 132 S. Ct. at 2469.

¶54 Defendant argues that, as applied to him, the mandatory firearm enhancement was "particularly harsh and unconstitutionally disproportionate" because he was 18-years-old at the time of the offense and had no adult convictions, only one non-violent adjudication as a delinquent for criminal trespass to a vehicle. Recognizing that defendant was not a juvenile at the time of the offense, he maintains his culpability should have been minimized where his brain maturity and cognitive functioning were similar to that of a 16 or 17-year-old.

¶55 Illinois courts have repeatedly been asked to extend *Miller*'s prohibition on mandatory life sentences for juvenile offenders to mandatory term-of-years sentences imposed upon juveniles, even sentences of such length that they could arguably be described as *de facto* life sentences. Our courts consistently have rejected those requests. See *People v. Wilson*, 2016 IL App (1st) 141500, ¶¶ 32-34, *People v. Patterson*, 2014 IL 115102, ¶¶ 107-11; *People v. Pace*, 2015 IL App (1st) 110415, ¶¶ 131-34; *People v. Reyes*, 2015 IL App (2d) 120471, ¶¶ 22-25, *appeal allowed*, No. 119271 (Ill. Sept. 30, 2015); *People v. Cavazos*, 2015 IL App (2d) 120444, ¶¶ 87-88; *People v. Banks*, 2015 IL App (1st) 130985, ¶¶ 20-24. Instead, our courts have held

that *Miller* requires a court to account for a defendant's youth before sentencing a juvenile to the *harshest* possible penalties, which is not every time a juvenile is sentenced. *Pace*, 2015 IL App (1st) 110415, ¶ 132 ("*Miller* *** merely stands for the proposition that the state cannot impose adult mandatory *maximum* penalties on a juvenile offender without permitting the sentencing authority to take the defendant's youth and other attendant circumstances into consideration" (emphasis in original)); *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 67 (the Supreme Court "has drawn the eighth amendment line at life without the possibility of parole and we cannot cross that line").

¶56 Moreover, in *People v. Leon Miller*, 202 Ill. 2d 328, 336 (2002), our supreme court instructed that:

> "We have repeatedly recognized that the legislature has discretion to prescribe penalties for defined offenses. [Citation.] The legislature's discretion necessarily includes the power to prescribe mandatory sentences, even if these mandatory sentences restrict the judiciary's discretion in imposing sentences. [Citation.] However, the power to impose sentences is not without limitation; the penalty must satisfy constitutional constrictions."

¶57 Until the Illinois or United States Supreme Court rules otherwise, we will continue to follow the line of cases limiting *Miller* to instances of mandatory life imprisonment without the possibility of parole. See *Pace*, 2015 IL App (1st) 110415, ¶ 134. In this case, not only was defendant not a juvenile at the time of the offense, the trial court had discretion to impose a sentence between 31 years' and life imprisonment. Defendant's 32-year sentence did not amount to life imprisonment without the possibility of parole. We, therefore, conclude defendant failed to satisfy his burden of persuading this court that his eighth amendment rights were violated.

¶58 Turning to defendant's proportionate penalties clause argument, there has been some debate regarding whether the proportionate penalties clause offers a defendant greater protection than the eighth amendment. In *Pace*, this court considered the competing arguments and held, based on the relevant law, that, when a punishment has been imposed, the proportionate penalties clause provides greater protection. *Id*. ¶ 139. Accordingly, we independently analyze whether defendant's sentence violates the proportionate penalties clause.

¶59 To succeed in a proportionate penalties claim, a defendant must show either that the penalty is degrading, cruel, "or so wholly disproportionate to the offense that it shocks the moral sense of the community," or that another offense containing the same elements has a different penalty. (Internal quotation marks omitted.) *Gipson*, 2015 IL App (1st) 122451, ¶ 69.

¶60 Defendant argues that, like the defendant in *Gibson*, his 32-year sentence is not proportionate where he will not be released from prison until he is 46 years old, which is well past the time when he could be restored to useful citizenship, especially considering the trial court found he had an "outstanding chance" for rehabilitation. We disagree. Unlike the defendant in *Gibson*, who was 15 years old at the time of the offense, suffered a mental illness, and was prone to impulsive behavior, defendant in this case was 18 years old at the time of the offense and had no such history of mental illness or impulsive behavior. See *Gibson*, 2015 IL App (1st) 122451 ¶ 73. Nor did the trial court in this case express its frustration with the statutory limitations for constructing an appropriate sentence. *Id.* ¶ 76.

¶61 Simply stated, defendant cannot establish his sentence was so wholly disproportionate to the offense that it shocks the moral sense of the community. Defendant armed himself with a handgun and waited in the Lowden Homes parking lot for Hawkins to return to his girlfriend's mother's home to retaliate for the earlier rejection and altercation at the Lowden Homes

basketball court. Defendant followed Hawkins as Hawkins passed him and walked toward Vanessa's house. Defendant then shot Hawkins multiple times before fleeing the neighborhood and hiding out until he was picked up by the police three months after the offense. Hawkins was shot eight times in the arm, back and leg. He underwent several surgeries, was in a coma, and nearly lost his leg as a result of defendant's actions. We, therefore, conclude that defendant's as-applied constitutional challenge to the mandatory 25-year firearm enhancement must fail.

¶62 CONCLUSION

¶63 We affirm the judgment of the trial court where defendant failed to establish ineffective assistance of counsel and failed to support his as-applied challenge to the mandatory 25-year firearm enhancement.

¶64 Affirmed.