No. 129676

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MATTHEW SLOAN, Defendant-Appellee.	) On Appeal from the Appellate of Illinois, Fifth Judicial District, No. 5-20-0225.)) There on Appeal from the Circuit Court of the Second Judicial Circuit, Jefferson County, Illinois No. 18 CF 295.)) The Honorable Jerry E. Crisel, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

NICHOLAS MOELLER
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 590-6936
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
2/8/2024 11:17 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

Page(s)

POINTS AND AUTHORITIES

NATURE OF THE CASE

Following a Jefferson County trial, a jury found defendant Matthew Sloan guilty of first degree murder, and the trial court sentenced him to 80 years in prison. C187.[1] The People appeal from the appellate court's judgment, which reversed defendant's conviction and remanded for a new trial. A1. No question is raised on the pleadings.

ISSUES PRESENTED

1. Whether the trial court abused its discretion by declining to instruct the jury that a non-aggressor has no duty to retreat. *See* Ill. Pattern Instr., Crim. 4th (IPI) No. 24-25.09X.

2. Alternatively, whether any error in declining to provide the instruction was harmless.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On September 27, 2023, the Court granted the People's petition for leave to appeal.

[1] Citations to the common law record, report of proceedings, and the appendix to this brief appear as "C__," "R__," and "A__," respectively.

STATEMENT OF FACTS

In 2018, defendant was charged with three counts of murder and one count of aggravated battery with a firearm after he fatally shot his brother, David Sloan. C26-27.[2]

I. Trial Court Proceedings

A. Undisputed facts

The trial evidence established that defendant, his brother David, and their cousin Daniel Klevorn spent the morning of July 4, 2018, drinking beer and shooting at cans in the field next to the home defendant shared with his parents. R364, 577. The men later relocated to Klevorn's home, where they continued drinking. R365. Eventually, David called his wife, Sara Sloan, to pick up defendant and him and drive them to their respective homes. R366.

When Sara arrived, the brothers loaded David's guns into the trunk of the car and got in. R306. Defendant threatened David as they argued during the drive to defendant's home. R297.

B. Sara's account of the fight and shooting

According to Sara, when they arrived at defendant's home, the brothers exited the car, and David said, "If you want to kick my ass, here I am." R298-99. Sara looked down to unbuckle her seatbelt and by the time she got out of the car, the brothers were fighting. R299. Sara quickly pushed

[2] Defendant was also charged with, and ultimately acquitted of, aggravated discharge of a firearm toward David's wife. *See* C28.

them apart, ending the fight. R299-301. Neither man appeared injured, apart from a cut on defendant's nose. *Id.*

After the fight, defendant went into the house, and Sara and David followed. R301. By the time Sara entered the house, defendant was already in his bedroom, a few doors down the hall. R302, 305. As David walked in front of the bedroom doorway, defendant was waiting a couple feet away in the bedroom with a shotgun. R302-03. David asked, "What are you going to do?" and defendant shot him. R304, 307.

Sara fled the house and called 911. R304-05.

C. Defendant's accounts

Defendant gave two accounts of the shooting: one in a police interview on the evening of the shooting, and the second at trial one year later.

A video recording[3] of defendant's police interview was played for the jury. R509. Defendant initially claimed that he had shot Sara's brother. Defendant said he was frustrated and wanted to leave Klevorn's home because he had "gotten an earful" from David. PE28 35:53. When Sara arrived to pick them up, Sara's brother, whom defendant had never met, was sitting in the car's front passenger seat. PE28 7:42, 14:42. David never got in the car, and defendant argued with Sara's brother during the drive. PE28 7:42-8:37.

[3] The recording of defendant's interview is included in the record as People's Exhibit 28, cited here as "PE28."

Defendant said that after fighting with Sara's brother in the driveway, defendant "retreated" inside his house and shut the door, but Sara's brother followed. PE28 9:14, 11:47. From 12 feet away, defendant levelled his shotgun at Sara's brother and told him to "get the fuck out." R585-86. Sara's brother walked forward, so defendant shot him in the face. PE28 13:49. Defendant told police he shot Sara's brother because he was scared, though he knew her brother was unarmed. PE28 11:03, 11:40, 16:38.

Later during the interview, defendant offered a different motive, stating, "maybe I had had enough, maybe I had been bullied my entire goddamn life." PE28 1:10:04. Despite having previously told police that he believed he had shot Sara's brother, defendant was the first to suggest that David was instead the victim. *See* PE 28 16:12. Specifically, defendant stated that it was not a "malice murder" because "number one I wouldn't do that to my brother." PE 28 16:12. A few minutes later, police told defendant for the first time that he had shot David, not Sara's brother, and called defendant's mother to confirm to defendant that he had killed David. PE28 19:45, 22:00. Defendant replied that he did not believe David was the victim and told police that he would never shoot his brother. PE28 21:50, 36:18.

At trial, defendant testified that he asked to leave Klevorn's home because he wasn't feeling well and was "too fucked up to hang out anymore." R567. But he later admitted that he instead wanted to leave Klevorn's home because he was irritated that he had "gotten an earful" from David and

because "his talking shit was probably going to turn into something different that day." R613-14. Klevorn offered to pay for a taxi, but David said he and Sara could drop off defendant on their way home. R567-68. When Sara arrived, David gave defendant guns to load into the car and then disappeared. R578. Defendant believed that he got in the car alone, and Sara and her brother were already seated in the front seats. R578-79. Yet defendant acknowledged at trial that the man in the front seat was in fact David. R579.

During the car ride, defendant and David "talk[ed] shit" and engaged in "territorial pissings" at each other. R578. When they arrived at defendant's home, defendant immediately left the car and put his sunglasses and hat on the hood of his nearby truck, which — according to defendant — is "the usual way" people indicate a challenge to a fight. R581, 621. David then placed his tobacco canister on the truck's hood, and the two men "ha[d] fisticuffs for approximately 30 seconds" before Sara broke them apart. R581. Defendant did not know who had thrown the first punch. R624.

Defendant went into the house to lay down in his bedroom. R581. About 30 seconds later, he heard the back door slam and someone quickly walk towards his bedroom. *Id.* Defendant then grabbed his shotgun, peered out of the bedroom door, and twice yelled, "Get the fuck out." R581, 585. David walked to the bedroom and asked, "What are you going to do about it?" R585-86. Defendant raised his gun and shot David in the face. *Id.*

On cross-examination, defendant initially testified that he fired his shotgun "less than a second" after picking it up. R602. When asked how all of these events took place in less than a second, defendant provided a new order of events. *Id.* In his second telling, he yelled, "Get the fuck out," as soon as the back door slammed. *Id.* He then looked out, repeated himself, and picked up his gun only after David asked him what he was going to do. *Id.* When the prosecutor asked whether the gun was ready to fire when he picked it up, defendant answered that it was not, and that it took him five seconds after picking up the gun to fire it. R603. In a third telling on cross-examination, defendant testified that he picked up the gun *before* he warned David a second time and David responded, "What are you going to do?" R642-43.

Defendant explained that he shot David because he believed David was coming back to restart the fight and might kill him. R589. He did not know whether David was armed because he was staring at David's face. R645-46. He acknowledged that, contrary to his testimony that he had shot David from a couple of feet away, he had told police that he shot the victim (who he had identified to police as Sara's brother) from about 12 feet away. R560-61. Defendant further acknowledged that he told police that he would not have murdered his brother in an act of malice before anyone had suggested that David was the victim. R596-97. When asked why he had said that if he did

not know David had been shot, defendant replied, "I don't — I don't have an answer for that question." R597.

D. Other evidence

The prosecution also presented evidence of an altercation between defendant and Klevorn in 2004 or 2005. R367. One night while the men were drinking at defendant's home, defendant grabbed a shotgun and aimed it at Klevorn. R368. Klevorn disarmed defendant, and defendant went to his bedroom. *Id.* Klevorn followed, found defendant retrieving a handgun, and disarmed defendant again. R368-69.

E. Jury instructions, closing arguments, and verdict

At the close of evidence, defendant requested IPI 24-25.09X, which states that "a person who has not provoked the use of force against himself has no duty to escape the danger before using force against the aggressor." R668-69. The trial court denied the request because there had been no evidence about which of the men was the initial aggressor and thus the instruction would confuse the jury. R670-71. The court instructed the jury on self-defense and second-degree murder based on imperfect self-defense. R686-89. The court did not instruct the jury that an initial aggressor typically may not claim self-defense. *See id.*; *see also* 720 ILCS 5/7-4.

In closing arguments, the prosecution emphasized that defendant intentionally or knowingly shot his brother out of anger, not in self-defense,

and that his contrary accounts were incredible, internally inconsistent, and inconsistent with other evidence. R698-716.

Defendant argued that he acted in self-defense. R736. Specifically, defendant posited that after his fight with David was over, he "retreated" into his house; when David "pursue[d]" him into the house, defendant reasonably believed his life was in danger, so he shot him. R728-29, 736. Defendant argued alternatively that he was at most guilty of second degree murder because he believed, albeit unreasonably, in the need for self-defense. R737.

The jury found defendant guilty of first degree murder and aggravated battery with a firearm. R766. The trial court merged the aggravated battery conviction into the murder conviction and sentenced defendant to 80 years in prison. C187.

II. Appellate Court Decision

On appeal, defendant argued that the trial court abused its discretion in declining to instruct the jury with IPI 24-25.09X and allowing the prosecution to present other crimes evidence, that his conviction should be reduced to second degree murder, that the prosecutor made improper statements in opening statement and closing arguments, and that his sentence is excessive. A1-2, ¶ 2. The appellate court found that the trial court had abused its discretion in declining to give IPI 24-25.09X, reversed defendant's convictions on that basis, and remanded for a new trial. *Id.* According to the appellate court, the instruction was necessary because

(1) there was some evidence that David was the aggressor, i.e., the two men had engaged in a fist fight[4] "next to a vehicle loaded with firearms," defendant retreated into his home, and David followed, A16-17, ¶¶ 70-71; and (2) defendant testified he had a subjective belief that his use of force was necessary, A17, ¶ 72. The appellate court concluded that the trial court incorrectly determined that there was no evidence as to who was the initial aggressor because that was a factual question for the jury. A17-18, ¶ 73. The appellate court rejected the People's argument that any instructional error was harmless; in doing so, the appellate court held that a reviewing court may not consider the People's evidence when determining whether an error is harmless. A19, ¶ 76. Because the appellate court reversed defendant's conviction, it did not resolve his remaining arguments. A20, ¶ 80.[5]

STANDARDS OF REVIEW

A trial court's decision not to provide a jury instruction is reviewed for an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42.

---

[4] Both the trial and appellate courts used the phrase "mutual combat" to describe the brothers' fight in the driveway. *See* A16, ¶ 70. However, defendant did not argue at trial or on appeal that he was guilty of second degree murder based on a provocation theory, *see People v. McDonald*, 2016 IL 118882, ¶ 59 (explaining provocation by mutual combat), so the courts presumably used that phrase in a colloquial, rather than a legal, sense.

[5] Although the appellate court stated it would "address" defendant's other-crimes evidence claim, it did not resolve the claim. A19, ¶¶ 78-79. Instead, it "urge[d]" the trial court to properly consider the matter during defendant's new trial. *Id.*

The question of whether an error is harmless is a legal question that is reviewed de novo. *See People v. Jolly*, 2014 IL 117142, ¶ 28.

ARGUMENT

The trial court did not abuse its discretion by declining to give IPI 24-25.09X because the instruction was irrelevant and unsupported by the evidence and thus would have confused the jury. First, an instruction that defendant had no duty to retreat if he did not provoke force against himself was irrelevant because it was undisputed that defendant retreated from the fight in the driveway, and there was no suggestion at trial that defendant had a duty to retreat once within his home before he allegedly acted in self-defense. Second, the instruction was inappropriate because there was no evidence that David was the initial aggressor. To the contrary, the undisputed evidence established that defendant provoked the fight with David in the driveway. In sum, no evidence supported giving IPI 24-25.09X; at a minimum, the trial court's same conclusion was not arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it, so as to constitute an abuse of discretion. *See People v. Bush*, 2023 IL 128747, ¶ 57 ("'An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.'") (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37)).

Alternatively, the alleged error was harmless because the result of defendant's trial would not have been different had the jury received with IPI

24-25.09X. First, informing the jury that defendant had no duty to retreat would have had no effect on the verdict because there was no evidence or argument by the prosecution, nor was the jury asked to find, that defendant failed in any duty to retreat. Second, in finding defendant guilty of first degree murder, and not second degree murder, the jury necessarily found that defendant did not actually believe he was defending himself. Consequently, the question addressed by the omitted instruction — whether defendant had a duty to retreat before defending himself — could have made no difference to the trial's result. Finally, the evidence proving defendant guilty of first degree murder was overwhelming, such that the result of the trial would have been the same had the instruction been given.

Accordingly, this Court should reverse the appellate court's judgment and remand for the appellate court to consider defendant's remaining claims.

I. The Trial Court Did Not Abuse Its Discretion in Denying the Proffered Instruction.

The trial court did not abuse its discretion by declining to give IPI 24-25.09X because it was not warranted by the evidence at trial.

Jury instructions provide the jury with the legal principles that are relevant to the evidence before them, allowing the jury to reach the correct conclusion according to both the law and the evidence. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). A party is entitled to an instruction "'if there is some foundation for the instruction in the evidence.'" *People v. Tompkins*, 2023 IL 127805, ¶ 42 (quoting *People v. Crane*, 145 Ill. 2d 520, 526 (1991)).

Instructions that are not supported by some evidence should not be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). Similarly, instructions that would confuse the jury should be denied. *People v. Herron*, 215 Ill. 2d 167, 188 (2005).

Defendant's theory of the case was that he acted in self-defense. R736. A person's use of lethal force is justified by self-defense only if the person subjectively and reasonably believes "that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1. An individual who provoked another's use of force may not raise self-defense unless "he has exhausted every reasonable means to escape such danger," or "withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force." 720 ILCS 5/7-4. However, an individual who has not provoked the use of force against himself has no duty to attempt to escape or withdraw before acting in self-defense. *People v. Hughes*, 46 Ill. App. 3d 490, 500 (1st Dist. 1977).

Defendant alternatively argued that he was guilty only of second degree murder based on imperfect self-defense, which required him to show that at the time of the killing, he unreasonably believed "the circumstances to be such that, if they existed," his actions would be justified by self-defense. 720 ILCS 5/9-2(a)(2), (c).

A pair of pattern jury instructions explain whether a defendant has the duty to attempt to escape or withdraw before acting in self-defense. IPI 24-25.09 instructs that an initial aggressor must attempt to escape or withdraw from the initial violence before he may act in self-defense. IPI 24-25.09X, the instruction which defendant requested, states, "A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." These instructions are not mandatory and should be given only in "appropriate cases." *People v. Alexander*, 408 Ill. App. 3d 994, 1002 (3d Dist. 2011) (citing IPI 24-25.09X, Comm. Note).

The trial court did not abuse its discretion in declining to give IPI 24-25.09X. The court reasonably concluded that this instruction was inappropriate for defendant's case because neither his defenses nor the prosecution's case raised any question with respect to whether he had a duty to retreat before he shot David. Defendant's self-defense claim centered on whether he believed force was necessary to defend himself against David, not on whether defendant had a duty to retreat. Indeed, it was undisputed that defendant *did* retreat, i.e., that defendant walked away from David after the fight outside and shot David only after David followed defendant into the house. R581, 728-29, 736, 3031-03; PE28 9:14. Further, defendant and Sara agreed that, at the time of the shooting, defendant was in the bedroom and David was in the doorway, R581, 3031-03, thus blocking defendant from any

possible escape. And the prosecution did not argue that defendant had a duty to retreat yet failed to do so. R282-86, 698-717, 738-49. In sum, there was no evidence or argument that defendant had a duty to retreat, making IPI 24-25.09X irrelevant, and meaning that its inclusion would have impermissibly risked confusing the jurors. *See Herron*, 215 Ill. 2d 188 (instructions that might confuse the jury should be denied).

Moreover, there was no evidence that David, and not defendant, "initially provoked the use of force." *See* IPI 24-25.09X. By its plain language, the instruction applies where an individual "has not initially provoked the use of force against himself" and uses force against an "aggressor." *Id.* Sara and defendant agreed that defendant argued with David during the car ride, R578, 297, and Sara testified that defendant threatened David, R297. Defendant did not contradict Sara's account but merely testified that he did not remember what he had said. R621. According to defendant, when they then arrived at his house, he immediately left the car and challenged David to a fight by placing his personal items on the hood of his truck. *Id.* Defendant could not say who threw the first punch. R624. But according to Sara, David responded, "If you want to kick my ass, here I am," R298-99, negating any suggestion that David "initially provoked the use of force" such that he was "the aggressor" in the fight outside. IPI 24-25.09X. In the end, the prosecution's evidence showed that defendant threatened David in the car, and defendant agreed that he then challenged

David to a fight. Thus, no evidence suggested that David was the initial aggressor, and the trial court reasonably declined to give a jury instruction that contemplated that he was.

Moreover, contrary to the appellate court's view, *see* A16, ¶¶ 70-71, there was no evidence that David became an aggressor after the fight outside concluded. Although defendant said that he was generally afraid of David, defendant never described any word or action by his brother that could be construed as an act of aggression. Rather, defendant agreed that after David and Sara entered the home that defendant shared with his parents, David merely walked in the direction of defendant's bedroom, unarmed and without saying anything threatening. PE28 11:03, 13:49; R581-86. Indeed, according to defendant, David said only, "What are you going to do?" when defendant pointed the gun at his face. R643. Moreover, the presence of the guns in Sara's trunk did not transform David's act of walking into his parents' home into an act of aggression, *see contra* A16, ¶ 71, particularly because defendant knew David was unarmed: he told police immediately after the shooting that the victim (whom defendant at the time identified as Sara's brother) was unarmed, PE28 11:03, and did not testify otherwise at trial, despite admitting David was only two feet away when defendant shot him, R645-46.

Nor did defendant's purported belief that he needed to protect himself necessitate giving IPI 24-25.09X. The appellate court held that the instruction must be given whenever "'any evidence is offered showing the

defendant's subjective belief that use of force was necessary.'" A17, ¶ 72 (quoting *People v. Stewart*, 143 Ill. App. 3d 933, 935 (1st Dist. 1986)). But *Stewart* is inapposite because it did not even consider IPI 24-25.09X. Rather, *Stewart* addressed whether that defendant's jury should have been instructed on self-defense and voluntary manslaughter (now second degree murder), 143 Ill. App. 3d at 935, instructions that defendant's jury was given, R686-89. Thus, *Stewart* does not support the appellate court's holding that IPI 24-25.09X must be given whenever a defendant provides some evidence of imperfect self-defense. To the contrary, as discussed above, the instruction was inappropriate in defendant's case because there was no evidence or argument that defendant had a duty to retreat from David after defendant went into the house, or any evidence that David, rather than defendant, was the initial aggressor.

Finally, the trial court did not invade the jury's role as factfinder, as the appellate court found. *See* A17-18, ¶¶ 73-75. The trial court did not weigh competing evidence or make any factual finding that defendant was the initial aggressor. Rather, it merely reviewed the evidence presented and found no evidence to support the instruction because there was no evidence that David was the initial aggressor. R670-71. That is exactly the determination that a trial court is required to make when considering whether to give a jury instruction. *Mohr*, 228 Ill. 2d at 65 ("There must be some evidence in the record to justify an instruction, and it is within the trial

court's discretion to determine which issues are raised by the evidence and whether an instruction should be given.").

In sum, whether defendant had a duty to retreat was irrelevant to the question before the jury, and there was no evidence that David was the aggressor. Consequently, the trial court's determination that the instruction was not supported by the evidence and would potentially confuse the jury was not so arbitrary, fanciful, or unreasonable that no reasonable person would agree with it. *Bush*, 2023 IL 128747, ¶ 57. Accordingly, the trial court did not abuse its discretion in declining to give IPI 24-25.09X.

II. Alternatively, Any Error Was Harmless.

Even assuming that the trial court erred in declining to give IPI No. 24-25.09X, the error was harmless because the instruction would not have changed the jury's verdict. It is "well-established . . . that an error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." *Tompkins*, 2023 IL 127805, ¶ 56. To determine whether an error in the jury instructions affected the verdict, this Court considers the other instructions given to the jury *and* the strength of the evidence against the defendant. *See id.*

Here, even if the jury had received IPI 24-25.09X, the result of the trial would not have been different. First, as discussed above, *see supra* pp. 13-14, informing the jury that defendant had no duty to retreat would have had no effect on the verdict because it was undisputed that defendant left the fight

when he and David were in the driveway, and there was thus no evidence or argument that defendant failed in any a duty to retreat. Moreover, when the jury was asked to determine whether self-defense or second degree murder applied to the facts, they were instructed on the elements of those theories. R686-89. Whether defendant was the initial aggressor or had a duty to retreat were not included as elements of either theory. *See id.* There is no reason to believe that the jury, after being instructed on the elements of self-defense and second degree murder, would have supplied new elements, like a duty to retreat, that the trial court had not included. Put differently, had the jurors received IPI No. 24-25.09X, they would have found it unhelpful to their deliberations because whether defendant had abided by a duty to retreat was not at issue.

Second, IPI 24-25.09X would not have resulted in a different verdict because the jury found that defendant's shooting of his brother was not an act of self-defense, so the question addressed by the instruction — whether defendant had a duty to retreat before defending himself — was not triggered. The jury was instructed on the elements of first degree murder, self-defense, and second degree murder based on imperfect self-defense. R686-91. The jury thus had three options. If defendant did not actually believe his conduct was necessary to defend himself against an imminent threat of death or great bodily harm, he was guilty of first degree murder. *See* 720 ILCS 5/ 9-1; *see also* R686. If defendant actually and reasonably

believed his conduct was necessary to defend himself against an imminent threat of death or great bodily harm, he acted in self-defense and was not guilty of first degree murder. *See* 720 ILCS 5/7-1; *see also* R691. If defendant actually but unreasonably believed his conduct was necessary to defend himself against an imminent threat of death or great bodily harm, he was guilty of second degree murder. *See* 720 ILCS 5/9-2(a)(2); *see also* R688. Thus, the jury had to first determine whether defendant actually believed his conduct was necessary to defend himself against an imminent threat of death or great bodily harm, and only after doing so would it determine whether that belief was reasonable. *See generally People v. Staake*, 2017 IL 121755, ¶ 41 (lack of self-defense is an element of first or second degree murder).

By finding defendant guilty of first degree murder, the jury found that defendant did not actually believe that he needed to defend himself against an imminent threat of death or great bodily harm when he shot David. In other words, the jury disbelieved defendant's account and found that he had not acted in self-defense. Whether there is a duty to retreat might be germane to assessing the reasonableness of a defendant's belief that self-defense is necessary (and thus whether his actions are fully justified or merely mitigated), but it is unrelated to the threshold question of whether he actually believed that lethal force was necessary to defend himself. Because the jury found that defendant did not shoot David in self-defense, the question addressed by the omitted instruction — whether defendant had a

duty to retreat — was a question that the jury would not have reached had the instruction been given. As a result, the failure to give the instruction could not have changed the verdict.

Finally, any error in omitting the instruction was harmless because the evidence proving defendant guilty of first degree murder was overwhelming. The People were required to prove that defendant (1) caused David's death (2) without legal justification (3) while either intending to kill or cause great bodily harm, or knowing there was a strong probability of such harm would result. *See* 720 ILCS 5/9-1. The only elements in dispute were whether defendant's actions were legally justified because he actually and reasonably believed his conduct was necessary to defend himself against an imminent threat of death or great bodily harm, s*ee* 720 ILCS 5/7-1, or otherwise mitigated to second degree murder because he unreasonably believed self-defense applied, *see* 720 ILCS 5/9-2(a)(2).

Sara, the only sober witness to the shooting, testified that defendant threatened David in the car, fought with him in the driveway, levelled a shotgun at him, and shot him in the face, unprovoked, from a distance of two feet. R297-304. Against Sara's testimony, defendant provided an inconsistent and unbelievable account of events. *See People v. Hart*, 214 Ill. 2d 490, 520 (2005) ("If a defendant chooses to give an explanation for his incriminating situation, he should provide a reasonable story or be judged by its improbabilities."). First, defendant testified that he was so drunk that he

was unable to recognize his own brother, even though he argued with him inside the car, fought with him in the driveway, and then stared into his face before shooting him. R579. Indeed, despite defendant's claimed extreme intoxication, he was able to speak, walk, fight, and ready a shotgun to fire with little difficulty.

Second, defendant's stories were inconsistent, both between his police interview and trial, and internally. He could not consistently say how far away David was, R560-61, what David said in the house, R642-43, or in what order the events occurred, R602. Nor could defendant explain why — after repeatedly saying that he believed he had shot Sara's brother and before anyone had informed him David was the victim — he told police that he would not "malice murder" his brother. R597.

Third, defendant claimed that he feared for his life, but there was no evidence of any imminent threat of serious harm to defendant. To the contrary, defendant knew that David was unarmed, he had already escaped a fight with David without incurring serious injuries, and although David and Sara entered the home that defendant shared with his parents, David did nothing more than walk in the direction of defendant's bedroom. PE28 11:03, 11:40, 16:38; R585-86.

Finally, defendant's admissions with respect to motive added to this strong evidence of guilt. Although defendant initially claimed at trial that he left Klevorn's home because he was drunk, he later admitted that the real

reason he left was because he was irritated that he had "gotten an earful" from David, and David's "talking shit was probably going to turn into something different that day." R613-14; PE28 35:53. Indeed, events did take a different turn after their fight, when defendant shot David because — as he told police — "maybe I had had enough, maybe I had been bullied my entire goddamn life." PE28 1:10:04. In sum, the evidence overwhelmingly proved that defendant intentionally or knowing shot David without lawful justification.

For its part, appellate court reasoned that any instructional error was not harmless because a reviewing court should not consider the prosecution's evidence when conducting harmless error analysis, A19, ¶ 76, but this is incorrect. First, it conflicts with this Court's description of the harmless error standard. *See*, *e.g.*, *People v. Woods*, 2023 IL 127794, ¶ 55 ("An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." (cleaned up)). Second, it cannot be squared with how this Court has applied the harmless error standard. *See*, *e.g.*, *Tompkins*, 2023 IL 127805, ¶ 56 (considering prosecution's evidence in harmless error analysis); *Woods*, 2023 IL 127794, ¶ 63 (same); *People v. Dennis*, 181 Ill. 2d 87, 96 (1998) (same). Finally, the appellate court mistakenly relied on *Stewart*, 143 Ill. App. 3d at 936, to support its novel holding. *See* A19, ¶ 76. But *Stewart* did not consider whether an instructional error was harmless. 143 Ill. App. 3d at

936. Instead, *Stewart* held that a court may not decline to give a jury instruction where it is supported by some evidence on the ground that the prosecution's evidence contradicts the evidence supporting the instruction. *Id*. In other words, *Stewart* considered only the threshold question of whether an error occurred; it did not decide whether the error was harmless and thus does not support the appellate court's reasoning.

In short, the jury's verdict would not have changed had the trial court given IPI 24-25.09X.

III. The Court Should Remand to the Appellate Court to Consider Defendant's Unresolved Claims.

Upon finding that the trial court had erred in refusing to give IPI 24-25.09X, the appellate court declined to consider defendant's remaining claims: that the trial court erred in allowing the prosecution to present other crimes evidence,[6] that his conviction should be reduced to second degree murder, that the prosecutor made improper statements in opening statement and closing arguments, and that his sentence is excessive. A1-2, ¶ 2; A20 ¶ 80. Consequently, if this Court reverses the appellate court's judgment, the Court should remand to the appellate court for consideration of defendant's remaining appellate claims. *See People v. Lowery*, 178 Ill. 2d 462, 473 (1997) ("where trial errors were raised but not ruled upon in the appellate court, it is

[6] The appellate court briefly addressed defendant's other-crimes evidence claim by asking the trial court to set forth its findings more explicitly should the issue recur on retrial. A19-20 ¶¶78-79. It did not determine whether the trial court abused its discretion in admitting the evidence. *Id.*

appropriate for this [C]ourt to remand the cause to the appellate court for resolution of those remaining issues").

CONCLUSION

This Court should reverse the appellate court's judgment and remand to the appellate court to consider defendant's remaining claims.

February 8, 2024

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

/s/ Nicholas Moeller
NICHOLAS MOELLER
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 590-6936
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 8, 2024 the foregoing Brief and Appendix of Plaintiff-Appellant People of the State of Illinois was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

Gilbert C. Lenz
Office of the State Appellate Defender,
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, IL 60601
1stdistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellee

Patrick Delfino
Edward R. Psenicka
Ivan O. Taylor, Jr.
State's Attorney's Appellate Prosecutor
628 Columbus Street, Suite 300
Ottawa, Illinois 61350
2ddistrict.eserve@ilsaap.org

Sean Featherstun
Jefferson County State's Attorney
100 S. 10th Street, room 203
Mt. Vernon, Illinois 62864
sfeatherstun@jeffil.us

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General
eserve.criminalappeals@ilag.gov

APPENDIX

Table of Contents to the Appendix

Order filed Mar. 31, 2023.
Modified upon denial of
rehearing Apr. 25, 2023.

2023 IL App (5th) 200225-U

NO. 5-20-0225

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 18-CF-295
	)	
MATTHEW SLOAN,	)	Honorable
	)	Jerry E. Crisel,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Boie and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Cause remanded for a new trial on charges of first degree murder where the trial court abused its discretion by denying defendant's request for an initial aggressor jury instruction.

¶ 2 The defendant, Matthew Sloan, appeals his conviction, following a trial by jury in Jefferson County, for the offense of first degree murder. On appeal, defendant raises numerous contentions of error. First, defendant argues that his conviction should be reduced to second degree murder, where he argues that he proved by a preponderance of the evidence that he acted with an unreasonable belief that self-defense was necessary. Second, defendant argues that he was denied his right to a fair trial when the court denied his request to instruct the jury that if they found defendant was not the aggressor, then he was not required to retreat before defending himself in his own home. Third, defendant argues that he was denied a fair trial due to the admission of other-

crimes evidence. Fourth, defendant argues that he was denied a fair trial when the prosecutor made improper statements in opening and closing arguments. Finally, defendant contends that his 80-year sentence was excessive. We agree with defendant that the court improperly denied his request for the initial aggressor jury instruction. Therefore, we reverse and remand for a new trial.

¶ 3 I. Background

¶ 4 A. The Charges

¶ 5 On July 5, 2018, the State charged defendant by three-count information. Count I charged defendant with the offense of first degree murder (720 ILCS 5/9-1(a)(1) (West 2016)), in that defendant, without lawful justification and with the intent to kill David Sloan, shot David Sloan with a firearm, and thereby caused the death of David Sloan on July 4, 2018. Count II charged defendant with the offense of first degree murder (*id.*), in that defendant without lawful justification shot David Sloan with a firearm knowing said act would cause the death of David Sloan. Count III charged defendant with the offense of first degree murder (*id.* § 9-1(a)(2)), in that defendant without lawful justification shot David Sloan with a firearm knowing said act created a strong probability of death to David Sloan, thereby causing the death of David Sloan. All three counts included firearm enhancements (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2016)), requiring that a term of 25 years to natural life be added to the term of imprisonment imposed by the court if, during the commission of the offense, the defendant, or a person for whose conduct the defendant was accountable, was armed with a firearm and personally discharged the firearm that proximately caused death to David Sloan.

¶ 6 On July 24, 2018, a Jefferson County grand jury indicted defendant of the same. The grand jury additionally charged defendant with aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2016)), wherein defendant, while committing a battery, knowingly discharged a

firearm and caused bodily harm to David Sloan, in that he shot David Sloan in the head. The grand jury additionally charged defendant with aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)), wherein defendant knowingly discharged a firearm in the direction of another person, Sara Sloan.

¶ 7 B. Motion *in Limine*

¶ 8 On May 16, 2019, the State filed a motion *in limine* seeking to admit evidence of defendant's crimes, wrongs, or other bad acts at trial. Specifically, the State sought to introduce testimony from Daniel Klevorn, defendant's cousin, eliciting that defendant pointed a shotgun at Klevorn in 2004, following a fight. The State alleged that the evidence was admissible to show "*modus operandi*, motive, intent, absence of mistake, and lack of accident."

¶ 9 On June 24, 2019, the trial court held a hearing on the State's motion *in limine*. The State proffered the following evidence. Klevorn and defendant were cousins, and the men knew one another "their entire lives." The State proffered that "after July" in 2004, Klevorn and defendant lived together in Mt. Vernon, Illinois. Following a night of drinking, an argument ensued between Klevorn and defendant. Defendant appeared with a shotgun "in Mr. Klevorn's face." Klevorn "snatched" the shotgun from defendant's hand. The State proffered that upon being disarmed, defendant went to his bedroom and retrieved a handgun. Before pointing the gun towards Klevorn, Klevorn intervened and disarmed defendant once more.

¶ 10 The State argued that the evidence constituted "evidence of a *modus operandi* of the defendant's motive, of his intent, and of the absence of mistake and lack of accident." First, as to *modus operandi*, the State contended that the 2004 incident constituted "exactly the same set of facts as far as something happening that causes the defendant to retreat to a bedroom and grab a gun." The State further argued that the 2004 incident constituted evidence of intent to kill, where defendant had the intent to kill the victim, David Sloan, following the fist fight in the yard.

¶ 11 The State further argued that the evidence constituted "motive and intent" where the "motive is simply alcohol." The State argued the evidence was admissible as "absence of mistake and lack of accident." The State argued that it could not "anticipate everything the defendant might say, but if he argues at all that he didn't intend to pull the trigger, that he only got the gun, you know, didn't intend to use it, then I think it squarely is going to fall into" the motive and intent exceptions.

¶ 12 Defense counsel objected to the admission of the evidence, noting that the evidence lacked reliability where there was no police report filed or a criminal case arising from the disputed conduct. Defense counsel further argued that the prejudicial nature of the evidence outweighed the probative value.

¶ 13 The trial court ruled:

> "It is certainly not to be considered—presented to show propensity to commit a crime, but it can be relevant for all the various factors that have been argued by [the State], namely, the absence of mistake or accident, common plan or scheme, consciousness of guilt, identity, intent, knowledge, *modus operandi*, motive, opportunity, plan or preparation, and giving the complete story, so the Court in its judicial discretion is going to allow this evidence to come in.
>
> I believe that it is relevant and would be presented not to show a propensity to commit crime but showing, certainly, absence of mistake, lack of evidence—of lack of accident, *modus operandi*, possibly motive, possibly intent."

The court continued:

> "I think it's relevant, particularly if the defendant is—is lodging the affirmative defense of self-defense, and so for clarification to help a jury to get the whole story and the

big picture, I think that this incident is relevant, and I will allow it, so I will grant your Motion *in Limine*."

¶ 14 C. The Trial

¶ 15 On July 17, 2019, defendant raised the affirmative defense of self-defense. On July 23, 2019, the matter proceeded to a jury trial.

¶ 16 1. Opening Statements

¶ 17 The State argued that on July 4, 2018, at approximately 5:56 p.m., the Jefferson County Sheriff's Department received a 911 call. Sara Sloan advised the dispatcher that her brother-in-law, defendant, shot her husband, David Sloan. Defendant also called 911 and stated that he got into a fight with his brother, his brother came into defendant's home, and defendant shot him.

¶ 18 The State argued that the men spent the day drinking with friends, and around 5 o'clock that evening, Sara picked the men up. There was "arguing and bickering" in the car. The State argued that Sara would testify that when the brothers arrived at defendant's home, they exited the car and engaged in a fist fight. The fist fight ended, and defendant went into the home that he shared with his parents. Sara and the victim, David, "follow [defendant] in the house." The State argued that defendant waited in the house with a shotgun, wherein defendant shot David in the head.

¶ 19 The State argued that defendant was not acting in self-defense when he shot David. The State argued "this isn't the first time that [defendant] has pulled a weapon on a family member."

¶ 20 Defense counsel encouraged the jury to consider the "who, what, when, where and why." Defense counsel noted that the "who," "what," and "when" were not in dispute, wherein defendant was in his own home when he shot his brother, David, on July 4, 2018. Rather, defense counsel asked the jurors to consider the "why."

¶ 21 2. The State's Evidence

¶ 22 Sara Sloan testified. Sara and the victim, David, lived in Mt. Vernon and spent 10 years married. Sara testified that defendant and David were brothers. Defendant lived with his and David's parents, Cindy and John, along with his son, Aiden.

¶ 23 David died on July 4, 2018, when defendant shot him. Sara took her husband, David, to Daniel Klevorn's house around noon on July 4, 2018. Before 5:30 p.m., David called Sara and asked her to "get [defendant] and take him home." Sara proceeded to Klevorn's home to pick up defendant, and David entered the vehicle to ride home, too. The parties proceeded to defendant's home that he shared with his parents. Sara later testified that David and defendant loaded firearms into the vehicle.

¶ 24 In the vehicle, defendant "was threatening and trying to argue with David." Upon arriving at defendant's residence, both defendant and David exited the vehicle and "met on the driver front corner" of the vehicle. The men engaged in a fist fight. Sara believed the men were intoxicated.

¶ 25 Sara exited the vehicle and broke up the fight. She did not see who "threw the first punch." She observed a cut on defendant's nose that was bleeding. The fight ended and defendant went inside the house. Sara and David followed defendant into the home.

¶ 26 Sara testified that defendant was already in the house by the time she and David arrived at the side door. The door was closed and unlocked. She did not immediately observe defendant when they entered the home.

¶ 27 Sara testified that they walked into the house through a side door, with David walking ahead of her. When they arrived at the opening of defendant's bedroom doorway, she observed defendant with a gun. Sara believed defendant held a black shotgun. Sara "pulled [her] head back." At that point, defendant shot David. Sara observed "David's body go limp" and blood "pooling up

underneath his head." Sara ran from the home.

¶ 28 Upon running from the home, Sara obtained her cell phone from her vehicle. Sara called 911. When law enforcement arrived and took defendant away in handcuffs, defendant told Sara: "I'm sorry."

¶ 29 On cross-examination, Sara testified that she believed defendant had been drinking, because he stumbled down a hill while carrying guns. She testified that the fist fight in the driveway did not last very long. Sara testified that they did not "chase" defendant into the home.

¶ 30 Daniel Klevorn, defendant's cousin, testified. Klevorn was with defendant on July 4, 2018. In the morning on July 4, Klevorn "woke up and got ahold of David" because they were "going to get drunk." Klevorn testified that he met defendant and David at the home that defendant shared with his parents to shoot guns and drink alcohol, before going back to Klevorn's home. Defendant and Klevorn then drove together to the liquor store to purchase beer and gin. The two went back to Klevorn's house and continued drinking. David's wife, Sara, dropped David at Klevorn's house shortly thereafter. The three men continued drinking.

¶ 31 At some point, defendant declared that he wished to go home. David called his wife, Sara, who came to pick up David and defendant to take defendant home. Klevorn did not observe any unusual behavior from any of the parties. Defendant and David loaded their firearms into Sara's car when she picked them up. The guns belonged to David. Klevorn testified that there were "a couple of ARs, a few pistols."

¶ 32 Previously, Klevorn lived with defendant for approximately eight months in late 2004 or early 2005. Klevorn testified that they stopped living together because defendant "pulled a gun on me one night." Klevorn could not recall the exact night. According to Klevorn, the two men were drinking beer. At some point in the evening, Klevorn observed defendant pointing a 12-gauge

shotgun at him. Klevorn disarmed defendant. This happened in the hallway next to the living room. Klevorn followed defendant into his room, where defendant had another gun. Klevorn took this second gun away from him. Klevorn testified that he did not call the police at the time, and he first reported the 2004 incident in July 2018.

¶ 33 Dr. Marissa Feeney, a forensic pathologist, testified. Dr. Feeney conducted the autopsy of David on July 5, 2018. Dr. Feeney testified that based on the wound, the victim was likely shot with a shotgun in a range from about one to three feet. Dr. Feeney did not find any injuries to the hands. Dr. Feeney determined the cause of death as a shotgun wound of the head with skull fractures and brain injury.

¶ 34 Upon the close of the State's evidence, defendant moved for a directed verdict. The trial court denied the motion.

¶ 35 3. Defendant's Case

¶ 36 Defendant testified. He suffered from drug addiction for approximately 10 years. As of July 4, 2018, defendant was not using drugs. On July 4, defendant woke up and went to the liquor store to purchase beer. Klevorn came to defendant's home, and the two men sat on the back porch, shot guns, and drank beer. Defendant testified that they shot an AR pistol and a ".45 conceal and carry by Kimber." Defendant testified that the guns belonged to his brother, David, who was also at defendant's home.

¶ 37 David left with his wife, Sara. Defendant and Klevorn packed up the firearms, went to the liquor store again, then went back to Klevorn's house. David came to Klevorn's house. This occurred at approximately noon, and the men continued drinking at Klevorn's house until about 4 or 4:30 p.m.

¶ 38 Defendant wished to go home. David indicated that Sara would give him a ride home.

Defendant and David bickered in the vehicle, and when they arrived at defendant's residence, a fist fight broke out in the driveway between defendant and David. Sara ultimately separated the men. Defendant sustained scrapes on his knees and a broken nose from the fist fight. When asked about the fight and whether there was an aggressor, defendant testified that he "thought it was a mutual combat."

¶ 39 Defendant left the fight and went into the house to his bedroom where he intended "to lay down." Defendant testified that he walked back into the house, and that he shut the door behind him.

¶ 40 Within about 30 seconds after he entered the home, however, defendant heard the "back door slam" and "footsteps approaching swiftly," so he reached for his shotgun, looked out the door and said, "Get the fuck out." Defendant testified that he said to get out twice, loudly. Defendant testified that initially David was approximately 12 feet away from him but continued moving closer to defendant's bedroom. David responded, "What are you going to do?"[1] Defendant testified that he did not see Sara in the house.

¶ 41 In his police recorded interview following the shooting, defendant advised law enforcement that his motivation for pulling the trigger was that he was "tired of being bullied [his] whole life." Defendant feared that David entered the home to "finish the job of beating me."

¶ 42 Defendant testified about the incident wherein he pointed a gun at Klevorn. He testified that the men were drinking and defendant and Klevorn "kind of had some hostile words with each other," so defendant "went to [his] bedroom and [he] grabbed a 12-gauge Mossberg Model 88

[1]In his police recorded interview and his testimony at trial, defendant offered conflicting testimony wherein defendant indicated that at first, he was under a mistaken belief an unknown intruder entered the home. Specifically, defendant testified that he pulled the trigger, because "there was a man in my house that had access to a carload of guns that I didn't recognize, and as far as I was concerned, the fight was over. He didn't think so. He came into the house, and I defended myself." Defendant testified that he was under a mistaken impression that it was Sara's brother who entered the house—who he had never met.

Maverick." Klevorn took the firearm from defendant. Defendant testified that the gun was not loaded. Defendant testified that Klevorn "reached out and snatched it" from him. Defendant was drunk when this occurred.

¶ 43 Next, defendant went into his bedroom and took a 9-millimeter firearm and placed it in his mouth, because "I was going to kill myself." Klevorn came into the bedroom and tackled him and took the gun away. David was in the home at this time, too.

¶ 44 4. Jury Instructions

¶ 45 The trial court instructed the jury related to first degree murder. People's Instruction 16 read:

> "A person commits the offense of first degree murder when he kills an individual if, without legal justification, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual, or he knows that such acts will cause death to that individual, or he knows that such acts create a strong probability of death or great bodily harm to that individual." Illinois Pattern Jury Instructions, Criminal, No. 7.01 (4th ed. 2000) (hereinafter IPI Criminal 4th).

¶ 46 The trial court also instructed the jury regarding mitigating factors reducing the offense of first degree murder to the lesser included offense of second degree murder, based on IPI Criminal 4th Nos. 7.05 and 7.06. Defendant's Instruction 4 read:

> "A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable." IPI Criminal 4th No. 7.05.

¶ 47 The trial court also offered instruction related to the justification of the use of force

pursuant to IPI Criminal 4th No. 24-25.06. Defendant's Instruction 8 read: "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." The instruction continued: "However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." IPI Criminal 4th No. 24-25.06.

¶ 48 Defendant requested IPI Criminal 4th No. 24-25.09X. The instruction read: "A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." The State objected, arguing there was no testimony that suggested David was the initial aggressor. Defendant argued that the instruction did not require a finding of the identity of the aggressor. Defendant argued that the jury should decide if there was an aggressor, and if so, who was the initial aggressor. Defendant argued that if the jury believed David was the aggressor, then defendant had no duty to escape or attempt to escape.

¶ 49 The trial court denied the instruction. The court reasoned that it did not hear evidence of "anybody being an initial aggressor, either side." In support, the court noted that defendant himself testified that he believed there was "mutual combat."

¶ 50 5. Closing Arguments

¶ 51 Defense counsel argued that defendant acted in self-defense where the evidence demonstrated that David had access to firearms, came into defendant's home uninvited, and advanced towards defendant after being told to leave.

¶ 52 In rebuttal, the prosecutor discussed Klevorn's testimony about the 2004 incident. Defense counsel objected, arguing that discussion of the 2004 incident went beyond the scope of his own argument. The trial court overruled the objection. The prosecutor continued: "I'm sure they don't

want me to mention again what Daniel Klevorn said because what Daniel Klevorn said is that this defendant has a history of taking a gun and putting it in family members' faces."

¶ 53 6. Verdict

¶ 54 The jury returned a verdict of guilty of first degree murder. The jury also found defendant guilty of aggravated battery with a firearm. The jury found defendant not guilty of aggravated discharge of a firearm related to the discharge of a firearm in the direction of Sara. The jury found that defendant personally discharged a firearm that proximately caused death to David Sloan.

¶ 55 On October 30, 2019, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant argued that the trial court erred by denying defendant's motion for directed verdict at the close of the State's case, where defendant was not proven guilty beyond a reasonable doubt. Defendant also argued that the court erred by denying defendant's request to include IPI Criminal 4th No. 24-25.09X, "no duty to retreat." Lastly, defendant argued that the court erred by allowing Klevorn to testify about events that allegedly occurred in 2004.

¶ 56 The State responded to the pleading on November 6, 2019. Relevant to the issues on appeal, regarding IPI Criminal 4th No. 24-25.09X, the State argued that no witness to the initial altercation could state who the initial aggressor was in the fist fight between defendant and David Sloan, which preceded the murder of David Sloan. Moreover, the State argued that the issue of whether defendant had a duty to escape was not raised to the jury. Additionally, the State noted that the court denied the instruction because the identity of the initial aggressor in the fist fight was "irrelevant given the fact that David Sloan was murdered after a cooling off period during which no threats or acts of intimidation occurred." As such, the State argued that "there was no evidence David Sloan was the initial aggressor in the fist fight and there was no evidence he was an

aggressor of any sort when he was later shot and killed." Therefore, the State argued that "the threshold provocation attached to the purpose of 24-25.09X had terminated prior to David Sloan's murder." Finally, the State argued that defendant's perceived claim of self-defense and second degree murder "hinged on" whether defendant feared death or great bodily harm after the end of the fist fight altercation with his brother.

¶ 57 The trial court ruled that Klevorn's testimony of the gun incident 14 years prior to the trial was "appropriately admitted." Additionally, the court ruled that the evidence did not support IPI Criminal 4th No. 24-25.09X, where "the evidence in this case was overwhelming." The court noted that the jury returned a verdict within two hours and recognized that the jury did find defendant not guilty of firing a weapon in the direction of the victim's wife. The court also noted that the evidence did not support a reasonable defense of self-defense. As such, the court denied defendant's motion.

¶ 58 D. Sentencing

¶ 59 On November 7, 2019, the matter proceeded for sentencing. The trial court sentenced defendant to 80 years in prison for the offense of first degree murder. Specifically, the court sentenced defendant to 50 years for first degree murder with a 30-year firearm enhancement and 3 years of mandatory supervised release. Defendant filed a motion to reconsider sentence, arguing that the trial court did not make specific findings with regard to mitigation. Following a hearing and argument from the parties, the court denied the motion.

¶ 60 This timely appeal followed.

¶ 61 II. Analysis

¶ 62 On appeal, defendant raises numerous contentions of error. First, defendant argues that his conviction should be reduced to second degree murder where he argues that he established, by a

preponderance of the evidence, that he believed his actions were necessary for self-defense, even if that belief was unreasonable. Second, defendant argues that he was denied his right to a fair trial when the court denied his request to instruct the jury that if they found defendant was not the aggressor, then he was not required to retreat before defending himself in his own home. Third, defendant argues that he was denied a fair trial due to the admission of other-crimes evidence. Fourth, defendant argues that he was denied a fair trial when the prosecutor made improper statements in opening and closing arguments. Finally, defendant contends that his 80-year sentence was excessive.

¶ 63 For the reasons that follow, we conclude that the trial court abused its discretion by denying defendant's request for an initial aggressor jury instruction. As such, we remand for a new trial on the charge of first degree murder.

¶ 64 Accordingly, we first consider defendant's claim that he was denied his right to a fair trial when the trial court denied his request to instruct the jury that if they found he was not the aggressor, then he was not required to retreat before defending himself in his own home. The State responds, arguing that defendant was not denied a fair trial where the trial court properly denied the jury instruction request. We agree with defendant.

¶ 65 The purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence, thereby allowing the jury to reach the proper conclusion based on the applicable law and the evidence as presented. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). The State and the defendant are both entitled to have a jury instructed on their theories of the case and, generally, an instruction is warranted if there is even slight evidence to support it. *People v. Barnard*, 208 Ill. App. 3d 342, 349-50 (1991). However, it is error to submit an instruction to the jury where there is no evidence to support it. *People v. Mohr*, 228 Ill. 2d 53, 65-66 (2008) (record

must contain some evidence to justify an instruction, and instructions not supported by evidence or law should not be given). We review issues concerning jury instructions for an abuse of discretion. *Id.* at 65 (which issues are raised by evidence and whether instruction should be given are for the trial court to determine).

¶ 66 Instructions concerning an aggressor's justifiable use of force may be given if the State presents evidence that the defendant was the aggressor, or even if there is a question whether the defendant was the initial aggressor. *Barnard*, 208 Ill. App. 3d at 350. In such cases, the use of the instruction does not erroneously assume that the defendant was the initial aggressor, and where, as in the present case, it is given with an additional instruction concerning justifiable use of force principles, the jury is able to resolve the issues under either hypothesis. *People v. Floyd*, 262 Ill. App. 3d 49, 55-56 (1994).

¶ 67 In this case, defendant requested IPI Criminal 4th No. 24-25.09X. The trial court refused defendant's requested instruction, finding there was no evidence of "anybody being an initial aggressor, either side."

¶ 68 The law instructs that "[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." IPI Criminal 4th No. 24-25.09X; see also *In re D.N.*, 178 Ill. App. 3d 470, 475 (1988) ("A nonaggressor 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 nonaggressor 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).

¶ 69 Before the jury, defendant argued that he was justified in killing David, because he was acting in self-defense. He alternatively argued that, even if his use of force was not justified, the evidence presented established a mitigating factor to reduce the offense to second degree murder, where he unreasonably believed that he was justified in the use of deadly force. Here, the jury received an instruction on the justifiable use of force and on second degree murder.

¶ 70 The plain language of IPI Criminal 4th No. 24-25.09X contemplates a situation that involves mutual combat, where a defendant is using force in response to the receipt of force.[2] Here, the trial court expressly noted that this case involved a situation of mutual combat. In support, the court noted that defendant himself testified that he believed there was "mutual combat." In denying the instruction, the court reasoned that it did not hear evidence of "anybody being an initial aggressor, either side." Evidence of mutual combat in the instant cause is clear, where the parties engaged in a fist fight in the driveway next to a vehicle loaded with firearms. Defendant arguably retreated by entering his home and closing the door. The evidence established that David entered the home unannounced shortly after the fist fight, wherein defendant shot and killed him.

¶ 71 By concluding that the initial aggressor instruction was not warranted because it was unclear who the initial aggressor was, the trial court impermissibly resolved a factual matter that the jury should have decided. Rather, here, there was evidence that defendant and David fought outside. The evidence also established that David had access to firearms in Sara's car. David entered defendant's home through a closed door. According to defendant's testimony, he twice

[2]See *People v. Lacey*, 2017 IL App (1st) 142352-U, ¶ 46.

told David to leave. This constitutes "some evidence" that there was an initial aggressor in the instant cause, which the jury could consider in rendering its decision.

¶ 72 Additionally, defendant testified that he felt the need to protect himself from an imminent danger of bodily harm when someone entered his home uninvited and unannounced. By determining that there was no evidence of who the initial aggressor was, and by suggesting that the events constituted mutual combat, 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." *People v. Washington*, 2012 IL 110283, ¶ 48.

¶ 73 With respect to the trial court's finding that there was no evidence of an initial aggressor, or that the parties engaged in mutual combat, the court engaged in fact finding. However, the jury heard opposing accounts of the events, and depending on which facts the jury chose to believe, it could have viewed the events in question as a single, continuous conflict that started and never ended. In contrast, according to defendant's testimony, the jury could have concluded that, although it was unclear who the initial aggressor was in the driveway, defendant retreated from the conflict by entering his own home and bedroom. David then followed defendant into the home following the end of the fist fight. The evidence also established that defendant knew that David

had access to firearms in Sara's vehicle outside. From these facts, the jury could have concluded that defendant abandoned the confrontation that began in the driveway, and thereby defendant was not the aggressor in the incident in the home.

¶ 74 Here, the proposed instruction would have informed the jury that if they found defendant was not the aggressor inside of the home, then defendant did not need to try and escape the danger before defending himself. This is especially true in a case such as this, where defendant claimed self-defense.

¶ 75 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. 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"); *Barnard*, 208 Ill. App. 3d at 350 ("We believe that evidence of 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 instruction, the jury "lacked the necessary tools to analyze the evidence fully and to reach a verdict based on those facts." *People v. Hari*, 218 Ill. 2d 275, 297 (2006). "Such an error is a denial of due process and requires that defendant be granted a new trial." *Id.*

¶ 76 The State alternatively argues 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. However, the State's evidence is "irrelevant" when determining whether the tendered instructions should have been given, because "[t]he test focuses only on defendant's evidence, not its reasonableness." *Stewart*, 143 Ill. App. 3d at 936.

¶ 77 For these reasons, we conclude that the trial court abused its discretion by refusing to instruct the jury in accordance with IPI Criminal 4th No. 24-25.09X. Therefore, we reverse the defendant's conviction for first degree murder and remand for a new trial.

¶ 78 Next, defendant argues that he was denied a fair trial where the jury heard other-crimes evidence concerning a 14-year-old incident that was dissimilar to the charged offense, the trial court failed to perform the mandatory balancing test for prejudice, and the State used the other-crimes evidence to demonstrate propensity. Because the issue raised by the defendant in this appeal is likely to recur on remand during a retrial, we address this issue to the extent we deem appropriate and necessary. See, *e.g.*, *People v. Stitts*, 2020 IL App (1st) 171723, ¶ 33 (appellate court has authority to address issues likely to recur on remand, but should not decide issues where resolution will have no effect on disposition of present appeal).

¶ 79 In this case, defendant contends that the trial court failed to engage in the required balancing test. The State merely responds that the prior act was substantially similar, and the probative value outweighed any prejudicial effect. The record is unclear as to whether the court engaged in a proper balancing test, particularly where the court never expressly considered the prejudicial effect of the other-crimes evidence. As set forth by our Illinois Supreme Court, "we urge trial judges to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial

impact of the evidence." *People v. Donoho*, 204 Ill. 2d 159, 186 (2003). When a new trial is held on remand, we urge the court to carefully engage in a thorough balancing test and set forth a clear analysis for any recognized exception to the general prohibition of other-crimes evidence.

¶ 80 For these reasons, we reverse the defendant's conviction for first degree murder and remand for a new trial. Given our disposition, we need not address defendant's remaining claims. We note that we considered all of the evidence presented at trial with regard to the defendant's conviction that we are reversing and find it sufficient to support that conviction; accordingly, double jeopardy does not prevent the retrial of the defendant. See, *e.g.*, *People v. Jamison*, 2014 IL App (5th) 130150, ¶ 18 (if evidence was sufficient to convict the defendant, principles of double jeopardy do not preclude retrial). We reach this conclusion because when we consider whether double jeopardy bars a retrial, the relevant question before us is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. See, *e.g.*, *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). We set out the evidence against the defendant in this case in extensive detail above. We conclude that from this evidence, a rational jury could have found beyond a reasonable doubt the essential elements of first degree murder.

¶ 81 III. Conclusion

¶ 82 For the foregoing reasons, defendant's Jefferson County conviction for first degree murder is reversed and the cause remanded for a new trial.

¶ 83 Reversed and remanded.

Index to the Record on Appeal

Common Law Record

Report of Proceedings

Supplemental Record[1]

[1] The Supplemental Record contains both a supplement to the Common Law Record (numbered SUP C 1-15) and a supplement to the Report of Proceedings (numbered SUP R 16-20) in one document.