2017 IL App (1st) 143867-U

No. 1-14-3867

Order filed May 24, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 13129
	)	
TIRELL REED,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of two counts of second-degree murder and two counts of aggravated discharge of a firearm are affirmed over his contention that the trial court erred in denying his motion *in limine*, filed pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984), to introduce evidence of the victims' propensity for violence. Defendant forfeited review of the court's alleged error in excluding from evidence the victims' prior convictions because the error did not amount to plain error where the evidence presented against defendant at trial was not closely balanced. The matter is remanded for a new sentencing hearing because the trial court relied on the death of the victims, a factor inherent in the offense of second-degree murder, as an aggravating factor in sentencing.

¶ 2 Following a bench trial, defendant Tirell Reed was found guilty of two counts of second degree murder and two counts of aggravated discharge of a firearm. He was sentenced, respectively, to two consecutive terms of 20 years' imprisonment and two concurrent terms of 10 years' imprisonment to be served consecutively to his two 20-year terms. On appeal, defendant contends that the trial court erred in denying his motion *in limine* to introduce evidence of the victims' propensity for violence and thereby violated his right to present a complete self-defense claim. He also contends that his total sentence of 50 years' imprisonment is excessive. We affirm and remand for a new sentencing hearing.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested in connection with a June 9, 2010, shooting that occurred outside of an apartment building at 4752 South Forrestville Avenue where numerous people had gathered for a post-funeral reception. The record shows that, after a brief altercation on the back porch of the building, defendant shot William Huntley, Frenchie Ford and Lewis Bell, all of whom were affiliated with the same street gang as defendant. As a result of the shooting, Huntley and Ford were killed.

¶ 5 Defendant was charged by indictment with 59 counts of first-degree murder for the death of Huntley, 61 counts of first-degree murder for the death of Ford, four counts of attempted first-degree murder of Bell, one count of aggravated battery with a firearm of Bell, two counts of attempted first-degree murder of, each, Antwon Paul and Craig Hopkins, and one count of aggravated discharge of a firearm in the direction of, each, Paul and Hopkins. The State ultimately *nolle prossed* the charges of attempted first-degree murder and aggravated battery with a firearm of Bell.

¶ 6 On February 4, 2011, defendant filed an answer to the State's motion for pretrial discovery, notifying the State of his intent to assert the affirmative defense of self-defense and provocation. When a defendant raises a claim of self-defense, he may be permitted, pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984), to present evidence of the victims' aggressive and violent character, if such evidence exists, in order to demonstrate which party was the aggressor.

¶ 7 Prior to trial, defendant filed a *Lynch* motion, seeking to introduce into evidence numerous past instances of Huntley's, Ford's and Bell's violent behavior to show that they were the initial aggressors on the date of the shooting. The record shows that, over the course of more than two years, defendant filed a number of pleadings related to his *Lynch* motion, including a memorandum of law in support of the motion, an addendum to that memorandum, a supplemental motion, an amended motion and another *Lynch* motion. The State responded by filing motions *in limine* to bar the introduction of the *Lynch* evidence unless defendant laid a proper foundation.

¶ 8 The trial court held a number of hearings on defendant's motion and the matter was continued numerous times for defendant to secure witnesses to testify about the events he sought to introduce as *Lynch* evidence. Judge Rosemary Grant Higgins presided over most of these hearings and entered a number of rulings on the specific items and events defendant sought to admit as *Lynch* evidence. The case was ultimately reassigned to Judge Angela M. Petrone, who, after reviewing the pleadings and Judge Higgins's rulings, entered a written order summarizing the pretrial proceedings and the numerous rulings on defendant's *Lynch* motion. Judge Petrone also presided over additional hearings on defendant's motion and entered further rulings on the

Lynch materials defendant sought to present at trial. Because defendant contends that the trial court erred in denying his motion, we recount the pretrial proceedings in detail.

¶ 9 Pretrial Proceedings

¶ 10 In his *Lynch* motion and memorandum of law in support thereof, defendant alleged that he had known Huntley, Ford, and Bell for a number of years because they were all members of the Goon Squad of the Four Corner Hustlers street gang. The victims were "ranking members" of the gang and defendant was their "foot soldier." In his memorandum of law, defendant alleged that there were conflicting witness reports about who was the initial aggressor during the shooting and therefore he was entitled to present evidence of the victims' propensity for violence to support his version of events that the victims were the aggressors.

¶ 11 Specifically, defendant alleged that a pretrial investigation revealed that the victims had a history of arrests and violent behavior and were, in relevant part, involved in the following events that defendant sought to admit into evidence: (1) on June 10, 2005, Ford was convicted of robbery and alleged armed robbery; (2) on October 30, 1999, Bell was arrested for aggravated battery when he fired shots in the direction of James Osby causing damage to Osby's car; and (3) on June 9, 2003, Bell was convicted of aggravated assault of a peace officer, stemming from his 2002 attempt to strike Chicago police officer John O'Ryan in the head. During this latter incident, Bell also fled when the officers attempted to take him into custody and, once in custody, "kicked out" the back window of a police car and spat on the arresting officers. In the memorandum of law in support of the motion, defendant notified the court that Bell was awaiting trial for first-degree murder and that witnesses from that case may be called to testify.

¶ 12 In an addendum to his memorandum of law in support of his *Lynch* motion, defendant also sought to introduce evidence of his personal knowledge of Huntley's, Ford's and Bell's propensity for violence. He further sought to introduce evidence that Ford and Bell had threatened him the day before the shooting in question. In the addendum, defendant alleged that the victims recruited him to join the gang in 2003. At that time, because of defendant's young age, he did not participate in crimes committed by the victims. Instead, defendant stored guns and drugs at his house on behalf of the victims. Defendant alleged that, prior to the date of the shooting in question, Huntley, Ford and Bell talked to him about their many robberies. Ford also talked to defendant about shoot-outs he had had with a rival gang. Defendant alleged that Bell, in particular, had a reputation of being a "killer," who had committed multiple murders. Defendant acknowledged that he had never personally witnessed the victims harm an individual, but argued that their "reputations commanded the respect and fear of others." Defendant alleged that on June 8, 2010, the day before the shooting in question, Ford and Bell expressed to him that they were unhappy with his friendship with "I.B.," Ford's cousin. Ford and Bell told defendant that he was "trying to [make] a name for himself" by associating with I.B. and that they were "going to do that," which defendant understood to mean that they were going to kill him.

¶ 13 At the hearing on defendant's *Lynch* motion, the court heard arguments from the parties and made numerous rulings on the specific instances of the victims' history of arrests and violent behavior that defendant sought to introduce into evidence. With regard to Ford's 2005 conviction for robbery and alleged armed robbery, the court stated that it would not rule on that item until defendant could present a proffer or a witness to testify about the nature of Ford's underlying conduct. With regard to Bell's 1999 arrest for aggravated battery, the court stated that that item

would be admissible if defendant presented a witness to testify about the event. Similarly, with regard to Bell's 2003 conviction for aggravated assault of a peace officer, the court stated that it would allow this item into evidence, but requested that defendant present a proffer or a witness to testify about the underlying incident. Likewise, with regard to Bell awaiting trial for murder, the court stated that this too was admissible if defendant presented a proffer or a witness.

¶ 14 Finally, with regard to defendant's personal knowledge of the victims' propensity for violence and that they had threatened him the day before the shooting, the court stated that it would consider this item if defendant "narrow[ed] it down and reframe[ed] it." The court noted that this evidence, as presented by defendant, was "too amorphous" for the court to make a specific ruling about the victims' propensity for violence. The court admonished defendant that he needed to inform the court of "specific information" about the victims that he expected to present at trial. The court then continued the hearing several times for defendant to secure witnesses to testify about the events he sought to introduce as *Lynch* evidence.

¶ 15 Before the matter was recalled, defendant filed a supplemental motion to admit *Lynch* material. In the supplemental motion, defendant alleged that in 2005 Ford was convicted of robbery and armed robbery. Defendant sought to admit a certified copy of Ford's conviction for these offenses through the testimony of the robbery victims, Frank Potter and Gary Lindsey. In the motion, defendant also alleged that in 1999 Bell was arrested for aggravated battery as a result of a shooting involving James Osby. Defendant claimed that, during the incident, Bell shot at Osby and that Osby would testify regarding this incident. In the motion, defendant further alleged that Bell was convicted of aggravated assault of a peace officer. Defendant sought to

admit a certified copy of Bell's conviction for this offense through the testimony of Officers O'Ryan and Giannini.

¶ 16 When the matter was recalled, the court advised defendant to review the court's previous rulings on the events he sought to admit as *Lynch* evidence and informed him that "merely stating that you have witnesses *** is not sufficient." The court admonished defendant that it had previously requested a proffer as to the contents of the testimonies of the relevant witnesses before it could rule on the admissibility of the materials defendant sought to admit as *Lynch* evidence. The court informed defendant that he needed to be more specific regarding the contents of the named witnesses' testimonies and then granted defendant leave to amend his supplemental motion in accordance with the court's instructions.

¶ 17 Defendant filed an amended motion to admit *Lynch* material, seeking to admit into evidence Ford's conviction for robbery and alleged armed robbery through the testimonies of Potter and Lindsey. In the amended motion, defendant alleged that an investigator from the office of the Public Defender had interviewed Potter about the robbery. Potter told the investigator, that on May 22, 2004, he was seated in the driver's seat of a vehicle when Ford approached the vehicle and opened the driver's side door. Ford displayed a weapon and said "yeah, mother*****r, you know what time it is. Give me everything in your pockets." Potter, who was in fear for his life, complied and tendered $1,450 to Ford. Potter then fled and notified police, who apprehended Ford and recovered most of the money. Defendant tendered to the State a copy of the investigation report about this incident.

¶ 18 In the amended motion, defendant also sought to admit Bell's 1999 arrest for aggravated battery, alleging that Bell shot at Osby during the underlying incident. Defendant stated that an

investigator from the office of the Public Defender had interviewed Osby. Defendant claimed that, as an offer of proof, Osby, if called to testify, would state that, on October 30, 1999, he was the driver of a car that was stopped at a stop sign in the vicinity of 70th Street and Clyde Avenue. There, a car driven by Bell pulled up "nose to nose" to Osby's car. "Bump J" exited Bell's car and started shooting at Osby's car. Osby drove away from the area at a high rate of speed and saw Bump J standing in the middle of the street shooting in his direction. Osby reported the incident to police and, subsequently, identified the shooter and Bell at Area 3 Police Headquarters. Osby signed a complaint related to the incident, but did not attend the subsequent court date.

¶ 19 In the amended motion, defendant further sought to admit a certified copy of Bell's 2003 conviction for aggravated assault of a peace officer. Defendant alleged that an investigator from the office of the Public Defender interviewed an Officer Giannini. The officer stated that, while she did not recall the underlying events of Bell's conviction, she "signed off" on the arrest report and would adopt the contents of the report. The report indicates that Bell was arrested because he was causing a disturbance on a public way by shouting and threatening pedestrians. During the arrest, Bell fled and, as he ran past Officer O'Ryan, he attempted to strike the officer in the head with his elbow. Bell was apprehended after a short foot chase and placed into the back seat of a police car. While inside the car, Bell "kicked out" the rear driver's side window and attempted to hit Officer O'Ryan with his feet.

¶ 20 The State filed an amended motion *in limine* to bar *Lynch* evidence, detailing each item defendant sought to introduce, the court's previous rulings on these items, and responding to each item in turn. In its motion to bar, the State pointed out that Ford was convicted of robbery

and possession of a stolen motor vehicle, not robbery and armed robbery as alleged by defendant. The State argued that these convictions were inadmissible because the report of the incident showed that the victim, Potter, had lied to police at the scene about the underlying events of the robbery.

¶ 21 With regard to Bell's arrest for aggravated battery stemming from the shooting involving James Osby, the State notified the court that at the time the court made its preliminary ruling regarding this evidence it had been presented with incomplete and incorrect information. Namely, that Bell was the shooter. The State argued in its motion to bar that this evidence was inadmissible under *Lynch* because it did not amount to a prior act of violence committed by Bell where Bump J., not Bell, was the shooter. The State also notified the court that there was additional information from defendant's interview with Osby that was not included in defendant's amended motion. Specifically, that Osby was acquainted with Bell and that Bell was charged with misdemeanor attempt aggravated assault and attempt criminal damage to property. These charges were ultimately dismissed when the complaining witness did not appear in court.

¶ 22 With regard to Bell's conviction for aggravated assault of a peace officer, the State argued that this evidence was inadmissible under *Lynch* because it was remote in time and Officer Giannini was unable to remember the incident, but rather could only attest to the hearsay contents of a police report she had signed about the incident. The State maintained that such hearsay was insufficient for purpose of *Lynch*. Finally, with regard to defendant's personal knowledge of the victims' propensity for violence the State argued that defendant needed to be more specific than merely alleging that the victims were members of a gang.

¶ 23 When the matter was recalled, the court admonished defendant that it had made "extremely detailed" rulings regarding what matters it would admit as *Lynch* evidence and that it would not continue to give "pre-rulings" on defendant's motion. The court advised defendant that its previous rulings would stand unless defendant was able to secure witnesses to testify about the specific matters he sought to admit as *Lynch* evidence. The court then heard arguments from the parties.

¶ 24 At the hearing, defendant recounted the evidence presented in his amended motion and argued for the admissibility of Ford's robbery conviction and Bell's aggravated assault of a peace officer conviction. Defendant argued that these convictions were admissible under *Lynch* because there were conflicting accounts of what happened during the shooting and the convictions were for violent offenses. The State informed the court of the inconsistencies in defendant's initial *Lynch* motion, including, in pertinent part, that Ford was not convicted of armed robbery and that Bell did not shoot at Osby. After hearing arguments, the court granted defendant's motion with regard to Ford's robbery conviction, but denied it with regard to Bell's aggravated assault of a peace officer conviction.

¶ 25 The case was then reassigned to Judge Petrone, and the matter was continued several times for the court to review the pleadings and rulings relating to defendant's *Lynch* motion, and to clarify what materials would be admitted into evidence.

¶ 26 Before the matter was recalled, defendant filed another motion to admit *Lynch* material. In this motion, defendant sought to admit into evidence Bell's 2012 conviction for first-degree murder.

¶ 27 When the matter was recalled, the court informed the parties that it had summarized, in a written order, the pleadings related to defendant's *Lynch* motion and Judge Higgins's rulings on the numerous items defendant sought to admit into evidence. In the written order, the court also entered additional rulings on defendant's motion.

¶ 28 In the order, the court found, in relevant part, many of defendant's allegations regarding the victims' prior acts inadmissible, but noted that it may have allowed this evidence had defendant presented a proper witness to testify about the nature of these acts. Specifically, the court found that Ford's robbery conviction was inadmissible because Potter, the only witness to the robbery produced by defendant, admitted to defendant's investigator that he lied to police about the incident. The court also found that Bell's alleged arrest for aggravated battery of Osby was inadmissible because Osby told defendant's investigator that Bell was not the shooter. The court further found that Bell's conviction for aggravated assault of a peace officer was inadmissible because defendant failed to produce a witness to testify about Bell's underlying conduct. With regard to this allegation, the court noted that Officer Giannini's hearsay statement that she would adopt the contents of the police report pertaining to the arrest was insufficient under *Lynch*. With regard to Bell's murder conviction, the court found that it would consider allowing it into evidence if defendant produced a witness who could testify to Bell's violent actions underlying the conviction. Finally, the court found that defendant's personal knowledge of the victims' propensity for violence may be admissible if defendant informed the court of the specific acts of the victims about which he would testify at trial.

¶ 29 At the next court date, defendant presented the testimony of Officer O'Ryan regarding Bell's underlying conduct for his conviction of aggravated assault of a peace officer. Prior to

doing so, the court admonished defendant that it would admit this material if defendant presented "direct evidence and not hearsay" of defendant's underlying conduct. The court informed defendant that Officer O'Ryan would have to testify from memory and not from the contents of the police report related to the incident.

¶ 30 Officer O'Ryan testified that he did not recall the incident in question. When the officer asked to see the police report to refresh his memory, the court *sua sponte* objected and sustained the objection, explaining that such hearsay would not be admissible for purposes of a *Lynch* motion. Based on Officer O'Ryan's testimony, the court found that its previous ruling regarding Bell's conviction for aggravated assault of a peace officer would stand and denied defendant's motion with respect to that allegation.

¶ 31 On the next court date, defendant presented the testimony of Potter, the victim of the robbery for which Ford was convicted. Potter acknowledged that he had previously been convicted of possession of a controlled substance, theft, and manufacture and delivery of cannabis. He stated that on May 22, 2004, he, Lindsey, and Tasheba Frazier drove, in two separate cars, to Chicago to purchase guns. Potter was in the car driven by Lindsey, and Frazier drove behind them. When they arrived in the city, Potter and Lindsey picked up Ford and Bell, who entered the car and directed them to a house that was "out east" in the city. When they arrived at the house, Lindsey, Ford and Bell exited the car and went inside the house. Shortly thereafter, Ford and Bell exited the house and approached the car. Ford opened the car door and pulled Potter out of the car. Following a "little tussle," Ford pointed a gun at Potter and said "don't do it white boy, it's not worth dying over." Potter then ran behind a tree and saw Ford and Bell drive away in Lindsey's car.

¶ 32 Potter and Frazier walked towards the house and saw Lindsey, who was disheveled and bruised, exiting the house. The trio then, using Frazier's car, followed Ford and Bell. During the brief vehicle chase, police stopped Lindsey's car. Potter, Lindsey and Frazier approached the scene and spoke to police about the robbery. Potter stated that he told the police about "the violence that took place," but acknowledged that he did not tell them that he had been in the area to purchase guns. Potter also acknowledged that he lied to police and told them that he and Lindsey were in the area assisting Frazier whose car had broken down nearby. Potter stated that he lied to police because the police had already recovered the money that was stolen from him and he thought that if he told them the truth they would not return the money.

¶ 33 On cross-examination, Potter was impeached with certain statements he made about the incident to the investigator from the office of the Public Defender. Potter acknowledged that, on their way to the police station, he, Lindsey and Frazier agreed to lie to the police and tell them that they were in the area because Frazier's car had broken down. Potter denied telling the investigator that he lied to police because he was fearful that if he told them the truth he would be arrested.

¶ 34 After hearing arguments from the parties, the court continued the matter to consider the issue. The record does not show that this issue was revisited by the court or defendant, and the court did not rule on the admissibility of Ford's robbery conviction in light of Potter's testimony.

¶ 35 When the matter was recalled, the court heard arguments regarding the admissibility of Bell's 2012 conviction for first-degree murder and the admissibility of the testimony of Yadonna Gailey, the State's primary witness at Bell's murder trial. Following numerous continuances and hearings, the court noted that it had previously ruled that this material would be admissible.

Ultimately, following defendant's testimony at trial, the court admitted into evidence Bell's murder conviction and the stipulated-to portions of Gailey's testimony from that murder trial, which defense counsel published in open court.

¶ 36 Prior to trial, the court granted defendant's motion to admit gang evidence for purposes of explaining an otherwise inexplicable act. Because defendant does not challenge the sufficiency of the evidence to sustain his convictions we recount the evidence presented at defendant's bench trial to the extent necessary to resolve the issues raised on appeal.

¶ 37 Trial

¶ 38 Chasity Island[1] testified that on June 9, 2010, she attended the funeral of her aunt, Curly Island. She stated that, during the procession from the funeral home to the cemetery, she was a passenger in a car that was directly behind the car driven by Alonzo Mingo. Defendant was a passenger in Mingo's car. During the procession, defendant extended his arm out of the car window and twice fired a gun into the air.

¶ 39 After the funeral, friends and family of the deceased gathered at the Island family home at 4752 South Forrestville Avenue for a reception. There, defendant, Huntley, Ford, Bell, Hopkins, Antwon Paul and Antwon Horton, were on the back porch of the building smoking marijuana. Paul testified that, at some point, he and defendant began to argue about drugs and money. During the argument, defendant told Paul that he was going to rob him and take his money. Bell then told defendant to "chill out" because they were at the funeral reception and "this is not the place to do that at." Defendant replied "you think I'm playing? I'll be right back and see how much I'm playing now." Defendant then went inside the apartment.

[1] Because there are multiple witnesses with the last name "Island" and "Hopkins" we refer to these witnesses by their first names.

¶ 40 When defendant returned to the porch, Paul saw a "clip" and the "outline" of a gun in defendant's waistband. Paul stated that he did not see the gun in defendant's waistband during their initial argument, prior to defendant entering the apartment. Defendant and Bell then began to argue. Bell pushed defendant towards the stairs of the porch and told him to chill out. Paul stated that Bell had his hands on defendant's arms and was "guiding" defendant down the stairs of the porch. Paul denied that Bell's hands were near defendant's waist. Defendant told Bell to "let [him] go" and "you think I'm f*****g playing? I'll shoot y'all ass." When defendant was on the stairs of the porch, he broke loose from Bell and fired three shots using a silver "chrome-like" gun. The third shot hit Bell in the neck. When defendant was at the bottom of the stairs, Paul heard more gunshots. Defendant then ran through the back gate of the building and Paul ran inside the apartment. Paul stated that Bell was the only person on the porch who made physical contact with defendant. Paul also stated that defendant was the only person on the porch with a gun.

¶ 41 Desiree Island testified that during the reception she was in the back bedroom of the apartment braiding Mingo's hair. As she was doing so, defendant walked into the bedroom and said "I'm tired of this s**t" then asked Mingo to give him a gun to hold until they left the reception. Mingo gave defendant a silver gun with "a pretty long clip." Defendant placed the gun in the back waistband of his pants and then exited the bedroom. Desiree followed defendant into the living room and saw him retrieve a bag of trash from the kitchen. Defendant then exited the apartment through the back door and Desiree returned to the back bedroom. About two minutes later, she heard "a lot" of gunshots coming from the backyard of the building. When the shooting

stopped, Desiree saw Ford and Huntley lying on the back porch and Bell inside the apartment bleeding.

¶ 42 Craig Hopkins testified that when he arrived at the reception he left his infant son in the living room of the apartment and headed to the back porch where defendant, Paul, Bell, Ford and Huntley were talking. At some point, defendant and Paul began to argue about drugs and money. During the argument, "somebody had called somebody a b***h." Craig then went inside the apartment to check on his son. Shortly thereafter, defendant entered the apartment. About two minutes later, Craig followed defendant outside of the apartment to the back porch. Defendant, with his hands under his shirt, approached Paul and said "you b***h a** n****r." Craig saw an extend clip of a handgun under defendant's shirt. Defendant, with his hand on the gun, told Paul to "empty his pockets, like he was robbing him." Paul tried to calm defendant. Bell then approached defendant and told him "this ain't the place for that." Defendant and Bell then began to argue and Bell tried to take the gun from defendant. Defendant pushed Bell and walked to the bottom of the porch stairs. Defendant pointed the gun at Bell and said "you b***h a** n******s ain't feeding me anyway," and fired the gun about four times. Craig ran inside the apartment and heard more gunshots. He grabbed his son and left the reception. Craig stated that defendant was the only person on the porch with a gun.

¶ 43 Rasheed Hopkins testified that during the reception he was inside the apartment while defendant, Bell, Ford, Huntley and Paul were on the back porch. Rasheed stated that Desiree and Mingo were in one of the bedrooms of the apartment. Rasheed saw defendant walk into the bedroom and then walk to the back porch. As defendant did so, he said "I ain't no b***h," and shifted a gun that was in his waistband. On the porch, defendant approached Paul "like he was

going to try and rob him or something" and said "I need some money." Bell, Huntley and Ford tried to hold defendant and told him to "calm down, it ain't that serious." As they did so, defendant pushed Bell and said "I'll lay all y'all a** down." Defendant then retrieved the gun from his waistband and pointed it at Paul, Ford, Huntley and Bell. Rasheed ran inside the apartment and heard eight to ten gunshots. When the shooting stopped, Bell entered the house and asked the persons inside to call the police.

¶ 44 Chicago Police Sergeant Jose Lopez responded to the shooting and assisted in securing the scene. Sergeant Lopez, along with his partner and other officers, performed a cursory search of the back of the building, the inside of the apartment and of the persons on the scene. The officers did not recover any weapons.

¶ 45 Chicago police forensic investigator Victor Rivera processed the scene of the shooting and recovered eight fired 9 millimeter cartridge casings near the back porch of the building. Investigator Rivera also recovered two fired bullets at the scene. One of the bullets was found inside the kitchen of the apartment and the other bullet was found near one of the victims. Investigator Rivera testified that, while he was processing the scene, he saw bullet holes in the windows and window frames of the building. He also saw damage inside the apartment.

¶ 46 Kellen Lee Hunter, a forensic scientist with the Illinois State Police Forensic Science Center, testified, as an expert in the field of firearm and tool mark examination, that he tested the eight cartridge cases recovered at the scene and determined that they had been fired from the same firearm. Hunter also tested the two fired bullets and determined that they had been fired from the same firearm. Hunter stated that, because he did not receive a firearm to examine, he was unable to compare the two fired bullets with the eight fired cartridge cases.

¶ 47 The parties stipulated that, if called, Doctor Ponni Arunkumar, deputy medical examiner at the Cook County Medical Examiner's Office, would testify, as an expert in the field of forensic pathology, that she performed the autopsy of Huntley's and Ford's body. Doctor Arunkumar concluded, to a reasonable degree of medical certainty, that the cause of Huntley's death was multiple gunshot wounds, including a through-and-through wound of the chest, and that the manner of death was homicide. Doctor Arunkumar also concluded, to a reasonable degree of medical certainty, that the cause of Ford's death was a through-and-through gunshot wound of the abdomen and the manner of death was homicide. The State then rested.

¶ 48 Defendant testified that he became a member of the Four Corner Hustlers street gang at the age of 12 or 13, when Bell, Huntley, Hopkins and Trazeon Hopkins recruited him to join the gang. Bell was the chief, Ford was a "lieutenant," and Huntley was a ranking member of the gang. Paul and Hopkins were members of the gang. Defendant stated that, prior to the shooting in question, he had witnessed Bell, Ford, Huntley, Paul and Hopkins in possession of guns. Defendant also stated that, prior to the shooting, he talked with Bell about Bell's previous criminal activities, including how Bell would rob, shoot and kill when he was "coming up" in the gang. Defendant further stated that, prior to the shooting in question, he talked with Ford about Ford's previous criminal activities. The State objected to this line of questioning and the court sustained the objection regarding what Ford said about his prior criminal activities, finding this evidence excluded by its previous rulings on defendant's *Lynch* motion.

¶ 49 Defendant explained that the gang would "discipline" its members and that a member may be killed for "snitching" or "treason." Defendant testified that in 2008, when the Four Corner Hustlers were at war with a rival gang, Bell twice instructed him to shoot at members of

the rival gang. Defendant refused to do so and, as a result, Bell "felt disrespected." Defendant acknowledged that, prior to the shooting in question, Bell did not confront him about his refusal to shoot rival gang members.

¶ 50 On the date in question, defendant attended Curly Island's funeral. During the funeral procession, defendant, along with Bell, Huntley, Ford, and Antwon Horton, was a passenger in a car driven by Mingo. Defendant stated that every person in the car was armed with a gun. Defendant acknowledged that, during the drive, he fired a gun out of the window of the car. He stated that he fired the gun because Bell told him to do so as a sign of respect for Curly.

¶ 51 At the reception, defendant joined Huntley, Ford, Bell, Hopkins, Paul and Horton on the back porch of the building. Defendant stated that, while he was talking with Horton, Bell, who had a handgun in his waistband, approached him and asked him why he was not "standing on that business for him." Defendant understood this to mean why he had not shot at rival gang members. Defendant responded that he did not want to discuss that at the reception and walked inside the apartment. Defendant then asked Mingo, who was also a chief of the gang, if he could hold Mingo's gun until they left the reception. Defendant stated that he asked Mingo for the gun because he did not feel safe after his conversation with Bell. Mingo gave defendant a loaded nine millimeter handgun with an extended clip that defendant placed into his waistband. Defendant then returned to the back porch.

¶ 52 On the porch, Bell again approached defendant and asked him why he "didn't take care of that business" with the rival gang. Defendant did not respond and walked towards Horton. Bell approached defendant and, after seeing the clip protruding from underneath defendant's shirt, signaled to Ford that defendant was armed. Ford then grabbed defendant and attempted to

place him into a "headlock." As Ford did so, Huntley grabbed defendant's shirt and Bell reached for the gun in defendant's waistband. Defendant stated that he was scared and believed that they were trying to kill him. Defendant freed himself from Ford's grasp and pushed Bell. As he did so, Huntley was still holding on to defendant's shirt. Bell reached for his own gun, which was tucked into his waistband. Defendant stated that he believed Bell was going to kill him. Defendant then pulled out the gun that Mingo gave him and fired a "couple of shots." Defendant stated that he was not trying to kill anyone and was just "shooting to get free." After the shooting, defendant ran away and threw the gun into a backyard.

¶ 53 After his testimony, defendant moved to admit into evidence Bell's 2012 murder conviction and the stipulated-to portions of Gailey's testimony from that murder trial. The court granted defendant's motion and defense counsel published in open court the stipulated-to portions of Gailey's testimony.

¶ 54 At Bell's murder trial, Gailey testified that on May 26, 2002, she attended Gino Rondell Island's birthday party. Bell and a man named Daddy-O were also at the party. Following the party, Bell asked Gailey to take a ride with him and drive Daddy-O home. Bell gave Gailey the keys to the car and she drove the men to 95th Street. During the drive, Daddy-O was in the front passenger seat and Bell was in the back seat. At about 100th Street, Daddy-O asked Gailey to stop the car and he exited the vehicle. While Daddy-O was out of the car, Bell told Gailey that he was "about to whack this n***a." Gailey understood this to mean that Bell was going to kill Daddy-O and saw a big gun next to Bell. Gailey asked Bell not to kill Daddy-O while she was inside the car and Bell responded "you're going to be alright." When Daddy-O returned to the car, Gailey started driving, but eventually stopped the car because she was nervous and her leg

was shaking. Daddy-O then switched seats with Gailey and started driving. When he did so, defendant placed the gun to the back of Daddy-O's head, and Gailey saw a light and heard a noise.

¶ 55 Based on this evidence, the court found defendant guilty of the second-degree murders of Huntley and Ford. In doing so, the court recounted the evidence presented and noted that the State proved beyond a reasonable doubt that defendant committed the first degree murders of Huntley and Ford. The court then found that defendant met his burden of showing that he believed his actions were committed in self-defense, but that his belief was unreasonable. In reaching this conclusion, the court stated that it was unreasonable to believe that an unarmed Bell, after a two-year period of not punishing defendant for disobeying his order to shoot at a rival gang, was "finally" going to enforce the order at the funeral reception. The court also found defendant guilty of aggravated discharge of a firearm in the direction of Paul and Hopkins.

¶ 56 Sentencing

¶ 57 The court denied defendant's motion for a new trial and then held a sentencing hearing.

¶ 58 In aggravation, the State presented the testimony of Department of Corrections officer Tiffany Harris, who stated that, in April 2013, while she was overseeing the detainees of Division 9 at the Cook County Jail, defendant stepped out of the shower area and masturbated in front of her. When Officer Harris summoned a male officer for assistance, defendant returned into the shower area. The State also presented the testimony of Cook County Sheriff's Department officer Sharon Wilson, who stated that, in January 2014, while she was overseeing the detainees of Division 9, defendant stepped out of the shower area and masturbated in front of her. The State further presented the testimony of Cook County Sheriff's Department officer

Johnny Rubio, who stated that, in October 2013, defendant asked to be moved to another tier of the jail. After Officer Rubio informed defendant that he would be moved when there was available space on other tiers, defendant brandished a "shank" and told the officer that he would start stabbing inmates if he was not relocated.

¶ 59 In aggravation, the court also heard the victim impact statements of Huntley's mother, Tina Robinson, Huntley's son, Rondell Huntley, Ford's mother, Pamela Barksdale, and Ford's daughter, Tahoni Ford, each of whom, respectively, detailed their pain and suffering as a result of Huntley's and Ford's murders.

¶ 60 In mitigation, defendant presented the testimony of his mother, Cherie Reed, who testified that defendant was a good person who became involved with the wrong people. Reed expressed her love for her son and stated that she would be there for him when he was released from prison.

¶ 61 In arguing for a sentence "somewhere in the middle of the [sentencing] range," defense counsel pointed out that defendant was 18 years old at the time of the shooting and had no prior convictions. Counsel acknowledged that defendant had prior juvenile adjudications, but noted that these adjudications were for nonviolent infractions. With regard to defendant brandishing a shank in the jail, counsel argued that defendant did so because he was desperate for help where Bell had placed a "hit" on his life inside the jail.

¶ 62 In allocution, defendant expressed his condolences to the families of the victims, and stated that he was no longer in a gang and was "trying get [his] life together."

¶ 63 In announcing sentence, the court stated that it had reviewed defendant's presentence investigation report and recounted the information therein. The court also recounted the factors

in aggravation and mitigation. In doing so, the court stated that it would not consider defendant's juvenile adjudications because they were not convictions. The court then noted the facts of the case and that defendant shot in the direction of numerous people during a post-funeral reception. The court also noted that it was troubled by defendant's actions of continuing to shoot even after he killed Huntley and Ford, thus placing numerous bystanders in danger. The court stated:

> "I am looking at the statutory factors here in aggravation and mitigation. In aggravation, the defendant's conduct certainly did cause or threaten serious harm. It caused physical harm that can never be taken back to William Huntley and Frenchie Ford, their deaths."

The court further stated that defendant exhibited a continued unwillingness to abide by the rules of society even after he was arrested and awaiting trial, as evidenced by his conduct in the jail.

¶ 64 The court then sentenced defendant to two consecutive terms of 20 years' imprisonment for the second-degree murder of Huntley and Ford, and two concurrent terms of 10 years' imprisonment for aggravated discharge of a firearm to be served consecutively to his two 20-year terms. In doing so, the court noted that it found it necessary to impose the aggravated discharge of a firearm sentences consecutively to defendant's sentences for second degree murder in an effort to deter others from committing a similar crime and to protect the public from harm. Defendant appeals.

¶ 65 ANALYSIS

¶ 66 I. Admission of *Lynch* Evidence

¶ 67 On appeal, defendant first contends that the trial court erred in denying his *Lynch* motion to introduce into evidence certain past instances of the victims' behavior to show that they were

the initial aggressors on the date of the shooting. Defendant argues that by denying his motion the court violated his right to present a complete claim of self-defense.

¶ 68 In setting forth this argument, defendant acknowledges that he has forfeited review of this issue because he failed to raise it in his posttrial motion. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve an alleged error for review, a defendant must, both, specifically object at trial and raise the specific issue again in a posttrial motion). Nevertheless, defendant argues that we should review the issue as plain error.

¶ 69 The plain error rule is a narrow and limited exception to the general rule of forfeiture. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under the plain error doctrine, a reviewing court will review an unpreserved error when a clear and obvious error occurs and: (1) the evidence is closely balanced and the error threatened to tip the scales of justice against the defendant; or (2) the alleged error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 565.

¶ 70 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant maintains that both prongs of the plain error rule apply in this case because the evidence was closely balanced and the denial of his right to present a complete claim of self-defense is a serious error that affected the fairness of his trial. However, the first step in the plain error analysis is to determine whether any error occurred. *Lewis*, 234 Ill. 2d at 43. If we find that the trial court erred in excluding any evidence we will consider whether the error rose to the level of plain error. See *People v. Simon*, 2011 IL App. (1st) 091197, ¶ 75.

¶ 71 Contrary to defendant's argument that a *de novo* standard of review applies, the decision to admit or exclude evidence rests within the sound discretion of the trial court and that decision will not be disturbed absent an abuse of discretion. See *Simon*, 2011 IL App (1st) 091197 at ¶ 67 (applying plain error review to a trial court's decision to exclude certain evidence pursuant to *Lynch* and reviewing that decision for an abuse of discretion). We will find an abuse of discretion only where the trial court's decision is arbitrary, fanciful or unreasonable, and where no reasonable person would agree with the position adopted by the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 72 In *Lynch*, our supreme court held that "when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor." *Lynch*, 104 Ill. 2d at 200. Pursuant to *Lynch*, the evidence of the victim's violent character may be offered in one or both of the following circumstances:

> "First, the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior. The same deadly force that would be unreasonable in an altercation with a presumably peaceful citizen may be reasonable in response to similar behavior by a man of known violent and aggressive tendencies. One can consider facts one knows, however, and evidence of the victim's character is irrelevant to this theory of self-defense unless the defendant knew of the victim's violent nature ***.
>
> Second, evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened. In

this situation, whether the defendant knew of this evidence at the time of the event is irrelevant." *Lynch*, 104 Ill. 2d at 199-200.

¶ 73 In the case at bar, defendant requested the admission of numerous prior acts of the victims under both circumstances enumerated in *Lynch*. We begin our analysis by reviewing the materials defendant sought to admit pursuant to the first circumstance.

¶ 74 1. Defendant's Knowledge of Victims' Violent Reputations

¶ 75 Defendant argues that the trial court erred in denying his request to admit evidence of his personal knowledge of the victims' violent reputations and that Ford and Bell had threatened him the day before the shooting. Specifically, defendant claims that the trial court erred in excluding from evidence that: (1) the victims were gang members who frequently carried out armed robberies and that they discussed these robberies with defendant; (2) Ford was involved in numerous shoot-outs with a rival gang and had discussed these shoot-outs with defendant; (3) Bell was a known killer; and (4) Ford and Bell had called him the day before the shooting and chastised him for "trying to [make] a name for himself" by associating with Ford's cousin. During the phone call, Ford and Bell told defendant that they were unhappy with his friendship with Ford's cousin and that they were "going to do that," which defendant understood to mean that they were going to kill him.

¶ 76 In setting forth this argument, defendant acknowledges that, at the initial hearing on defendant's *Lynch* motion, the court reserved ruling on this evidence finding it, as presented by defendant, to be "too amorphous" for the court to make a specific ruling about the victims' propensity for violence. The court stated that it would consider this evidence if defendant "narrow[ed] it down and reframe[ed] it." The court then admonished defendant that this evidence

"may be admissible if defendant makes this court aware of the specific acts that defendant plans on testifying to." However, as acknowledged by defendant, he did not pursue the issue further and the court "never found the evidence admissible."

¶ 77 It is well-settled that "a movant has the responsibility to obtain a ruling on his motion if he is to avoid forfeiture on appeal." *People v. Urdiales*, 225 Ill. 2d 354, 425 (2007). Here, because defendant failed to obtain a ruling on this issue, we may find it forfeited. *Urdiales*, 225 Ill. 2d at 425.

¶ 78 The record shows that, over the course of more than two years, defendant filed numerous pleadings related to his *Lynch* motion and the court held a number of hearings on defendant's motion. At these hearings, the court, essentially, made "pre-rulings" on the numerous allegations in defendant's motion and repeatedly admonished him about the proffers and witnesses he needed to present before the court could rule on the admissibility of the allegations. The court also continued the matter numerous times for defendant to secure witnesses and amend his motion in accordance with the court's instructions. The record shows that defendant filed a supplemental and amended motion, elaborating on his previous allegations, but did not include in these motions his allegation regarding his personal knowledge of the victims' violent reputations. Defendant also did not amend this allegation, even after the court entered a written order admonishing him "that this [evidence] may well be admissible if [defendant] makes this court aware of the specific acts [defendant] plans on testifying to[.]" Therefore, as a result of defendant's failure to obtain a ruling on this issue, we find it forfeited. *Id.*

¶ 79 Forfeiture aside, the court did not err in reserving its ruling regarding defendant's personal knowledge of the victims' violent reputations and admonishing him to lay a proper

foundation for these allegations by amending his motion to include specific acts of the victims about which he planned to testify.

¶ 80 Although a defendant may present testimony regarding the victims' reputations, such testimony must be supported by a proper foundation. *In re Jessica M.*, 399 Ill. App. 3d 730, 738 (2010). A "proper foundation for reputation testimony is established when the witness is shown to have 'adequate knowledge of the person queried about' and the evidence of reputation is 'based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness.' " *In re Jessica M.*, 399 Ill. App. 3d at 738, quoting *People v. Moretti*, 6 Ill. 2d 494, 523-24 (1955).

¶ 81 Here, defendant essentially argued in his addendum to his memorandum of law in support of his *Lynch* motion that because he was a member of the same gang as the victims he had adequate knowledge of the victims' violent reputations. However, there is no indication in the record that defendant's proposed testimony would have been based upon anything more than his personal opinion of the victims' violent reputations. Aside from the victims' membership in a gang, defendant did not relate in his addendum any specific incidents that supported his allegation that the victims' had a propensity for violence. As a matter of fact, defendant acknowledged in the addendum that he had never personally witnessed the victims harm an individual, but merely argued that their "reputations commanded the respect and fear of others." As such, there is no indication in the record that defendant's proposed testimony would have been based on his personal observations rather than his personal opinion. See *Simon*, 2011 IL App (1st) 091197 at ¶ 74. Instead, the record shows that defendant's testimony would have been based on statements made to him by the victims. Under these circumstances, the trial court did

not err in withholding its ruling regarding these allegations and affording defendant an opportunity to amend his motion and lay a proper foundation.

¶ 82 In any event, we note that much of this information about the victims' violent reputation came in as evidence at trial. Defendant testified that the victims were members of the gang and that Bell was the chief, Ford was a lieutenant, and Huntley was a ranking member of the gang. Defendant stated that, prior to the shooting in question, he had witnessed Bell, Ford, Huntley, Paul and Hopkins in possession of guns. Defendant also stated that, prior to the shooting, he talked with Bell about Bell's previous criminal activities, including how Bell would rob, shoot and kill when he was "coming up" in the gang. Although the trial court sustained the State's objection regarding defendant's similar conversations with Ford, defendant has forfeited this issue on appeal by failing to make an adequate offer of proof. See *People v. Peeples*, 155 Ill. 2d 422, 457 (1993) (When a trial court refuses to admit evidence, a formal offer of proof is needed to preserve an appealable issue); *People v. Thompkins*, 181 Ill. 2d 1, 10 (1998) (An adequate offer of proof is the key to preserving a trial court's error in excluding evidence because it provides the reviewing court with a record to determine whether exclusion of the evidence was erroneous); see also *Lynch*, 104 Ill. 2d at 202 ("[the] requirement of an offer of proof is not a formalistic ritual but an aid to justice").

¶ 83 Defendant nevertheless argues that he "detailed a very specific threat to his life" in the addendum to his memorandum of law in support of his *Lynch* motion. Contrary to defendant's argument, the record shows that defendant merely alleged that Ford and Bell expressed to him that they were unhappy with his friendship with "I.B.," Ford's cousin. Defendant also alleged that Ford and Bell told defendant that he was "trying to [make] a name for himself" by

associating with I.B. and that they were "going to do that," which defendant understood to mean that they were going to kill him. Defendant did not: (1) identify Ford's cousin; (2) elaborate as to how he was "trying to make a name for himself;" (3) explain why Ford and Bell would be unhappy about his friendship with Ford's cousin; or (4) explain why he understood the term "going to do that" to mean that Ford and Bell were going to kill him. Accordingly, given defendant's failure to lay a proper foundation for his proposed testimony, the trial court did not err in reserving its ruling on this issue until defendant presented the court with more information regarding these allegations. See *In re Jessica M.*, 399 Ill. App. 3d at 738 (2010); see also *People v. Ware*, 180 Ill. App. 3d 921, 929 (1988) (where *Lynch* evidence was too general, indefinite and could not be viewed as reliable it was properly barred).

¶ 84 2. Evidence of the Victims' Violent Acts

¶ 85 Defendant also contends that the trial court erred in denying his request to admit evidence of the victims' prior violent acts under the second *Lynch* circumstance. Specifically, defendant argues that the trial court erred in excluding from evidence: (1) Ford's 2005 conviction for robbery, despite Potter's testimony about Ford's underlying conduct; (2) Bell's 2003 conviction for aggravated assault of a peace officer; and (3) Bell's 1999 arrest for his involvement in the shooting involving James Osby. Defendant claims that, because this evidence was relevant to establish that the victims had a propensity for violence and supported his theory of defense that they were the initial aggressors, the trial court's exclusion of this evidence was prejudicial.

¶ 86 Contrary to defendant's argument, the fact that this evidence may be relevant of the victims' propensity for violence is not the sole factor that a trial court should consider when determining whether to admit or exclude *Lynch* evidence. *Simon*, 2011 IL App (1st) 091197, ¶

72. Rather, in *Lynch*, our supreme court instructed that the defendant could demonstrate that the victim was the aggressor by "appropriate evidence" and contained a discussion about whether the defendant's convictions for battery amounted to "competent evidence" of his violent character. *Lynch*, 104 Ill. 2d at 204.

¶ 87 That said, what constitutes appropriate evidence and what proof is necessary to establish such evidence as competent under *Lynch*, depends on the nature of the evidence that a defendant seeks to admit *e.g.* a victim's conviction, an arrest, or an altercation, etc. In this case, defendant sought to admit into evidence two convictions and an arrest.

¶ 88 a. Convictions

¶ 89 In *Lynch*, the defendant was tried for murder and convicted of manslaughter after he claimed self-defense. *Id.* at 197. At trial, the defendant sought to introduce evidence that the victim had three separate battery convictions. *Id.* at 199. The trial court ruled that the defendant's lack of knowledge of the convictions precluded their admission into evidence. *Id.* This court affirmed on direct appeal. *Id.* at 197. Our supreme court reversed, reasoning that the evidence should have been admitted despite defendant's lack of knowledge because "evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened." *Id.* at 200. The *Lynch* court stated that "convictions for crimes of violence," such as the three battery convictions, were reasonably reliable evidence of a violent character. *Id.* at 201. The court also stated that a battery was *prima facie* probative enough of the victim's violent tendencies to be admissible, and found that the batteries were competent evidence to prove that the victim was a violent man. *Id.* at 203-04. In so finding, the

Lynch court noted that all three of the victim's convictions were recent to the date of his murder for which the defendant was on trial. *Id.* at 203.

¶ 90 Therefore, in order for a victim's prior conviction to be admissible as *Lynch* evidence: (1) there must be conflicting accounts of what happened; (2) the conviction must be for a "crime of violence"; and (3) the conviction must not be remote from the incident at issue. *Id.* at 200-03; see also *People v. Ellis*, 187 Ill. App. 3d 295, 301-02 (excluding evidence of a victim's convictions because the convictions did not necessarily indicate a violent character and one of the convictions occurred more than 10 years before the defendant's trial); *People v. Morgan*, 197 Ill. 2d 404, 455-57 (2001) (a trial court may reject *Lynch* evidence on the grounds of remoteness); *People v. Montgomery*, 47 Ill. 2d 510, 516-19 (1971) (a trial court has discretion to exclude the admission of evidence of convictions which are 10 or more years old).

¶ 91 With regard to the admissibility of a victim's conviction, this court has also recognized that: "Nowhere does *Lynch* require that the [trial] court must allow live testimony on the issue of victim's prior conviction. Rather, it is only where the evidence of a victim's violent character is based on arrests or altercations for which there was no conviction that live testimony is required." *People v. Gibbs*, 2016 IL App (1st) 140785, ¶ 34. No such testimony is needed because the conviction itself is proof that the victim committed the crime. *Id.* This is because testimony regarding the particulars of a prior conviction can lead to a " 'trial within a trial' " and distract from the relevant issues. *Id.*, quoting *People v. Oaks*, 216 Ill. App. 3d 1072, 1075 (1991).

¶ 92 b. Arrests

¶ 93 In *People v. Cook*, 352 Ill. App. 3d 108 (2004), this court highlighted the difference between a victim's convictions and arrests for purposes of admissibility under *Lynch*. The court

in *Cook* held that the trial court properly excluded evidence of the complaints against the victim and his gunshot wounds because the evidence involved arrests, not convictions, and none of the complaining witnesses offered live testimony as to the victim's violent tendencies. *Cook*, 352 Ill. App. 3d at 128. In so doing, this court stressed that "*Lynch* and its progeny unquestionably hold that proof is needed that the victim committed the crimes," and "a prior altercation or an arrest, without a conviction, can be adequate proof of violent character when supported by firsthand testimony as to the victim's behavior." *Id.*; see also *Simon*, 2011 IL App (1st) 091197, ¶ 72 (trial court did not abuse its discretion by sustaining the State's hearsay objections to witness's testimony that the victim had previously shot the defendant where the witness had no firsthand knowledge of the shooting); *People v. Ellis*, 187 Ill. App. 3d 295, 301 (1989) ("evidence of a victim's mere arrest is inadmissible since it does not indicate whether the victim actually performed any of the acts charged"); *People v. Huddleston*, 176 Ill. App. 3d 18, 28 (1988) (noting that a victim could testify that the decedent had struck her, but a police officer who had not observed the incident could not).

¶ 94 Here, the record shows that the trial court excluded, both, Bell's arrest, as well as Bell's and Ford's convictions, based on defendant's failure to present firsthand testimony regarding these events. As mentioned, an arrest, without a conviction, may be adequate proof of violent character if supported by firsthand testimony as to the victim's behavior. *Cook*, 352 Ill. App. 3d at 128. In this case, defendant presented no such testimony with regard to Bell's arrest for the shooting involving James Osby and thus the trial court did not abuse its discretion in excluding this evidence. This is especially so where the record shows that Bell was not the shooter. See *Id.* (under *Lynch* an arrest can be adequate proof of a victim's violent character when supported by

"firsthand testimony as to the *victim's behavior*" (emphasis added)). Accordingly, the trial court did not err in excluding Bell's arrest.

¶ 95 However, the trial court did abuse its discretion in excluding Bell's conviction for aggravated assault of a peace officer and Ford's robbery conviction on the basis of defendant's failure to present firsthand testimony regarding these convictions. As mentioned, no such testimony was necessary where the convictions themselves were proof that Ford and Bell committed the relevant crimes. *Gibbs*, 2016 IL App (1st) 140785, ¶ 34. Rather, for the convictions to be admissible under *Lynch*, defendant had to show that: (1) there were conflicting accounts of what happened; (2) the convictions were for "crime[s] of violence"; and (3) the convictions were not remote from the incident at issue. The record shows that although defendant argued that there were conflicting accounts of what happened and that the convictions were for violent crimes, the court ultimately did not decide these issues. We need not decide these issues here where even assuming, *arguendo*, that the court erred in excluding this evidence the error did not amount to plain error.

¶ 96 Plain Error

¶ 97 A defendant's forfeiture of an unpreserved error will be excused only if the alleged error rises to the level of plain error. *Naylor*, 229 Ill. 2d at 602-03. Because the trial court's exclusion of Ford's robbery conviction and Bell's conviction for aggravated assault of a peace officer was not so serious that it affected the fairness of defendant's trial, we consider whether the evidence was so closely balanced that it threatened to tip the scales of justice against defendant. *Simon*, 2011 IL App (1st) 091197, ¶ 75, citing *People v. Nunn*, 357 Ill. App. 3d 625, 630 (2005) (exclusion of *Lynch* testimony did not affect the defendant's substantial rights); see also *People*

v. Crum, 183 Ill. App. 3d 473, 485 (any error made by the trial court in excluding evidence of specific acts of violence by the victim was harmless because there was sufficient evidence to convict the defendant beyond a reasonable doubt).

¶ 98 Here, in light of the evidence presented at trial, the court's exclusion of Ford's and Bell's convictions did not threaten to tip the scales of justice against defendant. Although defendant testified that Bell confronted him about his failure to obey Bell's previous order to shoot at rival gang members, the record shows that three eyewitnesses to the circumstances of the shooting contradicted defendant's version of events and corroborated each other's testimonies. Antwon Paul, Craig Hopkins and Rasheed Hopkins each testified that, during the reception, Paul and defendant argued about drugs and money on the back porch of the apartment. During the argument, defendant was angry and told Paul that he was going to rob him and take his money. Bell attempted to calm defendant because they were at the funeral reception. According to Paul, defendant replied "you think I'm playing? I'll be right back and see how much I'm playing now."

¶ 99 Defendant then went inside the apartment and procured a handgun from Mingo, who along with Desiree Island was inside a bedroom of the apartment. Desiree testified that when defendant entered the bedroom he said "I'm tired of this s**t" then asked Mingo for the gun. Defendant placed the gun in the waistband of his pants and walked back to the porch. Rasheed, who was inside the apartment, testified that as defendant walked back to the porch he said "I ain't no b***h."

¶ 100 Craig stated that, when defendant returned to the porch, he had his hands under his shirt. Defendant approached Paul and said "you b***h a** n****r." Defendant then, with his hand on

the gun, told Paul to "empty his pockets. Like he was robbing him." Bell again attempted to calm defendant and the pair began to argue. Paul stated that, shortly before the shooting, Bell had his hands on defendant's arm and was "guiding" defendant down the stairs of the porch. Paul denied that Bell's hands were near defendant's waist. According to Paul, defendant told Bell "you think I'm f*****g playing? I'll shoot y'all ass." Rasheed similarly testified that, shortly before the shooting, defendant pushed Bell and said "I'll lay all y'all a** down." Paul and Craig stated that defendant was the only person on the porch with a gun.

¶ 101 The physical evidence presented also corroborated Paul and Craig's testimonies that the victims were unarmed and that defendant was the only person on the porch with a gun. The record shows that all eight fired 9 millimeter cartridge cases recovered at the scene had been fired from the same firearm. Sergeant Lopez, who was one of the first officers to respond to the shooting, testified that he helped secure the scene and that a search of the apartment and the persons on the scene did not yield any weapons. Given this record, the evidence was not closely balanced such that the trial court's exclusion of Ford's robbery conviction and Bell's aggravated assault of a peace officer conviction rose to the level of plain error.

¶ 102 This is especially so where defendant's theory of the case was that he acted in self-defense after Bell confronted him about his failure to obey Bell's previous order to shoot at rival gang members. We initially note that defendant acknowledged that, prior to the shooting, Bell did not confront him about his refusal to shoot rival gang members. This aside, given defendant's theory of the case, gang evidence and Bell's violent character were of primary importance.

¶ 103 Although the trial court erred in excluding Ford's robbery conviction, defendant was permitted to testify in detail about his and the victims' status in the Four Corner Hustlers street

gang, including that Bell was the chief of the gang and that Ford was a lieutenant in the gang. Defendant also explained that the gang would discipline its members and that a member may be killed for various violations of the gang's code of conduct. Defendant stated that, prior to the shooting in question, he had witnessed Bell and Ford in possession of guns, and that he had talked with Bell about Bell's criminal activities, including how Bell would rob, shoot and kill when he was "coming up" in the gang. Although the court excluded Bell's conviction for aggravated assault of a peace officer, the court admitted into evidence Bell's more recent conviction for the more serious offense of first-degree murder. The court also admitted into evidence the stipulated-to testimony of the State's primary witness from Bell's murder trial detailing Bell's underlying violent behavior. Any additional evidence regarding Ford's and Bell's violent character would not have tipped the scales of justice in defendant's favor. See *Simon*, 2011 IL App (1st) 091197, ¶ 76.

¶ 104 Therefore, even assuming that the trial court erred in excluding Ford's robbery conviction and Bell's aggravated assault of a peace officer conviction, the error did not amount to plain error because the evidence was not closely balanced. Accordingly, defendant has failed to meet his burden under the first prong of the plain error doctrine and has thus forfeited review of this issue.

¶ 105 II. Sentencing

¶ 106 Defendant next contends that his total sentence of 50 years' imprisonment is excessive. Specifically, defendant argues that the trial court improperly considered the deaths of Ford and Huntley, as an aggravating factor in sentencin, because this factor was inherent in the offense of second-degree murder.

¶ 107 We initially note that defendant has forfeited review of this issue because he failed to raise it in a timely filed postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("[It is well-settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). One of the reasons for requiring that defendant first raise the issue in a postsentencing motion is that it affords the trial court an opportunity to review defendant's claim of sentencing error and save the delay and expense inherent in appeal if the claim is meritorious. *People v. Heider*, 231 Ill. 2d 1, 18 (2008). However, because the State does not argue forfeiture on appeal, the State has forfeited the claim that the issue raised by defendant is forfeited. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (State may forfeit claim that issue the defendant raises is forfeited if the State does not argue forfeiture on appeal).

¶ 108 In setting forth this argument defendant alleges that the appropriate standard of review is *de novo*. We note that the trial court has broad discretionary powers to determine a defendant's sentence and its decision merits great deference because it is in the best position to weigh the applicable sentencing factors. See *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). As such, the imposition of a sentence is normally within the trial court's discretion and a reviewing court will not alter a sentence imposed by the trial court absent an abuse of discretion. *People v. Fern*, 189 Ill. 2d 48, 53 (1999); *Stacey*, 193 Ill. 2d at 209-10. Moreover, a sentence that is within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *Fern*, 189 Ill. 2d at 54.

¶ 109 In this case, however, defendant is not asking us to reweigh the sentencing factors presented and substitute our judgment for that of the trial court. He is also not exclusively arguing that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. Rather, the core of defendant's argument is that the trial court relied on an improper factor in imposing sentence and the extent to which that factor influenced the court's sentencing decision is unclear. Stated differently, defendant is asking us to determine whether the trial court's consideration of the alleged improper factor affected the length of the sentences imposed on him.

¶ 110 The question of whether a court relied on an improper factor in imposing a sentence is a question of law that we review de novo. *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008); see also *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). If we find that the court improperly relied on the deaths of the victims as an aggravating factor, we will consider whether remand is required.

¶ 111 In determining an appropriate sentence, the trial court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2014). When such factors have been presented for the trial court's consideration, it is presumed, absent some contrary indication, that they have been considered. *People v. Brantley*, 2014 IL App (1st) 112633, ¶ 100. A trial court is not required to recite or assign a value to each factor in mitigation and aggravation that forms part of the record on appeal. *Id.*

¶ 112 However, a trial court may not consider a factor implicit in the offense as an aggravating factor in sentencing. *Phelps*, 211 Ill. 2d at 12. This is because a single factor cannot be used both as an element of an offense and as a basis for imposing a " 'harsher sentence than might otherwise have been imposed.' " *Id.*, quoting *People v. Gonzalez*, 151 Ill. 2d 79, 83-4 (1992).

Such dual use of a single factor is referred to as "double enhancement." *Gonzalez*, 151 Ill. 2d at 85. The prohibition against double enhancements is based on the reasoning that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense. *Phelps*, 211 Ill. 2d at 12. The defendant bears the burden of establishing that a sentence was based on improper considerations. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9.

¶ 113 Second-degree murder is punishable by a term of 4 to 20 years imprisonment. See 730 ILCS 5/5-4.5-30(a) (West 2014). Here, defendant was sentenced, in relevant part, to two consecutive terms of 20 years' imprisonment for the second degree murders of Ford and Huntley. As such, defendant's sentence, albeit the maximum term, was within the permissible sentencing range and, thus, is presumed proper.

¶ 114 That said, the record shows that in imposing sentence, the trial court, in considering all the relevant factors in aggravation and mitigation, specifically stated:

> "I am looking at the statutory factors here in aggravation and mitigation. In aggravation, the defendant's conduct certainly did cause or threaten serious harm. It caused physical harm that can never be taken back to William Huntley and Frenchie Ford, their deaths."

The court then went on to enumerate the other factors in aggravation such as defendant's criminal history and whether it was necessary to impose a sentence that would deter others from committing a similar crime. Given that the court expressly referred to the deaths of the victims while specifically enumerating the statutory factors in aggravation and mitigation we find that there was, in fact, reliance by the court on this factor in imposing sentence. See *Abdelhadi*, 2012

IL App (2d) 111053, ¶ 14 (trial court's reference to an improper factor, with no elaboration or description of that factor, did not amount to merely a mentioning of the factor within the nature and circumstances of the crime).

¶ 115 In reaching this conclusion, we are mindful that "it is unrealistic to suggest that the judge sentencing a convicted murderer must avoid mentioning the fact that someone has died or risk committing reversible error." *Id.*, quoting *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). However, it is reversible error for a sentencing court to not merely mention, but rely on, an improper aggravating factor in sentencing as was the case here. *Abdelhadi*, 2012 IL App (2d) 111053 at ¶ 17. Having found that the trial court improperly considered the deaths of the victims as an aggravating factor, we must next determine whether remand is required.

¶ 116 Remand

¶ 117 When a trial court considers an improper factor in aggravation, the case must be remanded unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a longer sentence. *People v. Whitney*, 297 Ill. App. 3d 965, 971; see also *People v. Conover*, 84 Ill. 2d 400, 405 (1981). If we cannot determine how much weight was placed on the improper factor, we must remand for a new sentencing hearing. *Abdelhadi*, 2012 IL App (2d) 111053 at ¶ 20; *Whitney*, 297 Ill. App. 3d at 971.

¶ 118 In determining whether a trial court afforded significant weight to an improper factor such that remand is required, we consider whether: (1) the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) the sentence received was substantially less than the maximum sentence permissible by statute. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18.

¶ 119 At the outset, we note that the sentencing record, considered in its entirety, shows that the trial court considered numerous appropriate factors in aggravation and mitigation when imposing sentence. That said, however, the court specifically stated on the record it was considering the deaths of the victims in aggravation. See *Whitney*, 297 Ill. App. 3d at 971. In doing so, the court was rather emphatic that defendant "caused physical harm that *can never be taken back* to William Huntley and Frenchie Ford, their deaths." Not only did the court reference this factor, but it also sentenced defendant to the maximum sentence permissible by statute. Given this, we cannot conclusively say, based on the record before us, that the weight placed upon this factor was insignificant and did not lead to a longer sentence for defendant. Accordingly, we remand for a new sentencing hearing.

¶ 120 CONCLUSION

¶ 121 For the reasons stated, we affirm the judgment the circuit court of Cook County, and remand the case for a new sentencing hearing.

¶ 122 Affirmed in part, remanded for resentencing.