2018 IL App (5th) 150428-U

NO. 5-15-0428

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 14-CF-306
	)	
JUSTIN VAUGHN,	)	Honorable
	)	Richard L. Tognarelli,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Cause remanded for a new trial on charges of first-degree murder where the defendant's request that the jury be instructed on self-defense and second-degree murder should have been granted.

¶ 2 On February 5, 2014, the defendant, Justin Vaughn, shot and mortally wounded Demetrius Lucas at the Storey Manor apartment complex in Alton. On June 19, 2015, a Madison County jury found the defendant guilty of first-degree murder and unlawful possession of a weapon by a felon. On appeal from his convictions, the defendant argues, *inter alia*, that he should be granted a new trial on the State's first-degree murder charges

because the trial court erroneously denied his request that the jury be instructed on self-defense and second-degree murder. For the reasons that follow, we agree.

¶ 3 BACKGROUND

¶ 4 In February 2014, by information and indictment, the defendant was originally charged with three counts of first-degree murder (720 ILCS 5/9-1(a) (West 2014)) and one count of aggravated unlawful use of a weapon (*id.* § 24-1.6(a)). In June 2015, the cause proceeded to a jury trial on an amended indictment charging two counts of first-degree murder and one count of unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)). The evidence adduced at trial established the following.

¶ 5 On February 5, 2014, Demarcus Johnson, the defendant, and the defendant's brother, Andrew, went to the Lumiere Casino in St. Louis in celebration of the defendant's birthday. They drove there in Demarcus's vehicle and picked up Demarcus's friend, Demetrius, along the way. We note that at trial, Demarcus and Andrew testified for the State.

¶ 6 While the group was at the Lumiere, Demetrius, whose nickname was "Wild Cuz," drank heavily and cursed loudly while on a winning streak at a blackjack table. The dealer told him to "lower it down" and stop using "the F word," but the behavior continued. Accompanied by Andrew, Demetrius was eventually escorted out of the casino by security personnel. Shortly thereafter, Demetrius went back in to get the defendant and Demarcus because he grew tired of waiting for them.

¶ 7 After leaving the casino, the four men went to Storey Manor, where the defendant was having a birthday party at the apartment where he lived with his girlfriend, Beth.

Beth; the defendant's brothers, Curtis and Devren; Devren's girlfriend, Shanna; Curtis's girlfriend, Layla; the defendant's cousins, Joe and Derek; and Joe's girlfriend, Chaquisha, were also in attendance. There were also young children present.

¶ 8 At the party, the revelers ate pizza, drank alcohol, and smoked marijuana. The defendant and Demetrius played craps at the dining room table. The game eventually got "heated," and Demetrius "went crazy" when he mistakenly thought that the defendant had cheated him out of $20. Demetrius antagonized the defendant, pushed the table towards him, threw pizza and dice at him, and accused him of stealing the money. Demetrius was cussing, screaming, and becoming increasingly aggressive. Demarcus tried to calm him down, but Demetrius wanted to fight the defendant. Demetrius "took a swing" at the defendant and missed. The defendant remained calm. Demetrius was repeatedly told to leave the apartment, but he refused to go. Shanna took the children upstairs out of concern for their safety. The accounts of what happened next varied by witness.

¶ 9 Demarcus testified that he had tried to physically coax Demetrius out of the dining room so that he could get him out of the apartment and drive him home. Demarcus testified that as they approached the adjacent living room, Devren hit Demetrius over the head with a vodka bottle, causing the bottle to shatter. In response, Demetrius shoved Devren onto the couch in the living room. Demarcus testified that the defendant had subsequently entered the living room holding a pistol at his side and told Demetrius to leave. Demarcus testified that upon seeing the gun, Demetrius had put his hands up and

hurriedly exited the apartment. Demarcus testified that the defendant, Curtis, and Andrew had followed Demetrius outside.

¶ 10 Demarcus indicated that after the defendant and Demetrius exchanged words outside the apartment, the defendant had fired a shot at Demetrius as Demetrius tried to run away. Demetrius grabbed his side, and the defendant fired two more shots as Demetrius stumbled off. Demarcus acknowledged that he had witnessed the shooting from the doorway of the apartment and had not been "fully outside" at the time. He further stated that he had only heard the second and third shots.

¶ 11 Demarcus acknowledged that Demetrius had been drunk and belligerent and had tried to antagonize the defendant into fighting him. Demarcus stated that Demetrius had been convinced that the defendant had stolen his money. Demarcus agreed that Demetrius had been the aggressor inside the apartment and should have left when initially asked to do so. Demarcus acknowledged that he might have previously told the police that Demetrius had been pushed out of the apartment and that Demetrius had stated that "he didn't care that [the defendant] had a gun." Demarcus further acknowledged that he was serving a 150-month sentence in federal prison and that his testimony against the defendant made him eligible to receive a sentence reduction of up to 50%.

¶ 12 Andrew testified that he had been worried for the defendant during the altercation inside the apartment. Andrew explained that Demetrius tended to get wild when he drank, and he had been aggressively provoking the defendant. Andrew testified that during the scuffle in the living room, the defendant had been holding the gun down by his leg and had remained in the dining room. Andrew testified that after Demetrius had been struck

in the head with the vodka bottle, "[W]e just pushed him out." Andrew testified that he, the defendant, and Curtis had then followed Demetrius outside.

¶ 13 Andrew testified that outside the apartment, the defendant had pointed the gun at Demetrius, but Demetrius still refused to leave. As Andrew was saying, "no, Bro, no," he heard gunshots. Demetrius scurried away, and Andrew followed him. Demetrius made his way to a trash dumpster in the parking lot and fell into the snow behind it. Andrew found him behind the dumpster, bleeding and gasping for air. Andrew acknowledged that he had a felony drug charge pending against him.

¶ 14 As a witness for the defense, Devren described Demetrius's behavior inside the apartment as "violent." Devren testified that Demetrius had tried to punch and grab the defendant in the dining room. Devren stated that the situation had made him nervous because he "didn't know how far [Demetrius] would take it." Devren testified that when he had attempted to assist Demarcus in moving Demetrius into the living room, Demetrius had resisted and shoved Devren over the couch. In response, Devren hit Demetrius in the head with the vodka bottle. The hit had no effect, and Demetrius became more hostile and still refused to leave. Devren testified that he and Demarcus had then forced Demetrius out of the apartment, and "everybody went outside." Devren indicated that he had not seen the defendant with the gun during the melee in the living room.

¶ 15 Devren testified that outside the apartment, Demetrius had disparaged the defendant and indicated that he was still not going to leave. Demetrius then charged at the defendant "like he wanted to fight him." The defendant was holding the gun down by his

leg at the time. When Demetrius closed in on the defendant, the defendant lifted the gun and fired it. Devren testified that the defendant had not pointed the gun at Demetrius before firing it. Demetrius took off running, and Devren heard two additional shots. Devren stated that it had all happened "very fast."

¶ 16 Devren denied having told investigators that Demetrius had been shot as he turned to run or that the defendant had gone "overboard." Devren acknowledged that he had a prior felony conviction for aggravated fleeing and eluding.

¶ 17 The defendant testified that in the dining room, Demetrius had thrown pizza and dice at him and tried to punch him. Demetrius refused to leave the party after repeatedly being asked to do so and threatened to "beat [the defendant's] ass." The defendant retrieved his .45-caliber pistol during the commotion in the living room intending to intimidate Demetrius into leaving. The defendant testified that he had stayed in the dining room with the gun. The defendant testified that when Demetrius saw him with the weapon, Demetrius had told him that he was going to need it. After Demetrius threw Devren over the couch, Devren hit him in the head with the vodka bottle. Demetrius still refused to leave. The defendant testified that Demarcus and Devren had then forced Demetrius out of the apartment.

¶ 18 The defendant acknowledged that he had followed Demetrius outside the apartment with the gun. The defendant testified that he had not locked the door and stayed inside because he had wanted to "get [Demetrius] away from [the] house totally." Holding the pistol down by his leg, the defendant told Demetrius that he needed to go. The defendant indicated that he had "pointed [the gun] and lowered it again" but had

never "pointed [it] directly at [Demetrius] to shoot him." From "like five steps away from [the] door," Demetrius cursed at the defendant and stated that he was not going anywhere. He then charged at the defendant with his arm up. The defendant raised the gun and fired a shot "out of reaction." The defendant testified that after firing the shot, he had not been certain whether Demetrius had been hit. When Demetrius acted as if he were going to come at the defendant again, the defendant fired a second shot. The defendant indicated that he had fired a third shot when Demetrius took off running. The defendant explained that it had all happened very quickly.

¶ 19 After Andrew found Demetrius behind the dumpster in the parking lot, he, Demarcus, Curtis, and Derek put him in the back seat of Demarcus's vehicle. Demarcus and Andrew rushed Demetrius to Alton Memorial Hospital, where he succumbed to internal injuries.

¶ 20 After the shooting, the defendant stashed the .45-caliber pistol between the cushions of a couch at Curtis's apartment, which was also at Storey Manor. Shanna then drove the defendant and Devren to Devren's house in South Roxana.

¶ 21 Several hours later, the defendant returned to Storey Manor and approached a detective who was investigating the scene of the shooting. The defendant indicated that he wanted to speak with the police about what had happened.

¶ 22 When subsequently interviewed, the defendant claimed that Demetrius had been drunk since leaving the Lumiere and that when his unruly behavior had become unsettling to the other guests at the party, he had been told to leave numerous times. The defendant denied that Demetrius had acted aggressively towards him or had thrown pizza

at him. The defendant indicated that Demarcus, Andrew, and Demetrius had subsequently left the party and that Demetrius had left without incident. The defendant and the remaining guests then heard three gunshots outside. When they went outside after hearing the shots, Demarcus, Andrew, and Demetrius were gone. The defendant denied having done anything to Demetrius and stated that he did not know him.

¶ 23 When the defendant was advised that his version of events was inconsistent with what other witnesses had stated, he admitted that he and Demetrius had argued, but he denied having shot him. The defendant repeatedly claimed that he had not had a gun. Meanwhile, the police had located the defendant's .45-caliber pistol at Curtis's apartment. When the defendant was shown a picture of the gun, his demeanor changed, and he eventually stated that following the incident inside the apartment, he had fired shots towards Demetrius outside intending to scare him.

¶ 24 On February 10, 2014, the defendant was interviewed a second time. During that interview, the defendant stated that after he had retrieved the pistol, Demetrius had told him that he was going to need it. He further stated that after firing the gun outside, he had not been sure whether Demetrius had even been shot. The defendant indicated that he was sorry about what had happened and that he had only wanted Demetrius to get away from the apartment.

¶ 25 Demetrius's autopsy revealed that he had been struck by two of the three bullets that the defendant had fired. One of the two entered the rear lower-right side of Demetrius's abdomen and traveled in downward trajectory before exiting the front lower-left side. The pathologist who performed the autopsy testified that Demetrius could have

been taking a swing or running away when the bullet struck him. The other bullet struck the back of Demetrius's right foot and exited straight through the front. At the time of his death, Demetrius had a vitreous blood-alcohol concentration of 0.16 and cannabinoids in his system. He was 5 foot 7 inches tall and weighed 215 pounds.

¶ 26 Four occupants of nearby apartments testified as to what they had seen with respect to the shooting. P.B. testified that after hearing three gunshots, she had looked out her window and seen a man running toward the parking lot.

¶ 27 P.B.'s mother, S.F., testified that after hearing one gunshot, she had looked out and seen a man running toward the dumpster in the parking lot followed by two men who were "running together." She indicated that she had then seen a fourth man fire a second shot, and one of the two men who had been running together fell down. She heard a third shot and saw the shooter head "back the other way."

¶ 28 T.T. testified that through the windows of her living room, she had seen the shadows of two men running by her apartment. She subsequently heard three gunshots and yelling.

¶ 29 T.T.'s mother, D.L., testified that after hearing a commotion outside her bedroom window, she had looked out and seen a "tall skinny" man running from Beth's apartment with the defendant, whom she had met before, behind him. D.L. indicated that she had subsequently seen the defendant raise his hand, fire a shot, move forward, and fire a second shot. A few seconds later, she heard a third shot.

¶ 30 With respect to his state of mind at the time of the shooting, the defendant testified that he had not wanted to fight Demetrius and had been scared during the altercation. The

defendant testified that when he retrieved the pistol, he had not intended on using it. The defendant nevertheless believed that his actions had been necessary to protect himself and his family. The defendant explained that Demetrius had a reputation for violence and that he had no idea what Demetrius might have done. The defendant maintained that he had acted in self-defense and that Demetrius had been the aggressor in the situation. The defendant stated that he believed that the force he had used had been necessary to protect himself from an imminent danger of bodily harm. The defendant indicated that he had feared that Demetrius was going to beat him and might have been able to take the gun away from him. The defendant acknowledged that his brothers would have "jumped in" to help him had the situation resulted in a fight.

¶ 31 The defendant testified that he had not told the police the truth when he was interviewed because he did not trust them. The defendant acknowledged that he had prior felony convictions for mob action (720 ILCS 5/25-1 (West 2010)) and unlawful restraint (*id.* § 10-3).

¶ 32 The defendant tendered jury instructions on self-defense and second-degree murder based on imperfect self-defense. See Illinois Pattern Jury Instructions, Criminal, Nos. 2.01B, 2.03A, 7.05, 7.06, 24-25.06, 24-25.06A (4th ed. 2000). When arguing that the instructions should be given, defense counsel contended that when the defendant shot Demetrius, the defendant believed that Demetrius was going to hit him or take the gun away. Counsel further argued that the defendant had not been the aggressor during the brief and "fluid situation." In response, the State maintained that the events that had occurred inside the apartment and the events that had occurred outside the apartment

represented "two different instances" and that the defendant had become the aggressor when he followed Demetrius outside with the gun. The State further maintained that the defendant's suggestion that he had shot Demetrius as "a reaction" belied his claim that he believed that bodily harm had been imminent.

¶ 33 The trial court ultimately denied the defendant's requested instructions by finding that the defendant had been the aggressor in the situation and had "never felt that he was in danger." The court noted, *inter alia*, that the defendant's trial testimony was inconsistent with his statements to the police. The court specifically stated, "I don't believe that there was any fear of harm. I don't believe that the victim was the aggressor. I believe [that the defendant] was the aggressor." The jury subsequently found the defendant guilty of first-degree murder and unlawful possession of a weapon by a felon. Following the trial court's denial of his motion for a new trial, the defendant filed a timely notice of appeal.

¶ 34 DISCUSSION

¶ 35 The defendant argues that we should reverse his conviction for first-degree murder and remand the cause for a new trial because the trial court erred in denying his request that the jury be instructed on self-defense and second-degree murder based on imperfect self-defense. The defendant further argues that he is entitled to a new trial because the trial court committed plain error during *voir dire* by failing to strictly comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The defendant additionally raises two evidentiary issues. The defendant does not challenge his conviction for unlawful possession of a weapon by a felon.

¶ 36 Instructional Issues

¶ 37 The defendant argues that we should reverse his conviction for first-degree murder and remand for a new trial because the trial court refused his request that the jury be instructed on self-defense and second-degree murder based on imperfect self-defense. We agree.

¶ 38 "[W]hen the trial court, after reviewing all the evidence, determines that there is insufficient evidence to justify the giving of a jury instruction, the proper standard of review of that decision is abuse of discretion." *People v. McDonald*, 2016 IL 118882, ¶ 42. If the evidence provides "some foundation for the instruction," however, "it is an abuse of discretion for the trial court to refuse to so instruct the jury." *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997).

¶ 39 A defendant on trial for first-degree murder is "entitled to an instruction on self-defense where there is some evidence in the record which, if believed by a jury, would support the defense, even where the defendant testifies he accidentally killed the victim." *People v. Everette*, 141 Ill. 2d 147, 156-57 (1990). To obtain a jury instruction on self-defense, a defendant must establish "some evidence" of six factors: (1) force was threatened against a person, (2) the person was not the aggressor, (3) the danger of harm was imminent, (4) the threatened force was unlawful, (5) the person actually and subjectively believed a danger existed that required the use of the force applied, and (6) the person's beliefs were objectively reasonable. *People v. Washington*, 2012 IL 110283, ¶ 35; *People v. Lee*, 213 Ill. 2d 218, 225 (2004). "Even very slight evidence

upon a given theory of a case will justify an instruction" under the "some evidence" standard. *People v. Hari*, 218 Ill. 2d 275, 298 (2006).

¶ 40 Second-degree murder is a lesser mitigated offense of first-degree murder. *People v. Parker*, 223 Ill. 2d 494, 506 (2006). Second-degree murder requires proof of all of the elements of first-degree murder but is mitigated by evidence of either provocation or imperfect self-defense. *People v. Jeffries*, 164 Ill. 2d 104, 112-13 (1995). The imperfect self-defense form of second-degree murder occurs when there is sufficient evidence that the defendant believed that he was acting in self-defense, but his belief was objectively unreasonable. *Id.* at 113. Where the evidence supports the giving of a jury instruction on self-defense, an instruction on second-degree murder must be given as a "mandatory counterpart" when requested. *Washington*, 2012 IL 110283, ¶ 56.

¶ 41 The right of self-defense does not justify the killing of the initial aggressor after the aggressor abandons the quarrel, nor does it justify a killing that is committed as an act of retaliation or revenge. *People v. Thornton*, 26 Ill. 2d 218, 222 (1962); *People v. De Oca*, 238 Ill. App. 3d 362, 368 (1992); see also *People v. Jackson*, 35 Ill. App. 3d 215, 221-22 (1975) (noting that "the defense of self-defense is not available where the initial aggressor retreats from the conflict and the defendant assumes the role of aggressor by pursuing the conflict"). A nonaggressor has a duty not to become the aggressor, and conduct which may qualify a defendant as the aggressor includes the act of pointing a loaded gun. *De Oca*, 238 Ill. App. 3d at 368.

¶ 42 At the same time, "[a] person who has not initially provoked the use of force against himself has no duty to escape the danger before using force against the

aggressor." Illinois Pattern Jury Instructions, Criminal, No. 24-25.09X (4th ed. 2000); see also *In re D.N.*, 178 Ill. App. 3d 470, 475 (1988) ("A non-aggressor has no duty to retreat, but he does have a duty not to become the aggressor."); *People v. Moore*, 43 Ill. App. 3d 521, 528 (1976) (recognizing that "a non-aggressor is not required to retreat from a place where he has the right to be"). Furthermore, "[i]t is a firmly established rule that the aggressor need not have a weapon to justify one's use of deadly force in self-defense [citations] and that a physical beating may qualify as such conduct that could cause great bodily harm." *People v. Reeves*, 47 Ill. App. 3d 406, 411 (1977). When a defendant claims that his use of deadly force was justified, it is his "perception of danger, not the actual peril, which is dispositive." *People v. Whiters*, 146 Ill. 2d 437, 444 (1992). Whether a defendant acted in self-defense is a question of fact to be decided by the jury. *People v. Ellis*, 107 Ill. App. 3d 603, 610 (1982).

¶ 43 Here, there was "some evidence" which, if believed by the jury, would have supported the defendant's claim of self-defense. "Even when conflicting evidence is presented on the issue of self-defense, a defendant is entitled to a jury instruction on the issue because the credibility of witnesses is for the jury to determine." *People v. Tyler*, 188 Ill. App. 3d 547, 552 (1989). By concluding that the tendered instructions were not warranted because the defendant had been the aggressor and had never felt that he was in danger, the trial court impermissibly resolved two factual matters that the jury should have decided.

¶ 44 The defendant testified that when he shot Demetrius "out of reaction," he had felt the need to protect himself from an imminent danger of bodily harm. The defendant

claimed that he had feared that Demetrius was going to beat him and might have taken the gun away from him. By determining that the defendant had never felt that he was in danger, the trial court ostensibly found that the defendant's testimony regarding his subjective belief was not credible. A defendant's credibility can only be resolved by the jury, however, and the trial court is restricted to deciding whether there was any evidence that the defendant had a subjective belief. *People v. Lockett*, 82 Ill. 2d 546, 553 (1980); *People v. Stewart*, 143 Ill. App. 3d 933, 935 (1986); *People v. Rodriguez*, 96 Ill. App. 3d 431, 436 (1981). The instructions at issue must be given "when any evidence is offered showing the defendant's subjective belief that use of force was necessary." *Stewart*, 143 Ill. App. 3d at 935. "It is for the jury to weigh the evidence and determine whether that subjective belief existed and whether it was objectively reasonable or unreasonable." *Washington*, 2012 IL 110283, ¶ 48.

¶ 45 With respect to the trial court's finding that the defendant had been the aggressor, the court apparently adopted the State's argument that the events that occurred inside the apartment and the events that occurred outside the apartment were two separate incidents and that the defendant became the aggressor when he followed Demetrius outside with the gun. The jury was presented with diametrically opposed accounts of how Demetrius exited the apartment and was subsequently shot, however, and depending on which facts the jury chose to believe, it could have viewed the events in question as a single, continuous conflict that Demetrius started and never abandoned.

¶ 46 Demarcus testified that when Demetrius saw that the defendant had a gun, Demetrius had voluntarily exited the apartment with his hands up. Demarcus further

testified that the defendant had followed Demetrius outside and shot him as he tried to run away. We note that Demarcus's account of the shooting was seemingly corroborated by T.T. and that Andrew indicated that the defendant had pointed the gun at Demetrius before firing it. In any event, crediting Demarcus's testimony, the jury could have concluded that although Demetrius had been the aggressor inside the apartment, he had retreated from the conflict, and the defendant had unjustifiably shot him in an act of retaliation or revenge.

¶ 47 However, the jury also heard testimony that Demetrius had become even more aggressive after being hit over the head with the vodka bottle and that when he saw that the defendant had a gun, he had told the defendant that the defendant was going to need it. It is undisputed that Demetrius was intoxicated and had been trying to provoke the defendant into fighting him. The defendant, Devren, and Andrew testified that Demetrius had to be forced out of the apartment and that once outside, he still refused to go. The defendant testified that he had not locked the door and stayed inside because he had wanted to get Demetrius away from the apartment "totally." The defendant testified that Demetrius had a reputation for violence and that he had no idea what Demetrius might have done. The defendant indicated that he had raised and lowered the gun outside but had not pointed it directly at Demetrius and had not intended on shooting him. The defendant and Devren both testified that the defendant had been holding the pistol down by his leg and had raised and fired it when Demetrius tried to attack him. From these facts, the jury could have concluded that Demetrius had not abandoned the confrontation

that he had started inside the apartment and that the defendant had not become the aggressor by following him outside hoping to scare him away.

¶ 48 Either way, given the conflicting facts regarding the manner in which Demetrius exited the apartment and was subsequently shot, whether the events in question constituted separate confrontations and whether the defendant had assumed the role of aggressor were issues for the jury to decide. See, *e.g.*, *People v. Bedoya*, 288 Ill. App. 3d 226, 238 (1997) (holding that the defendant was entitled to self-defense instructions where there were "factual conflicts concerning who was the aggressor"); *People v. Heaton*, 256 Ill. App. 3d 251, 258 (1994) (finding that a jury question was presented as to whether the defendant had been the aggressor where he could have chosen not to pursue the provocateurs as they retreated); *People v. Russell*, 215 Ill. App. 3d 8, 13 (1991) (concluding that "while there was evidence to support a finding that the defendant was the initial aggressor, that evidence was not so compelling that no other finding could have been made"); *People v. Barnard*, 208 Ill. App. 3d 342, 350 (1991) ("We believe that evidence of [the] defendant's act of pointing a loaded gun at [the victim] was sufficient to at least allow the question of who was the initial aggressor to go to the jury for resolution."); *People v. Smith*, 195 Ill. App. 3d 878, 881-82 (1990) (determining that whether the events that led to the victim's death constituted two or three separate incidents was a matter for the jury to decide). Ultimately, without the tendered instructions, the jury "lacked the necessary tools to analyze the evidence fully and to reach a verdict based on those facts." *Hari*, 218 Ill. 2d at 297. "Such an error is a denial of due process and requires that defendant be granted a new trial." *Id*.

¶ 49 On appeal, apparently referencing Demarcus's testimony that Demetrius had voluntarily exited the apartment with his hands up, the State suggests that the instructions at issue were not warranted because after Demetrius had "removed himself" from the apartment, the defendant "could have merely stayed inside and locked the door." As noted, however, Demarcus's testimony notwithstanding, the defendant, Devren, and Andrew all testified that Demetrius had to be forced out of the apartment. The manner in which Demetrius exited was thus a question for the jury to decide from the diverging accounts of what happened. The reasonableness of the defendant's actions and the credibility of his claim that he had gone outside with the gun to "get [Demetrius] away from [the] house totally" were also issues for the jury to decide. Moreover, as the defendant maintains on appeal, even if the jury would have wholly rejected his claim of self-defense, it might have concluded that a verdict finding him guilty of second-degree murder was appropriate under the circumstances. Second-degree murder is a "legal compromise between murder and exoneration," and its distinction from first-degree murder is "a recognition of human failings under stress." *People v. Monigan*, 97 Ill. App. 3d 885, 889 (1981). "[T]he distinction is designed to aid the person who, through no fault of his own, finds himself in a stressful situation where perceptions and judgment may be impaired." *Id.*

¶ 50 The State further suggests that the trial court's failure to give the requested instructions was harmless because the State's evidence clearly established that the defendant was guilty of first-degree murder. The State's evidence is "irrelevant" when determining whether the tendered instructions should have been given, however, and

"[t]he test focuses only on [the] defendant's evidence, not its reasonableness." *Stewart*, 143 Ill. App. 3d at 936. Moreover, this is not a case where the evidence precluded any possibility of a finding that the defendant had acted in self-defense. See *id.*

¶ 51 We lastly note that many of the cases that the State cites in support of its arguments are distinguishable in that they involved instances where the trier of fact rejected the defendant's claim of self-defense; the issue on appeal was whether the State had disproven the claim beyond a reasonable doubt; and the evidence adduced at trial was thus viewed in the light most favorable to the State. See, *e.g.*, *Lee*, 213 Ill. 2d at 224-25; *People v. Harmon*, 2015 IL App (1st) 122345, ¶¶ 44, 47-48; *People v. Anderson*, 234 Ill. App. 3d 899, 906-07 (1992); *People v. Belpedio*, 212 Ill. App. 3d 155, 160-62 (1991); *People v. Chatman*, 102 Ill. App. 3d 692, 698-700 (1981); *People v. Davis*, 33 Ill. App. 3d 105, 108-10 (1975). Conversely, as the defendant observes, when determining whether the instructions should be given in the first place, the evidence must be considered "in the light most favorable to the defendant." *People v. Alexander*, 250 Ill. App. 3d 68, 76 (1993).

¶ 52 Keeping in mind that even slight evidence in support of a defense will justify the giving of an instruction under the "some evidence" standard, we conclude that the trial court abused its discretion in refusing to instruct the jury on self-defense and second-degree murder. We accordingly reverse the defendant's conviction for first-degree murder and remand for a new trial on the underlying charges. Because the evidence adduced at trial was sufficient to prove the defendant guilty beyond a reasonable doubt, there is no double jeopardy impediment to a new trial. *People v. Tenney*, 205 Ill. 2d 411,

442 (2002). Given our disposition, we need not address the defendant's claim that the trial court's failure to strictly comply with Rule 431(b) also requires that he be retried. See *People v. Jones*, 2016 IL App (1st) 141008, ¶ 36.

¶ 53 Evidentiary Issues

¶ 54 In addition to his claim that the trial court erred in refusing to instruct the jury on self-defense and second-degree murder, the defendant relatedly argues that the trial court erred in refusing to allow him to introduce evidence of Demetrius's violent tendencies pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). Under *Lynch*, evidence of a victim's aggressive and violent character is admissible to support a theory of self-defense in two ways: (1) to show how the defendant's perceptions and reactions to the victim's behavior were affected by his knowledge of the victim's character and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened, regardless of whether the defendant was aware of the victim's character. *Id*. at 199-200. Such evidence can help to "complete the picture provided by the testimony" and assist the trier of fact's determination as to whether the defendant acted reasonably under the circumstances. *Id*. at 199. The trial court's decision to admit or exclude *Lynch* evidence is reviewed for an abuse of discretion. *People v. Nunn*, 357 Ill. App. 3d 625, 630 (2005).

¶ 55 Here, the defendant gave pretrial notice of his intent to introduce, as *Lynch* evidence, evidence that Demetrius had been convicted of home invasion (720 ILCS 5/12-11 (West 2002)) and domestic battery (*id.* § 12-3.2) in 2003, unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1 (West 2006)) in 2007, and armed habitual criminal (720 ILCS 5/24-1.7 (West 2012)) in 2012. The defendant further sought to introduce

evidence that from 2009 through 2013, Demetrius had been the subject of numerous Alton police department incident reports, some of which had apparently resulted in charges of battery (720 ILCS 5/12-3 (West 2012)) or aggravated domestic battery (*id.* § 12-3.3).

¶ 56 The defendant subsequently filed a list of proposed witnesses who would testify regarding the incident reports, along with summaries of their proposed testimony. The summaries indicated, among other things, that in July 2012, Demetrius had kicked and beaten a woman who required hospital treatment due to the resulting injuries; that in 2013, he had used or threatened violence against the woman on multiple occasions, including an instance where he had chased her with a butcher knife, slashed the tires of her car, and punched a hole in her door; and that in November 2012, he had shot two individuals with a paintball gun, injuring one of them. The summaries further indicated that with respect to all of these incidents, Demetrius had been the aggressor, and the victims were willing to testify at trial. The defendant also provided summaries of several witnesses' accounts of Demetrius's conduct underlying his 2003 conviction for home invasion. Those summaries indicated that one of the victims had to be treated at a hospital due to physical injuries inflicted by Demetrius and that the victims in that incident were also willing to testify.

¶ 57 The State later filed a response to the defendant's notice of his intent to introduce *Lynch* evidence. The State argued that Demetrius's 2003 convictions were inadmissible under *People v. Montgomery*, 47 Ill. 2d 510 (1971), because the convictions were "more than 10 years old." See *People v. Ellis*, 187 Ill. App. 3d 295, 301 (1989). The State

further argued that Demetrius's 2007 and 2012 convictions were inadmissible because firearm-possession offenses are not indicative of a violent character. See *People v. Cruzado*, 299 Ill. App. 3d 131, 137 (1998). With respect to the incident reports, the State noted that mere arrest evidence is inadmissible and that proof of the alleged incidents would have to be supported by firsthand witness testimony. See *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004); *Ellis*, 187 Ill. App. 3d at 301.

¶ 58 The trial court subsequently entered an order adopting the State's arguments and prohibiting the defendant from introducing his proffered *Lynch* evidence. Thereafter, seeking reconsideration of the trial court's ruling, the defendant filed a motion for clarification. With respect to Demetrius's 2003 convictions, the defendant noted that Demetrius had not been released from prison until 2009, so the convictions were not too remote under *Montgomery*. See *People v. Williams*, 173 Ill. 2d 48, 81 (1996) (noting that under "the *Montgomery* rule," evidence of a prior conviction is inadmissible where "a period of more than 10 years has elapsed since the date of conviction or release of the witness from confinement, whichever is later"). The defendant later tendered certified copies of documents obtained from the Illinois Department of Corrections indicating that Demetrius had been released from custody on his 2003 convictions in January 2009. See *People v. Naylor*, 229 Ill. 2d 584, 597 (2008) ("[T]he proponent of the prior conviction has the responsibility of presenting evidence of a subsequent release date."). With respect to the court's exclusion of the evidence set forth in the incident reports, the defendant acknowledged that the reports "standing alone, would be properly excluded." The defendant noted that he would be offering "firsthand, eyewitness evidence," however,

which the State had seemingly conceded would be sufficient for purposes of *Lynch*. See *Cook*, 352 Ill. App. 3d at 128 ("We recognize that 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.") The defendant later emphasized that several of his proposed *Lynch* witnesses were willing to testify and that some had been subpoenaed.

¶ 59 The defendant's motion for clarification was addressed on the first day of trial. The trial court indicated that although it was inclined to stand on its previous ruling, the matter could be revisited in the event that the defendant were able to "properly raise the issue of self-defense." When later determining that the defendant had failed to do so, the court accordingly ruled that the proposed evidence was inadmissible. See *People v. Armstrong*, 273 Ill. App. 3d 531, 533 (1995) ("*Lynch* applies only where the theory of self-defense is properly raised.")

¶ 60 As noted, the defendant contends that the trial court erred in refusing to allow him to present his proposed *Lynch* evidence. To the extent that the court precluded the evidence's admission on the basis of its finding that the defendant had failed to sufficiently raise the issue of self-defense, we agree. Nevertheless, we cannot conclude that the trial court abused its discretion with respect to Demetrius's 2007 conviction for unlawful possession of a firearm or his 2012 conviction for armed habitual criminal. See *Cruzado*, 299 Ill. App. 3d at 137. We further note that while the defendant challenged the court's *Lynch* ruling in his motion for a new trial, he did not reference those convictions. He rather alleged that the court erred in barring the evidence of Demetrius's 2003 convictions and the evidence of the incident reports that had apparently led to the filing

of battery or aggravated domestic battery charges. See *Lynch*, 104 Ill. 2d at 203 ("In general, battery is *prima facie* probative enough of aggressive and violent tendencies to be admissible.") In any event, "the admissibility of evidence should not be initially determined by a court of review" (*People v. Dea*, 353 Ill. App. 3d 898, 901 (2004)), and the issue of the defendant's proffered *Lynch* evidence can be revisited anew on remand.

¶ 61 Lastly, the defendant argues that the trial court abused its discretion in allowing the State to use his prior felony convictions for mob action and unlawful restraint for impeachment purposes. The defendant suggests, for the first time on appeal, that the trial court failed to employ the *Montgomery* "balancing test." *People v. Cox*, 195 Ill. 2d 378, 383 (2001); *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004). We note that although the trial court did not explicitly state that it had balanced the probative value of the prior convictions against their prejudicial effect (see *Montgomery*, 47 Ill. 2d at 516-18), the record indicates that the court was well aware of the *Montgomery* standard and appropriately exercised its discretion under the circumstances. See *Williams*, 173 Ill. 2d at 83; see also *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999) (noting that because the defendant's credibility was a "central issue," the evidence of the defendant's prior convictions was "crucial.") By failing to raise this claim below, however, the defendant deprived the trial court of the opportunity to clarify its ruling and waived any objection to it. See *People v. Embry*, 249 Ill. App. 3d 750, 764 (1993); *People v. Robertson*, 43 Ill. App. 3d 143, 148 (1976). Additionally, defense counsel anticipatorily impeached the defendant with the prior convictions, which further bars him from contending that the trial court's ruling was erroneous. See *People v. Meagher*, 70 Ill. App. 3d 597, 604

(1979). In any event, given that the defendant did not challenge the trial court's ruling below, the defendant's *Montgomery* claim can be addressed on remand, as well. See *Dea*, 353 Ill. App. 3d at 901.

¶ 62 CONCLUSION

¶ 63 For the foregoing reasons, the defendant's conviction for unlawful possession of a weapon by a felon is affirmed; his conviction for first-degree murder is reversed; and the cause is remanded for further proceedings and a new trial.

¶ 64 Affirmed in part; reversed and remanded in part.