No. 2—09—0752
Order filed May 26, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—2729
ARTHUR MANNING,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: The trial court abused its discretion in refusing to instruct the jury on self-defense, as slight evidence supported it; thus, we reversed defendant's conviction and remanded for a new trial.

Following a jury trial, defendant, Arthur Manning, was convicted of first-degree murder (720 ILCS 5/9—1(a)(1) (West 2008)) and sentenced to 29 years' imprisonment. Defendant timely appealed and argues: (1) that the trial court erred in refusing to instruct the jury on self-defense and in modifying the jury instructions on first-degree murder and second-degree murder; and (2) that the trial court failed to conduct an appropriate inquiry into defendant's *pro se* posttrial claim of

ineffective assistance of counsel. For the following reasons, we hold that the trial court erred in refusing to instruct the jury on self-defense, and thus we reverse and remand for a new trial.

I. BACKGROUND

Defendant was indicted on three counts of first-degree murder (720 ILCS 5/9—1(a)(1), (a)(2), (a)(3) (West 2008)), based on the stabbing death of the victim, Naromi Mannery, in September 2008. The following relevant testimony was adduced at defendant's jury trial.

Darren Barnett testified that, on September 21, 2008, he worked for Windy City Amusements (Windy City), a carnival ride company, and that he lived in a house owned by Windy City and located at 920 West Main Street in St. Charles. Windy City's offices were located on the ground level of the house, while apartments for employees were located in the basement and on the second floor. Barnett lived in the basement apartment with "a really big guy" named "Dave." Access to the basement apartment was by a stairway located on the side of the house. According to Barnett, defendant lived in the second-floor apartment with Willie Wimberly, Rick Rusin, and Guy Manning (Manning), who was defendant's brother. Access to the second-floor apartment was by a stairway also located on the side of the house. There was also a side porch near the stairs. Only Windy City employees were allowed on the premises; the residents were not allowed to have guests.

According to Barnett, on the evening of September 21, at about 10 p.m., defendant gave him $10 to buy beer. Barnett walked to a local liquor store, but the store was closed. When Barnett returned home, defendant asked him to go to a bar down the road. Barnett walked to the bar, but the bar refused to sell him packaged beer. As Barnett was walking home, he passed a house and somebody hollered to him, asking him if he wanted a beer. Barnett approached the house and saw a "stocky" Hispanic man and a "smaller, skinnier" black man (the victim). Barnett accepted a beer

and a Tequila shot from the men, and he stayed with them for about an hour. Barnett drank a second beer and Tequila shot. When Barnett left to return home, the victim went with him.

Barnett testified that, when he returned to the Windy City house with the victim, he asked the victim to remain on the side porch of the house, while Barnett tended to some business upstairs. As Barnett was on his way up the stairs to the second-floor apartment to return the beer money to defendant, the victim ran up the stairs behind him. Barnett told the victim that he had to stay downstairs, because Barnett was not allowed to have company. When defendant appeared in the doorway of the second-floor apartment, the victim started to explain to him where Barnett had been. Barnett told defendant that the victim was "extremely drunk and hard to talk to." Barnett told the victim to go downstairs, because he "had business to take care of." As Barnett was returning the money to defendant, the victim asked defendant if he could borrow the money. Defendant said that he did not want "anything to do with this. All he wanted to do this afternoon was get some beer." The victim pulled a beer out of his pocket and offered defendant a sip, which defendant accepted. Defendant told the victim that he was not interested in anything the victim had to say and that the victim "really needed to go on somewhere." Defendant was "agitated." Barnett and the victim walked down the stairs to the side porch. They remained there for awhile, smoking a cigarette and talking.

According to Barnett, while he was on the side porch with the victim, the victim asked him if he could stay at the Windy City house overnight. Barnett told the victim that he could not and explained the rules of the house. About 45 minutes later, defendant came down the stairs and told the victim that he had to leave. Defendant was a "[l]ittle more" agitated than he had been earlier. The victim "took offense to it"; he called defendant a "bitch" and said, "[Y]ou can't tell me what I

can do." Defendant then told Barnett that Manning needed to speak to him upstairs. Barnett told the victim, "[W]ell, see here, you done got me in a lot of trouble. I said you need to go on, get out of here, get on down the road. And I got to go up there and talk to one of the bosses." As Barnett and defendant proceeded to go upstairs, Dave came outside to smoke a cigarette and sat down with the victim.

Barnett testified that, when he entered Manning's room in the second-floor apartment, Manning, who was pretty agitated, "jump[ed] on" him about having the victim at the house. As Barnett explained to Manning that he was trying to get rid of the victim, defendant went to get Wimberly out of his room. As Manning put on his shoes, Barnett said, "[M]aybe the [victim] will be gone before we get back down there," and Manning responded, "He better be gone."

According to Barnett, the four men went downstairs to "physically remove the [victim] off the property" and found the victim sitting on the side porch having a cigarette with Dave. Barnett stopped at the bottom of the stairs, and Wimberly, Manning, and defendant walked around him. Wimberly "tr[ied] to get the [victim] to leave." When the victim refused, Wimberly "popped" him in the jaw. At that point, the victim stood up, put his head down, and "made a charge at the biggest guy standing there which happened to be [Manning]." Manning picked up a lawn chair, sidestepped, and swung the chair at the victim, striking him across the back. The victim backed away and then charged Manning a second time. Manning hit the victim with the chair again. The victim then charged defendant. According to Barnett, "it looked like they was—they was throwing blows at each other." Wimberly joined in and then "[i]t was over so quick right there." "[T]hey throw [*sic*] three or four punches at each other and then suddenly they [Wimberly and defendant] started backing away." Wimberly said, "[Y]ou cut me, [defendant], you cut me." Barnett never saw a knife. Barnett

told the victim to "go on, get down the road, get on, you know, we don't need all this around here." When the altercation ended, the victim yelled, "[W]hy you all got to jump on me." Defendant told the victim to leave "before he got some more." At that point, the victim walked away. Barnett saw blood coming from the front of the victim.

Barnett testified that, after the victim left, Barnett, Wimberly, Manning, and defendant headed upstairs. Barnett stopped to talk to "Mike" and told him what had just happened. Wimberly, Manning, and defendant went upstairs, but then came back outside. Manning told Barnett that they were going across town and that he should stay at the house. Wimberly, Manning, and defendant left in a white school bus, which was owned by Windy City. Barnett noticed blood on the sidewalk and decided to wash it off, because he was concerned about what the landlord would say.

Barnett testified that he remembered telling the police that Wimberly threw the first punch. He also remembered that he told the police that, when the victim started swinging his arms in response, defendant, Manning, and Wimberly jumped him, and the victim was not able to defend himself because "[h]e was very drunk." He further told the police that, after the victim was hit twice with a chair, it looked like he was getting ready to leave and that was when defendant became involved.

Rusin testified that, on the day of the incident, he lived at the Windy City house. He had spent that evening at a friend's house, located on South Third Street in St. Charles, watching football, drinking beer, and doing cocaine. At some point, he proceeded to jog home and, as he approached the Windy City house, he heard a commotion. He saw Manning, Wimberly, defendant, and the victim. Someone said, "[W]e told you to leave." Rusin saw Manning hit the victim with a chair, and he saw Wimberly attempt to hit the victim but miss. He also saw defendant hit the

victim, but he could not recall how many times. The physical altercation "went on for no more than a minute or two." When Rusin approached the side porch, the victim "was in the process of leaving." Rusin saw defendant holding a knife. After the victim left, Rusin, defendant, Wimberly, and Manning took the white school bus to Batavia. Rusin remembered telling the State's Attorney that, while on the bus, the men discussed what they were going to tell the police.

Philip David Lehrfield ("Dave") testified that, on the evening of the incident, he lived in the basement apartment at the Windy City house. That evening, he was in the basement apartment, and he thought he heard a knock on the basement door, which was located on the side of the house. He went up the stairs and found Barnett, defendant, and the victim. Defendant and Barnett were telling the victim that he should not be there. The victim was "a little bit drunk." Dave decided to have a cigarette and sat down on the porch. Barnett and defendant went upstairs, and the victim sat down with Dave to drink a beer. Defendant, Barnett, Wimberly, and Manning came back outside and "surrounded" the victim. They told the victim that he could not be there. There was "a little bit of a heated tone to the discussion."

According to Dave, Wimberly "threw the first punch." Then, "[defendant] and [Manning] got into him, they started getting close to [the victim], throwing punches." Manning hit the victim with a chair three or four times. The victim moved away from the others, while they were moving toward him. Eventually, the fight moved to the front of the house, and defendant, Manning, and Wimberly backed away from the victim. The victim fell down, got up, and left. Dave went back to his apartment, while defendant, Manning, and Wimberly went to the back of the house. The entire altercation lasted about two minutes. He never saw a weapon, other than the chair.

Troy Peacock, a detective with the St. Charles police department, testified that he interviewed defendant, along with another detective, on September 22, 2008. The interview was videotaped and played for the jury. At the beginning of the interview, defendant denied having any physical contact with the victim. However, after being told by the detectives that he had been implicated by the other men, defendant admitted to stabbing the victim. Defendant related to the detectives that the victim came to the Windy City house with Barnett and that defendant told Barnett that the victim could not be there. Defendant told the detectives that the victim cussed at him and told him to "get his bitch ass away from here." Defendant told the detectives that "that struck a nerve." Defendant went upstairs to get Wimberly and Manning and told them that they had a problem. They went downstairs to talk to the victim. The victim started to walk away but then turned around and struck defendant in the face. Defendant told the detectives, "That did it. All hell broke loose." Defendant stabbed the victim in the shoulder and in the back. When the detectives told defendant that the victim was stabbed three times, defendant responded that he must have stabbed him three times then. Defendant stated: "When he hit me, I just lost it." He stated: "I stabbed him because I was angry." After the victim walked away, Manning put defendant on the bus to get him away, because Manning knew how defendant could be. Defendant explained to the detectives: "I don't like to stop until somebody *** goes to the hospital or somebody goes to the grave."

An autopsy of the victim revealed that he had three sharp-force injuries; one on his back, one on his bicep, and one on his chest. Only the stab wound to his chest was fatal. He also had a blunt laceration on the right side of his forehead.

For the defense, defendant testified that, on the evening of September 21, 2008, he was 57 years old and lived in the upper apartment at the Windy City house. He had worked for Windy City

on and off for about 10 years. Before working for Windy City, defendant worked as a jockey, but he had to quit when a horse stepped on his shoulder and crushed his rotator cuff. As a result of the accident, defendant had a steel plate in his shoulder, and he was paralyzed in his arm. He cannot raise his arm higher than elbow level. In addition, defendant is blind in his right eye and has a "sponge kidney."

According to defendant, on the evening in question, Barnett went out to purchase beer for himself and defendant. He returned around 11 p.m. with the victim. When Barnett came upstairs, defendant met Barnett in the doorway and reminded him about the house rule prohibiting visitors. When the victim came up the stairs behind Barnett, defendant told him that he had to leave. The victim said that "he was gone as soon as he smoke[d] a cigarette." Defendant went back inside his apartment, and Barnett and the victim walked down the stairs.

When defendant went to take the trash out, he saw the victim walk out from behind the back of the building. Defendant asked him what he was doing, and the victim told him that he "had to take a leak." Defendant told the victim that he had to leave. The victim said, "I'm going, I'm going, brother," and walked to the side porch to join Barnett. Defendant returned to his apartment. When he heard "fussing and cussing" he went back outside. The victim asked defendant why they could not have company at the house. Defendant again told the victim that he had to leave.

According to defendant, at that point, defendant went upstairs to get Manning and Wimberly. The three men went downstairs and found the victim sitting on the stairs. Wimberly told the victim that he had to leave. The victim "cussed [Wimberly] out" and stood up. The victim said, "[O]kay, I'm gone." But, instead of leaving, the victim "got up, he made two steps, he turned and he punched [defendant]" above his eye. Then, defendant and the victim "started fighting." Defendant stated:

"When we started fighting I had a knife. Now when he came to me, I stabbed him in the shoulder. Then the next thing I know we started fighting. He backed off." Defendant further stated:

> "I thought he was gonna throw up his hand and say, I'm finished, man, I don't want no more. But this time he hit me like a football player across me in my stomach and I'm over his shoulder, so he's picking me up.
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> So when he picked me up he try to power drop me into the cement, but I wound up sticking him in his back. So when I stuck him in his back, he like, like that. I got off him. He say, I'm sorry, man, I'm going, I'm going. But when he walked out the door, he kept hollering, I'll be back, I'll be back, it's not over between me and you."

Defendant testified that the victim walked away. Defendant did not see the victim fall to the ground.

According to defendant, he had the knife in his pocket because he had used it at work that day. He did not recall stabbing the victim in the chest. He did recall that Wimberly got cut in trying to grab the knife away from defendant. Defendant did not have blood on himself. After the victim left, defendant, Manning, Wimberly, and Barnett went upstairs. Then, defendant, Manning, Wimberly, and Rusin went for a ride in the white bus to Batavia. They returned about 45 minutes to an hour later.

After the defense rested, defense counsel asked the court to instruct the jury on self-defense, second-degree murder based on an unreasonable belief in self-defense, and second-degree murder based on provocation. The court rejected the self-defense instruction, finding that (1) the victim did not threaten force against defendant; (2) defendant, Wimberly, and Manning were the aggressors; (3) the danger of harm was not imminent, as the victim was "one highly intoxicated diminutive

individual"; (4) the force was brought to the victim; (5) the amount of force used was not necessary to avert danger; and (6) the belief in the need for the amount of force used was not reasonable.

The State argued that, since the court had rejected a self-defense instruction, the court should also reject instructions on second-degree murder based on an unreasonable belief in self-defense. The defense countered that second-degree murder instructions were appropriate since the court "made that finding that his belief was unreasonable in those circumstances." The court reviewed the testimony, noting that Barnett said that the victim charged Manning twice and then charged defendant. The court concluded:

> "Here in the case at bar we have [defendant] who is a small, elderly individual who is blind in one eye and partially paralyzed in one arm. He gets himself involved in a fight, notwithstanding the fact he has backup, sufficient backup. And at a part of the fight the [victim] charges him, and that was through State witnesses as well.
>
> By his testimony he was picked up over the shoulder of [the victim]. And because of his age, his size and his disability, circumstances may have existed to cause him to believe that he needed to use deadly force.
>
> I would allow second degree murder."

The court rejected second-degree murder instructions based on provocation, finding that the attack on the victim was disproportionate violence based on slight provocation.

As a result of the court's ruling on self-defense, the State withdrew Illinois Pattern Jury Instructions, Criminal, Nos. 24–25.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos. 24–25.06), defining "Use of Force in Defense of a Person." The State also withdrew IPI Criminal 4th No. 4.13, defining "Reasonable Belief."

The State submitted IPI Criminal 4th No. 7.06B, which sets forth the issues to be proved in a first-degree murder case where the jury is instructed on both prongs of second-degree murder (provocation and unreasonable belief). It was modified to eliminate the language relating to provocation, thereby transforming the instruction into IPI Criminal 4th No. 7.06, which applies when the jury is instructed on second-degree murder based on only unreasonable belief. The State further modified IPI Criminal 4th No. 7.06 by deleting the third proposition, which would have required the jury to find: "That the defendant was not justified in using the force which he used."

The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 29 years' imprisonment. Defendant timely appealed.

II. ANALYSIS

Defendant first contends that the trial court erred in refusing to instruct the jury on self-defense. Initially, we note that the parties disagree about the appropriate standard of review. Citing *People v. Parker*, 223 Ill. 2d 494, 501 (2006), defendant argues that "[w]hether jury instructions accurately convey the applicable law is subject to *de novo* review." Citing *People v. Mohr*, 228 Ill. 2d 53, 65 (2008), the State argues that the abuse-of-discretion standard applies. We agree with the State. As noted by the supreme court in *Mohr*, there must be some evidence in the record to justify giving a particular instruction. *Id.* The trial court has the discretion to decide whether the evidence in the record raises a particular issue and whether an instruction on that issue should be given. *Id.* Here, because the issue concerns whether a self-defense instruction should have been given in light of the evidence at trial, we review the issue for an abuse of discretion.

Generally, it is appropriate to instruct the jury on defense theories supported by the evidence at trial, even if it is only slight. *People v. Davis*, 213 Ill. 2d 459, 478 (2004); *People v. Everette*, 141

Ill. 2d 147, 156 (1990). "Very slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Jones*, 175 Ill. 2d 126, 132 (1997); see also *People v. Bratcher,* 63 Ill. 2d 534, 539 (1976). As already noted, where some evidence was presented to support an instruction, it is an abuse of discretion to refuse the instruction. *Jones*, 175 Ill. 2d at 131-32.

Self-defense is an affirmative defense, and once a defendant raises it, the State bears the burden of disproving it beyond a reasonable doubt. *People v. Young*, 323 Ill. App. 3d 1078, 1089 (2001). Self-defense exists when (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm is imminent; (4) the threatened force is unlawful; (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. If the State negates any one of the elements of self-defense, the defendant's self-defense claim fails. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). A person commits second-degree murder when he commits the offense of first-degree murder and, at the time of the killing, he believes the circumstances to be such that, if they exist, would justify the use of deadly force under the principles of self-defense, but his belief is unreasonable. 720 ILCS 5/9—2(a)(2) (West 2008).

Defendant argues that "[t]he court erred in refusing self-defense instructions yet allowing second degree murder instructions, because the only difference between the complete defense and the lesser offense is whether the defendant's belief was reasonable or unreasonable." In support of his argument, defendant relies on *People v. Harris*, 39 Ill. App. 3d 805 (1976), and *People v. Woodward*, 77 Ill. App. 3d 352 (1979). We will address each in turn.

In *Harris*, after a jury trial, the defendant was found guilty of murder. *Harris*, 39 Ill. App. 3d at 806. As in the present case, the trial court instructed the jury on voluntary manslaughter[1] but it refused to instruct the jury on self-defense. *Id.* On appeal, the defendant argued that the court erred in refusing to instruct the jury on self-defense. In considering the issue, the reviewing court began by noting the "well[-]settled" rule that "a defendant is entitled to have the jury consider any legally recognized defense which has some foundation in the evidence and that 'very slight' evidence on a given defense entitles defendant to an instruction on that defense." *Id.* The reviewing court then thoroughly reviewed the evidence. It specifically noted the defendant's testimony "that on earlier occasions deceased had acted as though he had a gun, that a few minutes before the shooting defendant had seen deceased put a gun in his pocket, and that deceased was reaching for his pocket when defendant shot him." *Id.* at 810. The reviewing court noted that "the trial court apparently concluded that while there was evidence that defendant may have had a belief in the need to use deadly force, there was no evidence that the belief was a reasonable one." *Id.* The reviewing court disagreed with the trial court's conclusion. The court stated: "Even though the evidence of a reasonable belief was contradicted by other evidence and might not be believed by the jury, still, *** the defendant's credibility is a matter for the jury to resolve." *Id*. at 811.

In *Woodward*, the defendant was charged with two counts of murder. *Woodward*, 77 Ill. App. 3d at 356. The trial court instructed the jury on murder, voluntary manslaughter, and involuntary manslaughter. *Id.* The trial court refused to instruct the jury on self-defense. *Id.* The defendant was found guilty of voluntary manslaughter and appealed. *Id.* The reviewing court

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[1]The offense of voluntary manslaughter was replaced by the offense of second-degree murder in 1987. See Pub. Act 84—1450, §2, eff. July 1, 1987.

reversed. Relying on *Harris*, the court stated: "It seems clear that if there is a jury question as to the reasonableness of the defendant's belief in the necessity for self-defense, the judgment must be reversed for a new trial." *Id.* The court further emphasized: "It is, of course, true that the self-defense instruction would be proper only if the defendant produced 'some evidence' of a reasonable belief in the necessity for the use of deadly force." *Id.* at 357. The court reviewed the evidence and found that "[t]here was testimony that the defendant had heard the victim say to defendant's father only a minute or two before the incident that he was returning home to procure a gun to kill the father. *** [T]he victim had a reputation *** for violence and aggression. *** [T]he defendant was aware of the victim's reputation." *Id.* Based on this testimony, the court found that, notwithstanding certain inconsistencies in the defendant's testimony, the evidence supported the giving of a self-defense instruction. *Id.*

Here, the trial court found that the evidence warranted instructing the jury on second-degree murder based on an unreasonable belief in the need for the use of force but that the evidence did not meet the threshold for instructing the jury on self-defense. In rejecting the self-defense instruction, the court stated: "Here, the beliefs were not reasonable and the amount of force was not necessary." However, the court seemed to alter that position when ruling on the second-degree murder instructions, stating:

> "Here in the case at bar we have [defendant] who is a small, elderly individual who is blind in one eye and partially paralyzed in one arm. He gets himself involved in a fight, notwithstanding the fact he has backup, sufficient backup. And at a part of the fight the [victim] charges him, and that was through State witnesses as well.

> By his testimony he was picked up over the shoulder of [the victim]. *And because of his age, his size and his disability, circumstances may have existed to cause him to believe that he needed to use deadly force.*
>
> I would allow second degree murder." (Emphasis added.)

We find that there was slight evidence, as noted by the trial court, to support the giving of a self-defense instruction. Defendant testified that the victim punched him in the eye, hit him like a football player across the stomach, and lifted him up in an attempt to "power drop [him] into the cement." Indeed, given defendant's "size and his disability," defendant could have actually and subjectively believed a danger existed that required the use of the force applied and, further, a jury could have concluded that such belief was objectively reasonable. Based on *Harris* and *Woodward*, we agree that the evidence here warranted instructing the jury on both self-defense and second-degree murder and that it was for the jury to determine the reasonableness of defendant's belief.

Our decision is further supported by *People v. Lockett*, 82 Ill. 2d 546 (1980), which was decided after *Harris* and *Woodward*. Although the present case does not present the same issue as that decided in *Lockett*, we find *Lockett* instructive. There, the defendant was convicted of murder. *Id.* at 548. The evidence showed that the defendant and two friends, while in the defendant's car, encountered the victim, who was pushing a cart filled with glass bottles. *Id.* The defendant and his friends engaged in an argument with the victim about moving the cart. *Id.* The victim told the defendant that he had something in his cart that would make the defendant move. *Id.* The victim reached into his cart and picked up something brown. *Id.* When one of the passengers told the defendant to watch out, the defendant, thinking the victim had a gun, grabbed his own gun and shot the victim. *Id.* at 548-49. No weapon was found on the scene; a broken whisky bottle was found

next to the victim's body. *Id.* at 549. The jury was instructed on self-defense but not on voluntary manslaughter. *Id.* "The trial court's reason for rejecting the voluntary manslaughter instruction was not because the record failed to reveal any evidence that would reduce the crime to manslaughter. Rather, the trial judge refused to give the instruction because he concluded that 'self-defense is seldom compatible with voluntary manslaughter.' " *Id.* at 553-54. The defendant appealed, arguing that he was entitled to instructions on both self-defense and voluntary manslaughter. The supreme court agreed and reversed, stating that a defense based on self-defense does not preclude a voluntary manslaughter instruction in a murder prosecution. *Id.* at 550. The court stated:

> "It is not the province of the judge to weigh the evidence and decide if defendant's subjective belief was reasonable or unreasonable. The judge's duty is to determine if any evidence is presented that the defendant had a subjective belief. We can conceive of no circumstance when a judge could determine, as a matter of law, that a jury could find the defendant had a reasonable subjective belief the killing was justified, but that the jury could not find the defendant's subjective belief was unreasonable. So long as some evidence is presented from which a jury could conclude that defendant had a subjective belief, the jury should determine if the belief existed and, if so, whether that belief was reasonable or unreasonable. Consequently, we hold that when the evidence supports submitting an instruction on justifiable use of force, a tendered IPI Criminal No. 7.05 on voluntary manslaughter also should be given." *Id.* at 553.

The court further stated:

> "The submission of the self-defense instruction by the trial judge indicates that, in his opinion, the jury could conclude defendant acted in the subjective belief his conduct was in

> self-defense. The record supports that determination. As a result, a voluntary manslaughter instruction also should have been given. It was for the jury to conclude whether defendant acted in the belief his conduct was justified and whether that belief was reasonable or unreasonable." *Id.*

As noted, while *Lockett* presented a converse situation, its reasoning is applicable here and supports reversal. Other courts facing similar scenarios as the one presented here have also found *Lockett* persuasive. See *People v. Russell*, 215 Ill. App. 3d 8 (1991) (where the jury in a murder trial was instructed on second-degree murder, the trial court's refusal to give the defendant's requested instruction of self-defense was reversible error); *People v. Timberson*, 188 Ill. App. 3d 172 (1989) (same).

The State argues in the alternative that, even if we find that the jury was improperly instructed, the error was harmless. In a harmless-error analysis, "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). We cannot say that the jury's verdict would have been the same had it been properly instructed. As instructed, if the jury found that defendant intended to kill the victim and did kill him but had a reasonable belief that deadly force was necessary, they were offered no alternative but to find defendant guilty. See *Harris*, 39 Ill. App. 3d at 811-12. Indeed, not only did the court erroneously refuse to instruct the jury on self-defense, but the instructions that the court did give on first-degree and second-degree murder were (as the State concedes) erroneously modified. The modified IPI Criminal 4th No. 7.06 did not include the third proposition, which would have required the jury to find: "That the defendant was not justified in using the force which he used." Therefore, we cannot say that any error was harmless.

Because we are reversing and remanding for a new trial, we need not reach defendant's claim that the trial court failed to conduct an appropriate inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel.

Lastly, we conclude that the jury was presented with sufficient evidence, if believed, to support a guilty verdict, although we do not evaluate the evidence to be presented at a second trial. Our conclusion is simply to ensure that, upon remand for a new trial, defendant will not be subject to double jeopardy. *People v. Lopez*, 229 Ill. 2d 322, 366-68 (2008).

III. CONCLUSION

Based on the foregoing, we reverse the judgment of the circuit court of Kane County and remand for a new trial.

Reversed and remanded.