2013 IL App (3d) 110272-U

Order filed December 9, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-11-0272
	)	Circuit No. 09-CF-1973
TYRONE HENDERSON,	)	
	)	Honorable Edward Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's request to instruct the jury on affirmative defense of self-defense. The State adduced sufficient testimony at trial to convict defendant of first-degree murder, home invasion, and being an armed habitual criminal. Defense counsel did not render constitutionally ineffective assistance. Defendant's convictions for criminal trespass and possession of a firearm violate one-act, one-crime principles given his convictions for home invasion and being an armed habitual criminal.

¶ 2 This State charged defendant, Tyrone Henderson, with numerous crimes following the death of Michael Amos. A jury found defendant guilty of first-degree murder (720 ILCS 5/9-

1(a)(1) (West 2008)), being an armed habitual criminal (720 ILCS 5/24-1.7(a)(1) (West 2008)), criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2008)), home invasion (720 ILCS 5/12-11(a)(5) (West 2008)), and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The circuit court of Will County sentenced defendant to 45 years of imprisonment for the murder conviction, 6 years for being an armed habitual criminal, 3 years for criminal trespass to a residence, 6 years for home invasion and 6 years for unlawful use of a weapon by a felon. Defendant appeals, claiming, *inter alia*, the trial court erred when instructing the jury, the State failed to adduce sufficient evidence to prove him guilty beyond a reasonable doubt, that his trial counsel provided constitutionally ineffective assistance, and that the one-act, one-crime principle necessitates vacation of his convictions for criminal trespass, home invasion and unlawful use of a weapon by a felon. We affirm in part and vacate in part.

¶ 3 BACKGROUND

¶ 4 Michael Amos died of gunshot wounds he received on August 26, 2009. The State charged defendant with the crimes listed above as a result of the shooting, which occurred at 123 Logan Avenue in Joliet. The following people were at the residence on the night in question: Shantell Johnson, Tia Johnson, Kewon Amos, Michael Amos, Gloria Pratt, Jonathan Fairley, Robert Bouie and defendant, Tyrone Henderson.

¶ 5 Tia Johnson, Kewon Amos and Gloria Pratt all live at the residence. Gloria is Kewon's mother. Tia is Kewon's girlfriend. Kewon is the brother of the decedent, Michael Amos. Jonathan Fairley and Robert Bouie were friends of the decedent. Shantell Johnson is Tia's sister and the defendant's girlfriend.

¶ 6 At trial, Gloria Pratt testified that Shantell became volatile and loud during an argument

with Michael so Shantell was asked to leave the house, which she did. Michael and Shantell had previously dated.

¶ 7 Gloria noted that following the argument, she was in her bedroom when she heard defendant in the living room asking, "what's going on?" Gloria returned to the living room and placed herself between defendant and Kewon. She told defendant to leave. Having observed defendant grab for the door as if he was going to leave, she thought defendant and Kewon were going outside to talk so she walked away.

¶ 8 Gloria then heard what she described as someone throwing a punch and returned to the living room. She saw Kewon and defendant "stumbling to the floor" in a physical altercation. Fairley and Michael also became involved in the altercation. She observed Kewon, Michael, and Fairley each holding a part of defendant's body. At some point thereafter, defendant was on his back and Fairley screamed, "he got a gun, he got a gun." Three shots were fired in succession. Gloria assumed Fairley was referring to defendant as having the gun, but she could not see who had the gun.

¶ 9 Gloria stated that after the shots were fired, she ran in and out of the residence to see if police had arrived. While doing this, she heard a fourth and fifth gunshot. On one trip inside, she observed Kewon swing a machete at defendant twice, drop the machete, and fall onto defendant. Defendant had a gun in his right hand with his finger on the trigger. Gloria pleaded with defendant to let go of the gun. She grabbed the barrel of the gun in an attempt to pry defendant's fingers from the handle. She also attempted to release the magazine from the gun while it was in defendant's hand. Michael's friend, Robert Bouie, eventually entered the house and grabbed the gun.

¶ 10 Kewon testified that after Shantell was asked to leave, Tia escorted her out the back door. Shantell continued talking loudly and threatened to call people. Eventually, Kewon called the police. A few seconds later, Fairley entered the kitchen and told Kewon "someone was [t]here for [him]." Kewon went to the living room and observed defendant standing in the middle of the room. Defendant stated, "[I] heard we can't keep our hands to yourself," and asked Michael if he had touched Shantell's buttocks. Michael responded affirmatively. Defendant indicated that he would be waiting outside for Michael. Kewon told defendant to speak with him instead of seeking an altercation with Michael. Shortly thereafter, defendant struck Kewon in the face without any provocation. Kewon placed defendant in a headlock, and they fell to the ground. Kewon noted that after approximately 30 seconds, defendant pulled a gun from his pocket. Fairley tried to get defendant off Kewon by grabbing defendant from behind. Kewon grabbed defendant's wrist. The gun went off while it was in defendant's hand. Defendant's finger was on the trigger. No one else's hand was on the gun.

¶ 11 Kewon continued his testimony, noting that at this point in the fracas, Michael grabbed defendant from behind. Kewon heard a second shot. From the change in Michael's breathing, Kewon believed Michael had been hit with this second shot. Kewon then retrieved a knife from his bedroom. When Kewon returned with the knife, Michael was on top of defendant, and defendant was still holding the gun. Kewon heard a third shot. Kewon dropped the knife and tried to pry the gun from defendant's hand. Kewon was then struck in the back of the head and blacked out.

¶ 12 Tia testified that as she was outside walking Shantell to her car, the defendant approached in his car. Tia ran into the house through the back door, immediately heading toward the front

door to close it. However, defendant came through the front door as Tia entered the living room. She neither opened the door for him nor gave him permission to enter. Defendant repeatedly asked Michael if he touched Shantell's buttocks. Kewon suggested that he and defendant go outside to talk, but defendant "didn't want to hear it." Defendant made a move toward Michael, resulting in Kewon extending his hand as to indicate "no, you're not going there." Tia did not see Kewon make physical contact with the defendant despite extending his hand. Nevertheless, defendant punched Kewon in the face. Kewon then grabbed defendant, and they began to wrestle. After the wrestling began, Tia heard Kewon say, "he has a gun." Tia saw a gun in defendant's hand. No one else had their hand on the gun when Tia observed defendant shoot Michael in the back. As Kewon, Michael, and defendant wrestled for the gun, Tia ran out of the house and called the police.

¶ 13 Michael's friend, Jonathan Fairley testified that he was in the living room when defendant opened the door and entered the house. Defendant remained in the doorway, speaking to Michael and Kewon. Eventually, defendant threw a punch at Kewon. Kewon grabbed defendant, and they began to wrestle. As Fairley grabbed defendant from behind to get him off Kewon, defendant pulled a gun from his pants and pointed it toward the ceiling. Fairley heard one gunshot. Only defendant had his hand on the gun. Fairley threw defendant to the ground and was running toward the back door when he heard another gunshot. While outside for about ten seconds, Fairley heard four more gunshots so he ran back inside. Once there, he observed Bouie enter the house and grab the gun from defendant. Shantell then grabbed the gun from Bouie and ran out the back door.

¶ 14 Bouie testified that when he entered the house, Kewon, Michael, and defendant were

piled on top of one another. After Kewon said, “get the gun," Bouie took the gun out of defendant’s hands. Michael and Kewon also had their hands on the gun. Bouie reached out to give the gun to Gloria, but Shantell took the gun and ran out the back door.

¶ 15 The State's evidence indicated that Michael received gunshot wounds to his upper right shoulder, lower left abdomen, and right thigh. The entry and exit wounds went from Michael's back to his front. The State also entered defendant's prior felony convictions into evidence.

¶ 16 For the defense, Adrian Clark testified that in January of 2009, Michael came to his house and asked that he hide a shotgun for him. Clark refused because he was on parole. In June 2009, Michael accused Clark of stealing the shotgun, and they agreed to a fistfight. During the fight, Michael lifted his shirt revealing a gun to Clark.

¶ 17 Defendant testified on his own behalf. He noted that on August 26, 2009, he went to Kewon and Tia's house after Shantell called him crying. When he arrived, Shantell was standing in the front yard of the house crying and gesturing toward the house. Shantell’s mouth was bleeding. Concerned for Tia, he knocked on the door twice. Tia opened the door and stood with half of her body behind the door. Defendant entered and asked Tia if she was all right. Defendant asked Michael whether he grabbed Shantell's buttocks, hit or pushed Shantell. Defendant stated, “but you all see she’s pregnant” and was worried about potential complications to the baby. When defendant heard Michael's response, he told Michael they needed to step outside so defendant could beat Michael's "disrespectful ass." Defendant gestured toward the door indicating that Michael “need[ed] to come outside.”

¶ 18 As defendant reached for the door, Kewon grabbed defendant's waist. In response, defendant threw a punch. Michael, Kewon, and defendant collided and fell to the floor.

Defendant heard someone say "he got a gun." Defendant saw a gun in Michael's hand. Defendant grabbed Michael's hand that held the gun and twisted the gun toward Michael and away from himself. Defendant was on top of Michael, who was lying with his back to the floor. Kewon and Fairley were hitting defendant from behind him. Struggling for the gun, defendant yanked on Michael's hand and heard two gunshots. At no time was defendant's finger on the trigger.

¶ 19 Defendant continued, noting that as he and Michael continued to struggle over the gun, Kewon left the room only to return with a machete. Kewon swung the machete at defendant, but defendant rolled out of the way and the machete struck Michael's back. Kewon swung the machete a second time and struck defendant's leg. Defendant pulled the gun out of Michael's hand and held it by the bottom of the handle. The gun did not discharge while defendant was holding it, and defendant's finger was never on the trigger. Michael, Kewon, and Gloria immediately grabbed defendant's hand. Bouie then entered the house and pried the gun from everyone's hands.

¶ 20 At the close of evidence, the State prepared many jury instructions including one for self-defense and one for second-degree murder. At the jury instruction conference, the State indicated that a second-degree murder instruction was not appropriate in light of defendant's testimony that he did not pull the trigger. Defendant's counsel indicated that he was not requesting a second-degree murder instruction. Defense counsel did, however, request that the self-defense instruction be given. Defendant's attorney argued that there was evidence that defendant was not the initial aggressor and that the victim threatened force by pulling a gun from his waistband. The court denied the requested self-defense instructions, finding that any use of

force by the victim against defendant was lawful because defendant was the initial aggressor and the victim was acting in defense of his dwelling. The trial court specified for the record:

> "[S]how that the defendant has offered as Instructions IPI 24-25.09 [initial aggressor's justifiable use of force], 24-[2]5.06 [justifiable use of force in defense of a person], 24-25.06(a) [issue in defense of justifiable use of force], 3.12(x) [impeachment of a witness by prior conviction], and 4.13 [definition of reasonable belief]."

¶ 21 The jury ultimately found defendant guilty on all charges. Defendant filed a motion for a new trial, in which he argued, *inter alia*, that the "trial court erred by its denial of a self-defense instruction." The trial court denied defendant's motion and sentenced him to 45 years incarceration for first-degree murder to be served consecutively with his other sentences, which included the following: 6 years for unlawful use of a weapon by a felon; 6 years for home invasion; 6 years for being an armed habitual criminal; and 3 years for criminal trespass to a residence. The trial court ruled that all of the nonfirst-degree murder charges were to run concurrently. This appeal followed.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant argues: (1) the trial court abused its discretion in denying his request to instruct the jury on the affirmative defense of self-defense; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) his counsel provided ineffective assistance by failing to request jury instructions on second-degree murder and involuntary manslaughter; (4) his counsel provided ineffective assistance by failing to introduce the victim's felony conviction for unlawful use of a weapon into evidence; and (5) based on one-act, one-crime principles, his

convictions for criminal trespass to a residence and unlawful use of a weapon by a felon should be vacated.

¶ 24 I. Self-Defense Jury Instruction

¶ 25 Defendant contends the trial court erred by denying his request for the jury to be instructed on self-defense. A defendant is entitled to a jury instruction on an affirmative defense if there is some evidence, however slight, in the record to support that defense. *People v. Washington*, 2012 IL 110283 (2012). The question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review. *Id.*

¶ 26 A. Forfeiture

¶ 27 The State argues that defendant forfeited the issue of whether the trial court erred in denying his request for a self-defense instructions claiming the "defendant did not specifically identify in his post-trial motion which jury instruction he claimed the trial judge erred in denying." In support of its contention, the State cites *People v. Komes*, 319 Ill. App. 3d 830 (2001).

¶ 28 In *Komes*, the defendant objected to a non-IPI instruction regarding willful conduct. The *Komes* defendant's posttrial motion generally claimed that the trial court erred in " 'allowing instructions to be given to the jury that were improper' " without identifying the instructions or the reason for their impropriety. *Id.* at 834. On appeal, the *Komes* defendant provided greater specificity, arguing that the trial court should have instructed the jury on willfulness by using a statutory definition. Ultimately, the court held that the jury instruction issue raised on appeal was waived, as defendant failed to explicitly object at trial on the matter and further failed to raise the

issue in a written posttrial motion with sufficient specificity. *Komes*, 319 Ill. App. 3d 830.

¶ 29 This case is distinguishable from *Komes.* It is clear from the record that defendant objected to the denial of his request for a self-defense instruction. Furthermore, a review of defendant's posttrial motion and the arguments made to this court clearly identify the error claimed; that is, whether the trial court erred by refusing to instruct the jury on the issue of self-defense as defendant requested. Therefore, we find defendant properly preserved the issue for appellate review.

¶ 30 B. Refusal to Instruct the Jury on Self-Defense

¶ 31 Under section 7-1 of the Criminal Code of 1961 (the Code), the use of force against another that is intended or likely to cause death or great bodily harm is justified as self-defense when: (1) force was threatened against defendant; (2) defendant was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually and subjectively believed that a danger existed which required the use of the force applied to avert the danger; and (6) defendant's beliefs were objectively reasonable. 720 ILCS 5/7-1 (West 2008); *People v. Jeffries,* 164 Ill. 2d 104, 127-28 (1995).

¶ 32 Once defendant has provided some evidence for the above elements, the State has the burden of disproving at least one element beyond a reasonable doubt. *People v. Dickey*, 2011 IL App (3d) 100397. A defendant is entitled to instructions on those defenses supported by evidence, even where the evidence is "slight" or inconsistent with the defendant's own testimony. *People v. Everette*, 141 Ill. 2d 147 (1990). Generally, " 'a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.' " *Id.* at 156 (quoting *Matthews v. United States*, 485 U.S. 58, 64 (1988)). A

homicide defendant is entitled to an instruction on self-defense where there is some evidence in the record which, if believed by the jury, would support a finding of self-defense, even where defendant testified he accidentally killed the victim. *Everette*, 141 Ill. 2d 147.

¶ 33 However, our supreme court has been very clear that in "order to instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). The *Jeffries* court continued, noting that a "self-defense and a voluntary manslaughter (now second-degree murder) instruction should be given when any evidence is presented showing the defendant's subjective belief that use of force was necessary." *Id*. (citing *People v. Lockett*, 82 Ill. 2d 546, 552 (1980)).

¶ 34 Moreover, the "perfect defense of self-defense is not available" where a "case appears to be a mutual combat situation, where both parties fought willingly upon equal terms." *People v. White*, 293 Ill. App. 3d 335, 338 (1997). The question of "whether the defendant was the initial aggressor, *i.e.*, the one who provoked the fatal confrontation, is a question of fact to be decided by the trier of fact." *People v. De Oca*, 238 Ill. App. 3d 362, 367 (1992).

¶ 35 Defendant argues that he met the burden of providing slight evidence of self-defense such that he was entitled to have the jury instructed on the issue. Defendant stated that upon arriving at the house, he knocked on the door. Tia then opened the door and stepped aside as he entered. Defendant notes that his testimony indicates that after Michael confirmed grabbing Shantell's buttocks, defendant stated that the two "needed to step outside, because I was going to beat his

disrespectful ass." Defendant testified that he then turned toward the door with the intention of leaving. Defendant notes that Gloria corroborated this testimony as Gloria, herself, stated that she thought defendant was going to leave the living room after hearing the "step outside" remark. Defendant notes that Gloria testified she left the living room after observing defendant grab the door handle in an attempt to leave.

¶ 36 Defendant continues, noting that as he attempted to leave, Kewon grabbed him around the waste, pulled him back into the room with such force that defendant, Kewon, and Michael all fell on the floor. Defendant testified that after being pulled back into the living room from the front door area, he was defending himself against three larger men. Defendant claims that one of them then pulled a gun, requiring that he "fight for his life."

¶ 37 These facts, defendant claims, are at least slight evidence that defendant was not the aggressor, that the danger of harm to him was present, that the force threatened against him was unlawful, that he actually believed he was in danger, and that his use of force was appropriate and necessary to avert the danger. The State disagrees.

¶ 38 The State notes that defendant never specifically testified that Tia invited him in the residence, just that she opened the door and he entered putting Tia in a position where she "couldn't go nowhere, because I was standing right in the doorway." The State also notes that while defendant did describe a fracas between himself, Michael and Kewon, defendant specifically denied having his hand on the gun when shots were fired. Defendant stated, "I yanked a few times, because I was trying to really snatch it, but I couldn't snatch it away from him because he had the grip too tight. That's when I heard like two gunshots go off."

¶ 39 Defendant testified that after the initial two shots, he and Michael wrestled with each

other, struggling for the gun. At that point, defendant observed Kewon return to the room with a machete, which Kewon swung at defendant.

¶ 40 The State notes that defense counsel asked defendant numerous times if the gun discharged "while you were holding it" or while "your finger [was] on the trigger?" Each time, defendant denied that the gun discharged while in his possession or control.

¶ 41 We find the trial court did not err in denying defendant's self-defense instruction. Again, as the *Jeffries* court noted, "self-defense and a voluntary manslaughter (now second-degree murder) instruction should be given when any evidence is presented showing the defendant's subjective belief that use of force was necessary." *Jeffries*, 164 Ill. 2d at 127-28. The "force" defendant is accused of using involves shooting the decedent. Specifically, the indictment charges defendant with shooting "Michael Amos in the body with a handgun, thereby causing the death of Michael Amos." We can find nowhere in the record where defendant claims to have used such force to defend himself. Defendant simply claims that someone else shot the decedent while three men scuffled.

¶ 42 In *People v. Salas*, 2011 IL App (1st) 091880, the court found that the trial court erred when instructing the jury on self-defense as the "defendant never admitted he killed Sergio [the victim] and, as such, never presented any evidence that he reasonably believed deadly force was necessary to prevent imminent death or great bodily harm to himself or another ***." *Id.* at ¶ 85.

¶ 43 The *Salas* court noted:

> "Defendant testified at trial that, after Sergio attempted to point his gun at him in the alley, they struggled and Sergio fired the gun without hitting defendant. Sergio eventually dropped the gun. Defendant picked up the

> gun and ran away. Defendant specifically testified he never touched the trigger, never shot the gun while he was in the alley, and that he did not shoot anyone. ***
>
> During closing arguments, defendant's theory was *not* that he shot Sergio in self-defense to prevent imminent death, great bodily harm, or the commission of a forcible felony, or that Sergio was struck by a bullet during that struggle, but rather, that one of the Satan Disciples accidentally shot Sergio while attempting to shoot defendant." (Emphasis in original.) *Id.* at ¶¶ 85-86.

¶ 44 Similarly, the defendant herein did *not* testify that he shot Michael in self-defense to prevent imminent death, great bodily harm, or the commission of a forcible felony. Defendant's testimony was very clear that he did not shoot Michael at all. The State's indictment claimed that defendant "shot Michael Amos in the body with a handgun, thereby causing the death of Michael Amos." The State's witnesses testified that defendant entered the residence without authority, punched Kewon in the face, then shot Michael. There is simply no evidence suggesting defendant committed the shooting as self-defense in the face of unlawful threatened force against him. As such, we find the trial court properly refused to instruct the jury on self-defense.

¶ 45 We further note that the jury convicted defendant of home invasion. Self-defense is not available to one committing a home invasion. *People v. Freeman*, 234 Ill. App. 3d 380 (1992).

¶ 46 II. Sufficiency of the Evidence

¶ 47 Defendant argues that the State failed to prove him guilty beyond a reasonable doubt on all counts. Defendant claims that the State's evidence was "so contradictory and confusing that it

failed to prove the offenses charged."

¶ 48 The relevant inquiry in reviewing the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985). A reviewing court will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of defendant's guilt. *People v. Maggette*, 195 Ill. 2d 336 (2001). It is for the trier of fact to resolve any conflicts in testimony, weigh the evidence, and draw all reasonable inferences from the evidence (*People v. Chromik*, 408 Ill. App. 3d 1028 (2011)), and to determine how flaws in a portion of testimony affect the credibility of the whole (*People v. Cunningham*, 212 Ill. 2d 274 (2004)). As noted above, defendant stands convicted of intentional first-degree murder pursuant to section 9-1(a)(1) of the Code, which required the State to prove he performed acts which caused the death of the victim, and that defendant knew or reasonably should have known that such acts would kill or do great bodily harm to the victim. See 720 ILCS 5/9-1(a)(1) (West 2008).

¶ 49 Tia testified that defendant entered the house without authority. Multiple witnesses testified that he verbally confronted and threatened Michael and punched Kewon. Witnesses further testified that a physical altercation ensued, during which defendant pulled out a gun and shot Michael. Rational jurors could have inferred from the evidence that when defendant shot Michael he intended to kill or do great bodily harm to Michael.

¶ 50 Regarding defendant's conviction for home invasion, a person commits home invasion when, without authority, he knowingly enters the dwelling place of another knowing one or more persons is present and personally discharges a firearm that proximately causes death to another

within the dwelling. 720 ILCS 5/12-11(a)(5) (West 2008). The evidence shows that defendant went to Tia and Kewon's house to confront Michael about his interaction with Shantell. Tia testified that defendant was not invited into the home; instead, he entered on his own accord and, during a physical altercation, shot Michael. Thus, there was sufficient evidence for rational jurors to find that defendant entered the home without authority and intentionally caused the death of another in the home.

¶ 51 Pursuant to section 24-1.1(a) of the Code, a person commits unlawful use of a weapon by a felon when he "knowingly possess[es] on or about his person *** any firearm or any firearm ammunition if the person has been convicted of a felony." 720 ILCS 5/24-1.1(a) (West 2008). Here, the State presented evidence of defendant's prior felony conviction and evidence that defendant pulled a gun out of his pocket or waistband on the day of the incident. Therefore, there was sufficient evidence for rational jurors to find defendant was a convicted felon in possession of a firearm.

¶ 52 In reviewing the evidence in the light most favorable to the State, we conclude the State adduced sufficient evidence at trial from which a rational jury could find defendant guilty beyond a reasonable doubt as to first-degree murder, home invasion, and unlawful use of a weapon by a felon. We need not discuss the remaining two convictions since, as will be discussed below, those convictions are vacated under one-act, one-crime principles.

¶ 53 III. Ineffective Assistance of Counsel

¶ 54 Defendant claims his counsel provided ineffective assistance for failing to: (1) request jury instructions on second-degree murder and involuntary manslaughter; and (2) introduce evidence of the victim's prior conviction for aggravated unlawful use of a weapon. To prevail on

a claim of ineffective assistance of counsel, a defendant must show: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) defendant was prejudiced by the deficient performance in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984); *People v. Golden*, 229 Ill. 2d 277 (2008).

¶ 55 A. Second-Degree Murder Jury Instructions

¶ 56 As noted above, the defendant was not entitled to have the jury instructed on self-defense. "In the absence of any evidence supporting the giving of a self-defense instruction, defendant was not entitled to an instruction on second-degree murder." *Salas*, 2011 IL App (1st) 091880, ¶ 87. Where instructions are not supported by either the evidence or the law, the instructions shall not be given to the jury. *People v. Simester*, 287 Ill. App. 3d 420, 431 (1997). Defense counsel does not render ineffective assistance by failing to request an instruction which should not be given. *People v. Bauer*, 393 Ill. App. 3d 414, 423-24 (2009). "A defendant must show prejudice resulting from the failure to tender preferred jury instructions in order to demonstrate a denial of effective assistance of counsel." *People v. Burchette*, 257 Ill. App. 3d 641, 662 (1993).

¶ 57 As the defendant was not entitled to have the jury instructed on self-defense, he "was not entitled to an instruction on second-degree murder." *Salas*, 2011 IL App (1st) 091880, ¶ 87. Therefore, his trial counsel simply cannot be held to have rendered constitutionally ineffective assistance for failing to request the jury be instructed on second-degree murder.

¶ 58 B. Involuntary Manslaughter

¶ 59 Defendant additionally asserts that a jury instruction on involuntary manslaughter should

have been tendered by his attorney. A person commits involuntary manslaughter when he unintentionally kills another person without lawful justification by recklessly acting in a manner likely to cause death or great bodily harm. 720 ILCS 5/9-3 (West 2008). For the purpose of involuntary manslaughter, a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm to another, even though there was no intent to inflict injury. *People v. Castillo*, 188 Ill. 2d 536 (1999); 720 ILCS 5/4-6 (West 2008). To justify an instruction on involuntary manslaughter, there must be some credible evidence in the record to show that the defendant "recklessly" performed the acts that caused the death of the victim. *Salas*, 2011 IL App (1st) 091880, ¶ 92.

¶ 60 In *Salas*, the court noted that a defendant commits involuntary manslaughter when he unintentionally kills another person without lawful justification by recklessly acting in a manner likely to cause death or great bodily harm. *Id*. The prosecution in *Salas* presented evidence that defendant intentionally shot the victim in the back of the head, but the defendant denied ever shooting the victim. *Id*. at ¶ 93.

¶ 61 In the case at bar, defendant similarly denied that he shot Michael Amos. The State's witnesses testified that defendant entered the home without authority, threatened to beat one of the occupants, threw a punch at Kewon, then pulled a gun and purposely shot Michael. Forensic evidence shows the bullets entered Michael's back and exited his front. Defendant claimed his hand was not on the gun or the trigger when it discharged, and the State's witnesses claim only the defendant's hand was on the gun when it discharged. Just as in *Salas*, there is simply no evidence of recklessness and no evidence that defendant unintentionally shot the victim. The two versions of the events presented at trial were either that defendant did not shoot the victim, or

that defendant purposely and intentionally shot the victim. As such, we find that defendant was not entitled to have the jury instructed on involuntary manslaughter. Therefore, his trial counsel cannot be said to have rendered constitutionally ineffective counsel by failing to request the instruction. *Bauer*, 393 Ill. App. at 423-24.

¶ 62 C. Victim's Prior Conviction

¶ 63 Where the theory of self-defense is raised, evidence of the victim's aggressive or violent character is relevant for the following reasons: (1) to show defendant's knowledge of the victim's behaviour and tendencies that affected his perception of, and reaction to, the victim's actions; and (2) to support defendant's version of the facts where there are conflicting accounts of what happened. *People v. Lynch*, 104 Ill. 2d 194 (1984). *Lynch* only applies where self-defense is supported by the evidence. *People v. Figueroa*, 381 Ill. App. 3d 828 (2008). As discussed *supra*, the trial court did not err in refusing to instruct the jury on self-defense making the victim's prior criminal history irrelevant.

¶ 64 Moreover, we note defendant's claim of error in this instance is not that counsel rendered ineffective assistance by failing to uncover the conviction. Defendant notes that counsel filed a motion *in limine* seeking to introduce the conviction into evidence, which the trial court took under advisement but never specifically denied as counsel never sought to admit the conviction. We find trial counsel's decision not to introduce the victim's prior conviction into evidence constitutes trial strategy. Trial strategy cannot be a basis for finding counsel ineffective. *People v. Smith*, 177 Ill. 2d 53, 92 (1998). As trial strategy includes the decision to allow, and not object to, the introduction of a defendant's prior conviction (*People v. Anderson*, 2013 IL App (2d) 111183), the converse in this context is equally a strategic choice: that is, the decision not to

introduce evidence of the victim's prior convictions.

¶ 65 The decision of whether or not to speak ill of a dead victim in front of a jury is certainly a strategic one. Counsel was well aware of the conviction, having identified it in his motion *in limine*. To paint a colorable ineffective assistance of counsel claim, a " 'defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy.' " *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Even were we to find that the victim's conviction was somehow relevant, which we do not, defendant has not met his burden to show that the challenged action was anything other than trial strategy.

¶ 66 IV. One-Act, One-Crime

¶ 67 Defendant argues based on one-act, one-crime principles that his conviction for criminal trespass to a residence should be vacated where he was also convicted of home invasion, and his conviction for unlawful use of a weapon by a felon should be vacated where he was also convicted of being an armed habitual criminal. The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161 (2010). When a court or jury returns multiple convictions for the same physical act, the mittimus should reflect only the conviction for the most serious charge, and the convictions on the less serious charges must be vacated. *People v. Cardona*, 158 Ill. 2d 403 (1994).

¶ 68 The State concedes, and we agree, that the trial court erred in convicting and sentencing defendant on the charge of criminal trespass to a residence. Defendant's convictions for criminal trespass to a residence and home invasion were based on the same physical act, *i.e.*, entering the residence of another, without authority, knowing that one or more persons is present. See 720

ILCS 5/19-4(a)(2) (West 2008) (criminal trespass to a residence); 720 ILCS 5/12-11(a)(5) (West 2008) (home invasion). The home invasion conviction in this case required the additional element of personally discharging a firearm that proximately caused death to a person in the dwelling. Accordingly, we affirm the more serious offense of home invasion (Class X felony) and vacate the less serious offense of criminal trespass to a residence (Class 4 felony).

¶ 69 Similarly, defendant's convictions for unlawful use of a weapon by a felon and armed habitual criminal were based on the same physical act of defendant possessing a firearm on August 26, 2009. Therefore, we affirm the greater offense of armed habitual criminal (Class X felony) and vacate the less serious crime of unlawful use of a weapon by a felon (Class 2 felony). See *People v. Bailey*, 396 Ill. App. 3d 459 (2009) (reversing conviction and vacating sentence for unlawful use of a weapon where defendant was also convicted of armed habitual criminal based on the same physical act).

¶ 70 CONCLUSION

¶ 71 Therefore, based on one-act, one-crime principles we vacate defendant's convictions and sentences for criminal trespass to a residence and unlawful use of a weapon by a felon, and affirm defendant's remaining convictions and sentences.

¶ 72 Affirmed in part and vacated in part.