No. 129676

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

It was undisputed that Matthew Sloan shot and killed his brother David Sloan after David entered Matthew's house without warning, moments after they fought in the driveway. Matthew knew David had access to guns in his car and had time to grab one before entering the house. Matthew testified that he fired his gun because he feared David intended to do him harm.

The State countered this claim of self-defense by asking Matthew about his thoughts and actions from the moment he entered his home to the moment he fired his gun, including asking what other actions he could have taken. The State then argued to the jury that if Matthew actually feared David, he would have taken action to avoid the danger.

Based on the State's questions and arguments, Matthew requested Illinois Pattern Instruction, Criminal, (IPI) 24-25.09X, which would have informed the jury that if they found he did not provoke David's actions inside the house, he had no duty to try to avoid the danger before using force in response. The trial court refused to give this instruction. The appellate court found that was error.

1) Did the trial court err when it refused Matthew's request for IPI 24-25.09X, where it instructed the jury on self-defense and second-degree murder based on evidence that David was the aggressor inside Matthew's home, and the State's questioning and arguments suggested Matthew had a duty to try to avoid the danger before using force in self-defense?

2) Can the State meet its burden to prove this instructional error

was harmless beyond a reasonable doubt, where its evidence of guilt was not overwhelming and the refused instruction went to the sole issue before the jury: whether, and to what extent, Matthew's thoughts and actions during the incident conformed with the law?

Alternatively, because the appellate court failed to apply the proper harmless-error test to the instructional error, as the parties agree, should this Court remand with instructions to the appellate court to conduct a proper prejudice analysis in the first instance, and, if necessary, to consider Matthew's other claims of error that are not before this Court?

STATEMENT OF FACTS

Matthew Sloan was charged with first-degree murder and other offenses after shooting and killing his brother, David Sloan. (C 26-27)

July 4, 2018: State's Evidence

At the jury trial, Matthew's cousin Daniel Klevorn testified that on the morning of July 4, 2018, he, David, and Matthew met at Matthew's house to shoot guns and drink beer. (R 363-64) Matthew lived with his parents and son, who were not home that day. (R 295) Later that morning, all three men went to Klevorn's house. (R 364, 372) Klevorn and Matthew bought gin and beer on the way. (R 364-65, 373) David drove home, then his wife Sara Sloan dropped him off at Klevorn's house around noon. (R 296, 364, 372) The three men drank alcohol all afternoon. (R 365-66)

When Matthew said he wanted to go home, David called Sara and asked her to pick them up. (R 313, 366) Sara, who had not been drinking, arrived alone around 5 p.m. (R 300, 311-12) Sara saw Matthew stumbling as he carried several of David's guns and a half-empty bottle of tequila to her car and put them in the trunk. (R 299-300, 306-07, 313, 373-74) The police later found three handguns and one rifle in the car. (R 424-25; E 39-42)

Sara testified that she drove to Matthew's house with David in the passenger seat and Matthew in the back seat. (R 298) Matthew and David argued as she drove. (R 297) The brothers got out of the car and fought in Matthew's driveway until Sara broke it up. (R 298-300, 314) After the fight, Matthew had a cut on his nose and a bruised left eye. (R 387-89; E 59-72)

Matthew walked away from Sara and David, entered his home, and shut the door. (R 301) Sara and David then walked towards the house. (R 301-02, 315) David opened the unlocked door and entered. (R 301-02) Sara followed David as he walked about 15 feet to the door of Matthew's bedroom. (R 302, 305) As David stood in the doorway, Sara looked around the edge of the doorway and saw Matthew in his bedroom, pointing a shotgun at David. (R 302-04) Sara testified that David may have asked Matthew what he was going to do, but she could not remember David or Matthew saying anything because her "brain [was] so foggy." (R 307) Matthew fired, hitting David in the face, and David fell to the floor. (R 304, 496)

Sara ran from the house and called 911 from the road at 5:46:17 p.m. (R 304-05, 324, 328; PE2) The dispatcher testified that Matthew called 911 about one minute later, at 5:47:15 p.m., but she could not answer his call. (R 328) Matthew called 911 again at 5:47:53 p.m., and told the dispatcher to send the coroner to his house. (R 324, 328; PE2 1:36) Matthew explained that after he fought Sara's "brother-in-law," that man entered the house and Matthew shot him. (PE2 3:13) Matthew later said both he and the man he shot had been drinking. (PE2 7:24) Matthew added, "[H]e came into my house after we got into a fight" and "he came into my house uninvited." (PE2 9:35, 9:51) When the dispatcher told Matthew to talk to the deputies when they arrived, Matthew said, "No, talk to Sara about it. Talk to my brother about it. He's dead. And I'm still alive. What does that mean?" (PE2 10:55)

Sara told the dispatcher she did not know where the gun was and that

"Matt is standing outside and I'm standing way way away from him but he doesn't have the gun on him." (PE2 4:29) The call ended when deputies arrived about 12 minutes after Sara called 911. (PE2 11:58)

When Deputy Kristina Draege arrived, Matthew exited the house with nothing in his hands and "identified himself as the shooter." (R 335) Draege saw a shotgun on the side porch. (R 335; E 79-80) As Draege handcuffed Matthew and put him in her car, he said, "I'm sorry" to Sara, and told Draege three times that "he came into my house." (PE3 3:00-10:00)

Deputies found David's body inside the house and a shotgun casing under a nearby dresser. (R 436; E 89) David was killed by a gunshot to the face fired from one to three feet away. (R 484, 496, 511-12, 521; E 26) David had a blood alcohol concentration of .259. (R 496; E 16)

The investigator who took photographs of Matthew after his arrest described him as "very intoxicated." (R 454) Captain Burge and Detective Wallace interviewed Matthew for about 75 minutes that evening, and recorded the interview. (R 506-10; PE 28)

Matthew told the detectives he already "got an earful" from David before Sara picked him up. (PE28 35:53) When Sara arrived at Klevorn's house, she introduced Matthew to "her brother," who was in the car. (PE28 7:42, 14:42) Matthew had never met him before. (PE28 8:47) Sara's brother and Matthew argued during the ride. (PE28 7:42) Matthew said David stayed at Klevorn's house and was not in the car. (PE28 8:19, 8:37, 29:04)

After fighting Sara's brother in front of his house, Matthew walked

inside and shut the door. (PE28 9:14) Matthew said, "I went inside to retreat, he came in after me." (PE28 11:47) While he did not see the man holding a gun, Matthew believed the man wanted to continue the fight. (PE28 11:03, 11:40) Matthew did not have a chance to lock the door or call the police. (PE28 11:56) Standing 12 feet away from the man, Matthew pointed his shotgun at him and told him to "get the fuck out." (PE28 13:40) When the man did not get out, and instead continued to move forward, Matthew shot him. (PE28 10:29, 13:49) Immediately after shooting the man, Matthew put the gun on the porch outside, then went back inside and called 911. (PE28 12:21) He repeated that the man advanced toward him after he retreated and that he shot the man because he was scared. (PE28 16:38; 18:07)

Matthew denied committing murder, saying, "I wouldn't do that to my brother." (PE28 16:15) A few minutes later, the detectives told Matthew he shot David, then called his mother, who confirmed this for Matthew. (PE28 19:35) Matthew said he did not believe the man he shot was David because David would not have fought him. (PE28 21:50, 29:23) Matthew again said he would never shoot his brother. (PE28 36:18)

When the detectives questioned Matthew about his motive, Matthew asked if they would have let someone enter their home to "finish[] the job." (PE28 40:29) He said he did not have a choice whether to let the man into his house. (PE28 42:45) Matthew explained the Army taught him that when you retreat from a person but he pursues you, he wants to do you harm. (PE28 45:11) Matthew thought the man was stronger than he was and fired because

he believed his life was in danger. (PE28 52:16, 53:16; 1:00:38) When the detectives asked Matthew whether the man was armed, Matthew asked, "Did you check their car?" (PE28 1:04:36) After the detectives asked again if this man had a weapon, Matthew responded, "not on him." (PE28 1:04:40) Matthew was scared of the man and felt it was necessary to arm himself with a shotgun. (PE28 1:09:13)

2004 Incident Involving Matthew and Klevorn

Before trial, the State filed a motion seeking admission of Klevorn's testimony about a prior incident as other-crimes evidence. (C 66-67; R 109-10) Klevorn was in court to testify at the motion hearing, but the parties instead agreed to proceed by proffer. (R 109-11)

The State proffered that some time in 2004, when Matthew and Klevorn lived together, they were drinking and got into an argument, then Matthew "suddenly ... appeared with a shotgun in … Klevorn's face." (R 109-11) Klevorn disarmed Matthew, who then went to his bedroom and grabbed a handgun. (R 111) According to the prosecutor, Klevorn disarmed Matthew again "[b]efore [Matthew] could raise the handgun to point that at [Klevorn's] ... face for the second time in a day." (R 111)

Matthew's counsel argued Klevorn's testimony was inadmissible because the two incidents were separated by about 14 years and it would be far more prejudicial than probative. (R 115-16)

The State argued that Klevorn's testimony about the 2004 incident should be admitted to show Matthew's *modus operandi*, motive, or intent on

July 4, 2018. (R 112-14) As to *modus operandi*, the State claimed the prior incident "is exactly the same set of facts as far as something happening that causes [Matthew] to retreat to a bedroom and grab a gun." (R 112-13) As to motive, the State argued "the motive is simply alcohol." (R 113-14)

The court admitted Klevorn's testimony, as proffered by the State, finding the 2004 incident was relevant to the charged 2018 incident to show *modus operandi*, motive, intent, absence of mistake, and lack of accident. (R 120-23) In doing so, the court ordered that this testimony "is certainly not to be ... presented to show [Matthew's] propensity to commit a crime." (R 121)

In its opening statement to the jury, the State said, "[T]his isn't the first time that Matt Sloan has pulled a weapon on a family member." (R 285)

Klevorn testified that he lived with Matthew in 2004, but moved out after Matthew "pulled a gun" one night after they had been drinking. (R 367-68) Klevorn did not call the police at the time, acknowledging that the first time he reported this incident to law enforcement was in July 2018, about 14 years later. (R 374-76) When the prosecutor asked Klevorn if he and Matthew had been "arguing" that night, he said, "Not that I recall." (R 368) When the prosecutor said, "But you mentioned a gun ended up in your face," the court sustained Matthew's objection. (R 368) Klevorn testified that Matthew pointed a shotgun at him, but he quickly took it away. (R 369) Klevorn then followed as Matthew walked to his bedroom and grabbed a handgun, which Klevorn also quickly took away. (R 369-70) Klevorn never testified that Matthew pointed a gun at his face. (R 368-70)

After the close of evidence, the court instructed the jury that evidence of Matthew's uncharged "conduct" was "received on the issue of [his] modus operandi, motive, intent, absence of mistake, or lack of accident and may be considered ... only for that limited purpose." (R 682) The court did not give this limiting instruction when this evidence was presented. (R 367, 376)

Matthew Sloan's Testimony

Regarding the 2004 incident, Matthew testified that he was drunk and he and Klevorn "had some hostile words." (R 569-70) Matthew went to his bedroom and came back with an unloaded shotgun, which Klevorn quickly took away. (R 569-70) Matthew returned to his bedroom, grabbed a handgun, and put it in his own mouth because he wanted to kill himself. (R 570) Klevorn again disarmed Matthew. (R 570)

As to July 4, 2018, Matthew testified that he drank 16 beers and two shots of gin that day. (R 566-67, 609) David called Sara around 4:30 p.m., after Matthew said he did not feel well and wanted to go home. (R 567-68, 615) When Sara arrived, Matthew carried several guns to her car and put them in the trunk. (R 578) Matthew got into the back seat and did not see anyone else get into the car, but saw that a man was already in the front passenger's seat. (R 578) Matthew did not know him, but thought it was Sara's brother. (R 579) As Sara drove, Matthew and Sara's brother were "talking shit." (R 578-79) When they arrived at Matthew's home, the two men fought in the driveway for 30-60 seconds before Sara broke it up. (R 581)

Matthew then walked into his house, shut the door, and walked to his

bedroom, which took 15-20 seconds. (R 581-84) Matthew sat on his bed and started to take off his shoes. (R 585, 601) About 30 seconds later, Matthew heard the door slam and heard someone quickly approach his bedroom. (R 581-85) Matthew grabbed his shotgun and said, "Get the fuck out." (R 585) The man Matthew fought in the driveway was standing in his bedroom doorway about 12 feet away, and said, "[W]hat are you going to do about it?" (R 585) Matthew pointed his gun at the man and fired when the man advanced toward him. (R 585-86) Matthew fired "[b]ecause 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." (R 586) Matthew did not recognize the man as David because the man followed Matthew into his house after the fight, which was uncharacteristic of David. (R 590-91)

On cross-examination, the State noted that during his interview with the police, Matthew mentioned his "brother" before the detectives did, then continued to deny knowing the man he shot was his brother even after his mother told him it was David. (R 594, 596-97) Matthew testified that he continued to say the man was someone other than David because he "just couldn't believe it" was his brother. (R 594)

The State also confirmed Matthew had been drinking alcohol that day. (R 605) When the prosecutor asked Matthew if he has "impaired decision-making when [he is] drunk," if he "[doesn't] make good decisions about what's reasonable or not when [he's] drinking," and if "alcohol ... helped kill [his]

brother," Matthew agreed on all points. (R 605)

The State asked Matthew many questions about his thoughts and actions from the moment he entered his house to the moment he fired the gun, a period Matthew estimated as 90 seconds. (R 601-04, 635-46) The prosecutor confirmed Matthew could have locked the exterior door when he entered, but did not. (R 636-38) Matthew did not know why he did not lock the door. (R 636-37) The prosecutor also asked if Matthew's bedroom door had a lock, and Matthew said it did not. (R 640-41)

The prosecutor asked Matthew about his thoughts when he heard someone enter the house – specifically, how he knew it was not his parents or a friend, or David entering with a bottle of whiskey as a peace offering. (R 593, 639-40) Matthew testified that he knew it was not his parents or a friend, and believed it was the person he had just fought in the driveway, not David. (R 593, 640, 642)

The prosecutor confirmed that Matthew's shotgun was leaning against the bedpost near the door to his bedroom, and that he was sitting on the bed when he heard the man enter and decided to grab the gun. (R 601, 641) At the prosecutor's request, Matthew marked a diagram of his house with his location and the location of the shotgun at the moment he heard the door open. (R 599-601) Matthew agreed that the sound of someone entering the house was "all that happened to make [him] pick that gun up." (R 642)

The prosecutor also confirmed that Matthew picked up the shotgun, "racked" it, and twice warned the person to leave before firing the gun. (R

602-03, 643) Matthew initially estimated all of that took "[l]ess than a second," but changed his estimate to "[a]bout five seconds" on further reflection. (R 603) The prosecutor asked Matthew about his thoughts after he picked up the gun, both before and after he fired it. (R 642-45) Specifically, the prosecutor asked if Matthew considered "using any less lethal force," such as using the shotgun as a bludgeon or shooting the man in the leg. (R 645-46) Matthew said he did not know at that moment whether the other man had a gun and that he chose to use lethal force because he perceived the man as a threat. (R 644-46)

Jury Instructions

At Matthew's request, and without objection from the State, the court instructed the jury on both justification based on self-defense, and second-degree murder based on an unreasonable belief in the need for self-defense (imperfect self-defense). (C 93, 102-03, 108-09, 115, 117, 121; R 664, 666-68, 671-72, 679, 683-95)

Matthew's counsel also requested IPI 24-25.09X, which states that 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." (C 116; R 668-69) While the State did not object to Matthew's requests for instructions on self-defense and second-degree murder, it objected to IPI 24-25.09X, arguing there was "no testimony" regarding who the "initial aggressor" was in this incident. (R 668-69) Defense counsel noted Matthew was claiming self-defense and argued that because some evidence

supported that defense, the jury should be instructed that Matthew had no duty to retreat if they found he was not the initial aggressor. (R 669-70) The court refused to give this instruction after finding the evidence did not suggest that either Matthew or David was the initial aggressor during the fight in the driveway. (R 670-71)

Closing Arguments

Defense counsel argued Matthew fired the gun believing it was necessary for self-defense, and urged the jury to find him not guilty or, alternatively, guilty only of second-degree murder. (R 718-19, 736-37) Counsel asked jurors to consider "how long [it is] reasonable for somebody [in Matthew's position] to wait" before acting in self-defense, knowing a man he had just fought had access to guns in the car, had just entered his house, and continued to move forward after Matthew told him to leave. (R 731-32, 736)

The State described Matthew as the aggressor, arguing that David ended the fight in the driveway, but Matthew was not "done" and went inside to "get a gun." (R 704-05) According to the prosecutor, "the only reason" Matthew went to his bedroom was "because that's where the gun was." (R 712) The prosecutor urged the jurors to reject Matthew's claim that he feared the person who entered the house, arguing Matthew would have locked the door if he truly feared the man he fought in the driveway. (R 705)

In both its closing and rebuttal arguments, the State also urged the jury to consider what Matthew was thinking and doing in the minutes after the shooting. (R 712, 728-30, 736, 747-48) The prosecutor claimed the

dispatcher "told you it was well after Sara called that [Matthew] called" 911. (R 712) The prosecutor then told the jury Matthew was "in the house for 15 or more minutes thinking about what to say" to the 911 dispatcher. (R 712) And in rebuttal, the prosecutor claimed the jury heard Sara tell the dispatcher Matthew was "outside ... looking for" her after the shooting. (R 747-48)

During the State's rebuttal argument, Matthew's counsel objected when the prosecutor began to discuss Klevorn's testimony about the 2004 incident. (R 745) After the court overruled the objection, the prosecutor said, "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." (R 745-46)

Verdict and Post-Trial Motion

The jury found Matthew guilty of first-degree murder and found he personally discharged the firearm. (C 128-31; R 766)

In his post-trial motion, Matthew argued the court erred in refusing to give IPI No. 24-25.09X and in allowing Klevorn to testify about the 2004 incident, and argued these errors, either alone or in their combined effect, denied Matthew a fair trial. (C 175-79) The court denied the motion. (R 782)

Sentencing

Matthew was 37 years old on the date of sentencing. (SEC C 11) Matthew served in the Army from 1999 until his general discharge in 2003. (SEC C 13) While in the Army, he suffered a back injury and became addicted to pain pills, which he abused until 2012. (SEC C 13-15) In 2005,

Matthew received an Associates Degree in Auto Technology. (SEC C 13) Matthew got married in 2005 and had a son. (SEC C 12) In 2007, Matthew began to abuse alcohol after his wife left him. (SEC C 12, 15) At the time of his arrest in 2018, Matthew was drinking until he passed out almost every day. (SEC C 15) In 2007, Matthew was diagnosed with PTSD and ADHD, and was prescribed Adderall and Xanax. (SEC C 14) He attended counseling from 2007 to 2013, until his insurance stopped paying for the services. (SEC C 14) After his arrest, Matthew was prescribed medications for hypertension, PTSD, anxiety, schizophrenia, and involuntary movements. (SEC C 14) Matthew had one prior misdemeanor and several traffic violations, but no prior felonies. (SEC C 15-16)

The court sentenced Matthew to a prison term of 80 years – 50 years for murder and 30 years for the firearm enhancement. (R 808) In doing so, the court found Matthew "led a law abiding life for a substantial period of time" and that his criminal history was "pretty minimal." (R 802) The court later said Matthew had "no criminal history, actually," but described this fact as aggravating: "You have traffic tickets and then you do this. So what's going on underneath the surface there? You know, something that is a total surprise. I'm considering all those things, so that's why I consider that this is not a situation for a minimum sentence on a murder." (R 807-08)

Appeal

On appeal, Matthew argued his conviction should be reduced from first-degree to second-degree murder and, alternatively, that his sentence

was excessive. *People v. Sloan*, 2023 IL App (5th) 200225-U, ¶¶ 2, 62.

Matthew also argued he was denied a fair trial on several grounds:

- The court erred in denying Matthew's request for IPI 24-25.09X.
- The court erred in admitting Klevorn's testimony about the 2004 incident because it was irrelevant for any proper purpose and was far more prejudicial than probative.
- The court failed to conduct the required balancing test to determine whether the probative value of Klevorn's testimony about the 2004 incident was substantially outweighed by its prejudicial impact.
- The court failed to give the required limiting instruction for the evidence of the 2004 incident at the time of Klevorn's testimony.
- The State explicitly urged the jury to consider Klevorn's testimony about the 2004 incident for an improper purpose – as evidence of Matthew's propensity to commit crimes.
- The State misstated the evidence three times in closing arguments, when it told the jury that Matthew put a gun in Klevorn's face in 2004, that Matthew waited 15 minutes after the shooting to call 911, and that Sara told the 911 dispatcher Matthew was looking for her after the shooting.

(Appellant's Brief in Appellate Court 23-54)[1]; *Sloan*, 2023 IL App (5th) 200225-U, ¶¶ 2, 62.

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[1] At Matthew's request, pursuant to Rule 318(c), the 5th District Appellate Court Clerk has submitted to this Court certified copies of the appellate court briefs in *People v. Sloan*, No. 5-20-0225.

The appellate court found Matthew's claim of instructional error dispositive, finding the judge abused his discretion in denying Matthew's request for IPI 24-25.09X, and that this error required a new trial regardless of the trial evidence. 2023 IL App (5th) 200225-U, ¶¶ 63-75.

While the appellate court did not consider the merits of Matthew's other claims, it expressed concern over the judge's admission of Klevorn's testimony about the 2004 incident. 2023 IL App (5th) 200225-U, ¶ 78. The court found the judge "never expressly considered the prejudicial effect" of this testimony, and the record is thus "unclear as to whether the [trial] court engaged in a proper balancing test" before admitting the other-crimes evidence. *Id.* ¶ 79. The court urged the judge at the new trial "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." *Id.*

ARGUMENT

Because the trial court erred in refusing Matthew Sloan's request for IPI 24-25.09X, and the State cannot prove that error was harmless, this Court should affirm the judgment of the appellate court. Alternatively, this Court should affirm the appellate court's finding of instructional error, then remand for that court to consider Matthew's other claims of error, which are not before this Court, and to conduct a proper prejudice analysis of the errors it finds occurred at this trial.

After fighting with a man in his driveway, Matthew Sloan walked away, entered his home, shut the door, and walked to his bedroom. About 30 seconds later, long enough for the man he had just fought to grab a gun from the car, Matthew heard the man enter the house without warning and walk in his direction. Matthew then fired his shotgun at the man and killed him, telling the jury he did so only after the man continued to advance after Matthew told him to leave. Matthew knew the man he had just fought had access to guns in the car, and told the jury he feared the man intended to do him harm. Matthew's defense hinged upon convincing the jurors he acted in self-defense, and thus should be found not guilty, or at least that he believed he acted in self-defense, however unreasonably, such that he should be found guilty only of second-degree murder.

To counter this defense, the State asked Matthew about his thoughts and actions from the moment he entered the house to the moment he fired the gun. The prosecutor asked why he did not lock the door to the house or to his bedroom. The prosecutor asked if it was only the sound of the person entering that led him to grab the shotgun. And the prosecutor asked if he

considered using non-lethal force. Then the prosecutor argued to the jury that if Matthew truly feared the man in the driveway, he would have locked the door. The State thus tried to convince the jurors that Matthew could have avoided the danger he faced inside his home, and that Matthew's actions had no basis in the law, either as self-defense or imperfect self-defense.

The State's cross-examination and arguments raised the question of whether Matthew had a duty to take some other action before firing his gun. And it was undisputed that Matthew walked away from the fight in the driveway, at which point the man he had just fought, who had access to guns in his car and had time to grab one, entered Matthew's house without warning and rapidly approached. Matthew's counsel thus requested IPI 24-25.09X, which would have informed the jury that if they found Matthew did not provoke David's actions inside his home, he had no duty to try to avoid the perceived danger before using force. Because the State raised a question concerning whether Matthew could have avoided the danger before using force, and because there was some evidence indicating Matthew did not provoke David's actions inside the house, the trial court abused its discretion when it refused Matthew's request for IPI 24-25.09X.

If this Court agrees, it should remand for a new trial because the State cannot meet its burden to prove that error was harmless beyond a reasonable doubt. *People v. Woods*, 2023 IL 127794, ¶¶ 55-56. This is true for two independent reasons. First, the State's evidence that Matthew did not believe self-defense was necessary, reasonably or unreasonably, was not

overwhelming. And second, the court's erroneous refusal to give IPI 24-25.09X may have contributed to the verdict because that instruction would have spoken to the dispositive questions before the jury – whether, and to what extent, Matthew's thoughts and actions after the man entered his home conformed with the law. A reviewing court may find a defendant was denied a fair trial by a single error. *People v. King*, 2020 IL 123926, ¶¶ 40, 45. Therefore, if this Court agrees the instructional error was not harmless, it should affirm the appellate court's judgment on that basis.

Alternatively, this Court should affirm the appellate court's finding of error, then remand with instructions to that court to consider Matthew's other claims of error, which are not before this Court, and to perform a proper prejudice analysis of the instructional error and any other errors it finds. (Appellant's Brief in Appellate Court); *see People v. Sloan*, 2023 IL App (5th) 200225-U, ¶¶ 2, 62 (noting Matthew's unresolved claims of error); *People v. Prante*, 2023 IL 127241, ¶ 88 (remanding for appellate court to resolve claims it did not reach in its initial decision).

Such a remand would be particularly appropriate here because the parties agree the appellate court failed to apply the proper test for prejudice to the instructional error. The court found this error required a new trial regardless of the trial evidence, but the proper test was whether the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. *Sloan*, 2023 IL App (5th) 200225-U, ¶ 76; *Woods*, 2023 IL 127794, ¶¶ 55-56. Because the appellate court did not apply the proper test for harmless

error, this Court may remand for that court to conduct the proper prejudice analysis of the instructional error in the first instance. *In re D.L.H., Jr.*, 2015 IL 117341, ¶¶ 80-81.

Also, a reviewing court may not find a single error was harmless, and affirm a conviction on that basis, without first considering the other claims of error, then weighing the prejudicial impact of all errors that occurred. *See, e.g., People v. Watkins*, 2021 IL App (3d) 190117-U, ¶ 26 (finding three trial errors, including counsel's unreasonable failure to request IPI 24-25.09X, then finding the combined effect of the errors was prejudicial, even if a single error was not)[2]; *cf., People v. Whitlow*, 89 Ill. 2d 322, 341-42 (1982) (combined effect of preserved and unpreserved errors required new trial).

Here, Matthew raised several other issues in the appellate court that are not before this Court. Those issues include a preserved claim that the trial court improperly admitted other-crimes evidence, as well as claims that the judge failed to perform the required balancing test before admitting that evidence, that the State improperly urged the jury to consider that other-crimes evidence for propensity purposes, and that the prosecutor misstated the evidence in closing arguments on three important questions of fact. (Appellant's Brief in Appellate Court 23-54); *Sloan*, 2023 IL App (5th) 200225-U, ¶¶ 2, 62. The appellate court appeared to agree that at least one of these alleged errors occurred, but did not resolve the merits of any of these

[2] Matthew cites *Watkins* "for persuasive purposes" pursuant to Supreme Court Rule 23(e)(1). *Watkins* is attached as an Appendix to this brief.

claims. *Id.* ¶ 79. This Court may thus remand for the appellate court to address those claims and to assess the prejudicial impact of all errors that may have occurred at this trial.

Finally, if this Court finds no instructional error, it should reverse the appellate court's judgment on that basis, then remand with instructions to consider Matthew's other claims and to perform a proper prejudice analysis of whatever errors it finds occurred. *Prante*, 2023 IL 127241, ¶ 88.

A. The trial court abused its discretion when it refused Matthew's request for IPI 24-25.09X.

Defense counsel is responsible for making strategic decisions at trial, including determining what instructions best serve the defendant's theory of the case. *People v. Jones*, 2023 IL 127810, ¶¶ 51-53. Because courts generally defer to counsel's strategic choices, the court must give an instruction requested by counsel if some evidence supports it, even "very slight evidence." *People v. Hari*, 218 Ill. 2d 275, 298 (2006); *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). A court abuses its discretion when it denies counsel's strategic request for an instruction that has some foundation in the evidence. *People v. Tompkins*, 2023 IL 127805, ¶ 42; *Jones*, 175 Ill. 2d at 131-32.

In cases where a murder defendant is claiming self-defense, a question often arises as to whether the defendant was required to try to avoid the danger he perceived before using force. When that question is raised, a court may be required to instruct the jurors on the defendant's duty to attempt to escape the danger by giving either IPI 24-25.09 or IPI 24-25.09X, or both. IPI 24-25.09X, Committee Note. The first instruction informs jurors that if they

find the defendant provoked the use or threat of force against himself, he had a duty to take every reasonable step to avoid the danger before using force. IPI 24-25.09. The second instruction clarifies that if the jurors find the defendant did *not* provoke the decedent's actions, the defendant had "no duty to attempt to escape the danger before using force." IPI 24-25.09X.

In every case where a party requests IPI 24-25.09 or IPI 24-25.09X, the court has already found the evidence supports a self-defense instruction.[3] Therefore, the question before the court is no longer whether there was some evidence indicating the decedent was the aggressor, which has already been answered in the affirmative. Instead, the first question is whether the evidence or arguments at trial raised an issue concerning the defendant's duty to try to avoid the danger before using force. *See, e.g., People v. Watkins*, 2021 IL App (3d) 190117-U, ¶ 26 (trial court would have given IPI 24-25.09X, had counsel requested it, because defendant argued self-defense and the State argued defendant could have escaped the danger before using force).

If either party's evidence or arguments suggests the defendant had a duty to try to avoid the danger, or had no such duty, the next question is whether there is evidence indicating the defendant provoked the actions by the decedent that the defendant perceived as a threat. Where some evidence indicates the defendant did *not* provoke the decedent's actions, the court should grant a party's request for IPI 24-25.09X. *Watkins*, 2021 IL App (3d)

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[3] IPI 24-25.09X may also be given when the jury is instructed on defense of another, of dwelling, or of property.

190117-U, ¶ 26. Similarly, where some evidence shows the defendant provoked those actions, the court should grant a party's request for IPI 24-25.09. *See, e.g., People v. Floyd*, 262 Ill. App. 3d 49, 56-57 (2d Dist. 1994) (court did not err in granting State's request for IPI 24-25.09, where defendant claimed self-defense but there was evidence he provoked the decedent's actions).

Here, Matthew requested jury instructions on both self-defense and second-degree murder based on imperfect self-defense. (C 109, 115) Those requests were based on the undisputed evidence that Matthew walked away from the fight in the driveway, then entered his house and shut the door, after which the person he had just fought, who had access to guns in the car and had time to grab one, entered Matthew's home without warning and approached his bedroom. (R 300-02, 315, 424-25, 581-85, 601; E 39-42; PE2 9:51; PE3 3:00-10:00; PE28 9:10-12:00, 42:45) Matthew's requests for those instructions were also based on his statements and testimony indicating that he believed the man who entered was the man who injured him in the driveway, that he knew the man had access to guns, that he believed his use of force was necessary to prevent the man from doing him harm, and that he only fired the gun when the man continued to advance after Matthew told him to leave. (R 299-300, 306-07, 313, 373-74, 578, 585-86, 644-46; PE2 9:35; PE28 10:00-19:00, 40:00-46:00, 52:00-53:30, 1:00:30-1:09:30)

Based on this evidence, the court granted Matthew's requests for self-defense and imperfect self-defense instructions with no objection from the

State. (R 667-68, 687-91) It was thus undisputed that there was some evidence indicating David was the aggressor, and some evidence indicating Matthew believed his actions were necessary for self-defense. *See People v. Everette*, 141 Ill. 2d 147, 157 (1990) (a self-defense instruction is *only* given where "there is some evidence in the record which, if believed by the jury, would support" that defense).

Matthew's request for IPI 24-25.09X also had a foundation in the record, both because the State implied Matthew had an obligation to avoid the danger before using force, and because there was some evidence that Matthew did not provoke David's actions inside his home.

1. The State raised a question for the jury as to whether the law required Matthew to try to avoid the danger before using force.

While cross-examining Matthew, the State asked many questions about his thoughts and actions in the roughly 90 seconds between the moment he entered his house and the moment he fired the gun. (R 601-04, 635-46) The prosecutor confirmed Matthew could have locked the exterior door when he entered, but did not. (R 636-38) The prosecutor also asked whether there was a lock on Matthew's bedroom door, how he knew the person who entered was the person he had just fought, and if the sound of the person approaching was the only thing that led him to pick up the shotgun. (R 593, 639-42) And the prosecutor asked Matthew if he considered "less lethal force," such as using the gun as a bludgeon or shooting the man in the leg. (R 645-46) Then, in closing arguments, the State urged the jurors to

reject Matthew's claim that he feared the person who entered the house by arguing that Matthew would have locked the door if he truly feared the man he fought in the driveway. (R 705)

A reasonable juror may have wondered whether Matthew had a duty to avoid the danger before using force. Indeed, a reasonable juror hearing the State's questioning and arguments may have believed Matthew *did* have a duty to try to avoid the danger, by, for example, locking the door. Under these circumstances, it was crucial to Matthew's defense to ensure the jury understood an important principle that would not necessarily be obvious to the average juror: that Matthew had no duty to try to avoid the danger before using force if the jurors found he did not provoke David's actions. *See People v. Watkins*, 2021 IL App (3d) 190117-U, ¶ 26 (where defendant claimed self-defense and State implied defendant could not have reasonably believed self-defense was necessary because he could have tried to avoid the danger, IPI 24-25.09X would have ensured jurors understood how the legal principles of justification applied to the case).

The State argues IPI 24-25.09X was "irrelevant" to this case because "there was no suggestion at trial that [Matthew] had a duty to retreat once within his home before he allegedly acted in self-defense." (St Br 10, 13-14, 16) The State is incorrect.

The State first asserts the "duty to retreat" was not before the jury because Matthew "*did* retreat" from the fight in the driveway, and it was only after Matthew retreated that David followed him into the house and

blocked "any possible escape" Matthew had from the bedroom. (St Br 13-14) (emphasis in original) But the fact that Matthew retreated from the driveway, then was followed into the house by David, who had access to guns, only makes it more clear that counsel's request for IPI 24-25.09X was rooted in the evidence. One question a reasonable juror might have had after hearing this evidence was whether Matthew had a duty to try to avoid the perceived danger David posed inside the house, just as he retreated from David in the driveway. *Cf., Floyd*, 262 Ill. App. 3d at 57 (court properly gave IPI 24-25.09 because "[t]o the extent ... the jury could have concluded ... the victims threatened to use force against defendant (or that defendant reasonably perceived such a threat), it was appropriate for the jury to consider whether defendant's actions provoked the victims' conduct," thus triggering defendant's legal duty to retreat).

The State then claims it "did not argue [to the jury] that [Matthew] had a duty to retreat yet failed to do so." (St Br 14) As explained, the record rebuts this claim. To be clear, IPI 24-25.09X does not contain the phrase "duty to retreat." Instead, it tells the jury that where the defendant did not provoke the decedent's actions, he had "no duty to attempt to escape the danger" before acting in self-defense. IPI 24-25.09X. A person may try to escape a perceived threat in any number of ways, not just by running away. For example, a person in Matthew's shoes may have tried to avoid any danger David posed by locking the door. The State implied exactly that when it elicited from Matthew that he could have locked the door, but did not. (R

636-41) Then the State explicitly argued to the jury that they should not believe Matthew feared the man who entered his home because if he actually feared that man, he would have locked the door. (R 705)

Matthew's counsel, recognizing the implications of the State's questions and arguments, asked the jury to consider "how long [it is] reasonable for somebody [in Matthew's position] to wait" before acting in self-defense. (R 731-32, 736) That response to the State, however, was not supported by the corresponding instruction that would have clarified for the jurors that if they found Matthew did not provoke David's actions, Matthew had *no* duty to wait, or to try to avoid the danger, before acting in self-defense. Because the State plainly implied to the jury that Matthew had a duty to take such action, Matthew's request for IPI 24-25.09X had a foundation in the record.

2. There was some evidence indicating Matthew did not provoke David's actions inside the house.

The court should have granted Matthew's request for IPI 24-25.09X because there was far more than slight evidence indicating Matthew did not provoke David's actions inside the house. Indeed, there was no evidence at all that Matthew did anything to provoke David's actions after Matthew walked away from the fight. Had there been any such evidence, the State could have requested IPI 24-25.09, informing the jurors that if Matthew provoked David's actions, he had a duty to retreat before using force. But there was none. Instead, all of the evidence showed Matthew did not provoke David's actions after Matthew entered his house.

At trial, the State tried to convince the jurors that Matthew went to his bedroom to "get a gun" so he could "put that gun in [a] family member's face ..., just like in [the] 2004" incident with Klevorn. (R 704-05, 746) But there was no evidence Matthew went to his bedroom to get a gun, or that he grabbed a gun and was returning to David's location. Instead, as the State now agrees, "it was undisputed" that Matthew "retreat[ed]" from David after the fight in the driveway, "and shot David only after David followed [Matthew] into the house" and stood in the doorway to Matthew's bedroom, "blocking [Matthew] from any possible escape." (St Br 13-14) The State points to no evidence that Matthew did anything to provoke David's actions after Matthew walked away.

The trial court found that David's actions after the fight in the driveway, combined with Matthew's knowledge of the guns in the car and his stated belief that self-defense was necessary, provided a basis for instructing the jurors on self-defense and second-degree murder. The State, however, urged the jury to find Matthew guilty of first-degree murder, in part, because he failed to try to avoid the danger he claimed to perceive. And, as noted, there was no evidence that Matthew provoked David's actions inside the house. Matthew's request for IPI 24-25.09X, therefore, had a foundation in the record and should have been granted. The court's refusal was an abuse of discretion. (C 116; R 670-71)

The State argues IPI 24-25.09X was inappropriate because there was "no evidence that David was the initial aggressor." (St Br 10, 15) But when

Matthew requested instructions on self-defense and imperfect self-defense, the State had no objection and the court granted those requests. (R 667-68) Those instructions are only given where there is some evidence indicating the defendant believed, reasonably or unreasonably, that self-defense was necessary. By choosing not to object to those instructions, the State conceded that some evidence indicated David was the aggressor. And here, that evidence could only have consisted of David's actions *after* Matthew "retreat[ed]" from the fight in the driveway. (St Br 13) All of this contradicts the State's assertion in this Court that "there was no evidence that David became an aggressor after the fight outside concluded." (St Br 15)

And in any event, the State's own description of Matthew's and David's actions shows there was far more than slight evidence indicating David was the aggressor after Matthew walked away from the fight. (St Br 13-15) In addition to the undisputed facts recited by the State, the jury heard Matthew testify that he believed the man who entered his house was the man he had just fought in the driveway, that he feared the man would attack him, possibly with a gun, and that he only fired his gun when the man continued to advance after Matthew told him to leave. (R 585-86, 644-46; PE28 10:20-14:00, 16:38, 18:07, 40:29, 45:11, 52:00-54:00, 1:00:38, 1:09:13) The State's assertion that Matthew "never described any word or action by his brother that could be construed as an act of aggression" is simply incorrect. (St Br 15)

Despite its acknowledgment that David withdrew from the initial confrontation, the State also argues nothing supported Matthew's request for

IPI 24-25.09X because David was not the aggressor *in the driveway*. (St Br 14-15) But regardless of whether David or Matthew was the aggressor in the driveway, the dispositive questions at this trial concerned what Matthew believed *after* he withdrew from the fight in the driveway and *after* David entered the house. *Cf., Floyd*, 262 Ill. App. 3d at 56-57 (where defendant retreated from the initial confrontation, then returned with a handgun and shot multiple people, "even if [the shooting victims] were the aggressors in the initial encounter, this would not of itself prove that they were the aggressors just prior to the shootings").

Equally misplaced is the State's reliance upon *other* evidence that, according to the State, shows Matthew's stated belief in the need for self-defense was not credible or reasonable, such as his testimony that he did not see a weapon in David's hand. (St Br 15) The State's argument conflates the ultimate questions for the jury, in light of *all* of the evidence, with the preliminary question before the judge – whether *some* evidence supported counsel's request for IPI 24-25.09X. *See, e.g., Jones*, 175 Ill. 2d at 132 (when determining whether evidence supports the requested instruction, the question is whether some such evidence exists, not whether it outweighs contrary evidence). Even accepting that other evidence arguably contradicted Matthew's claim of self-defense, this does not change the fact that some evidence supported the instructions on self-defense and second-degree murder, as the State conceded at trial. *See, e.g., People v. Evans*, 259 Ill. App. 3d 195, 209 (1st Dist. 1994) (even an unarmed person can be an "aggressor" if

evidence showed he "was capable of inflicting serious bodily harm" and "it appeared he intended to do so"); *People v. Whiters*, 146 Ill. 2d 437, 444 (1992) (where defendant claims self-defense, "[i]t is defendant's perception of danger, not the actual peril, which is dispositive"). Nor does any other evidence change the fact that the prosecutor raised the issue of Matthew's duty to avoid the danger he perceived from David before using force, in a case where Matthew had no such duty because he did nothing to provoke David's actions, all of which supported Matthew's request for IPI 24-25.09X.

Finally, the State argues that this instruction would have "impermissibly risked confusing the jurors" because it had no basis in the record. (St Br 14) However, if this Court finds counsel's request had support in the record, then giving the instruction posed no risk of confusing the jurors. On the contrary, IPI 24-25.09X was necessary to *avoid* the risk of confusion about Matthew's legal duties inside his home, a risk only heightened by the State's questioning and argument.

3. This Court should affirm the appellate court's finding of instructional error.

The State elicited from Matthew that he could have taken steps to avoid the danger he perceived from David, then argued Matthew's failure to do so showed he did not actually believe self-defense was necessary. IPI 24-25.09X would have clarified for the jurors that if they found Matthew did not provoke David's actions inside the house, Matthew had no duty to retreat. In other words, this instruction would have clarified that while Matthew did not try to avoid the danger before using force inside his own home, this did not

necessarily negate his testimony that he believed he was acting in self-defense, contrary to the State's closing argument. Because defense counsel's request for IPI 24-25.09X had far more than slight support in the record, the trial court abused its discretion in refusing that request. This Court should affirm the appellate court's judgment on this point.[4]

B. This Court should affirm the appellate court's judgment because the instructional error was not harmless. Alternatively, this Court should affirm the appellate court's finding of error, then remand for that court to perform the prejudice analysis, particularly in light of Matthew's as-yet unresolved claims of error.

While the parties agree that the appellate court did not conduct a proper prejudice analysis of the instructional error, this Court should affirm

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[4] This Court might also take this opportunity to clarify that a court can give IPI 24-25.09X where a defendant had not (yet) received actual force from the perceived aggressor, or where there was not (yet) "mutual combat." It is axiomatic that a person may reasonably believe the use of force in self-defense is necessary *before* he has been subjected to *actual* force from the perceived aggressor. *See* 720 ILCS 5/7-1(a) (2018) (a person is justified in using force when he reasonably believes it is necessary for self-defense against an "imminent use of unlawful force"); 720 ILCS 5/7-4 (2018) (a person facing "imminent danger of death or great bodily harm" may be justified in using force, even if he provoked the actions posing that danger); *see also Whiters*, 146 Ill. 2d at 440, 444; *Evans*, 259 Ill. App. 3d at 209-10. IPI 24-25.09X applies in cases where there is some evidence the defendant did not provoke the actions of the perceived aggressor. Those actions by the perceived aggressor may be acts of violence, or they may be actions that lead the defendant to believe an act of violence is imminent.

For its part, the State does not argue IPI 24-25.09X should only be given where mutual combat had already begun, or where the defendant had already received actual force from the aggressor. Thus, while this Court should affirm the appellate court's finding of instructional error, it should not affirm its assertion that IPI 24-25.09X necessarily, or always, "contemplates a situation that involves mutual combat, where a defendant is using force in response to the receipt of force." *See Sloan*, 2023 IL App (5th) 200225-U, ¶ 70 n.2 (citing unpublished order making the same misstatement of law).

the appellate court's judgment, if not its reasoning, because the State cannot meet its burden to prove the instructional error was harmless beyond a reasonable doubt. *See People v. King*, 2020 IL 123926, ¶¶ 40, 45 (single prejudicial error required new trial).

Alternatively, this Court may simply affirm the appellate court's finding of error, then remand with instructions to that court to consider Matthew's other claims of error, and to perform a proper prejudice analysis of the instructional error alongside any additional errors it finds. *Cf., People v. Whitlow*, 89 Ill. 2d 322, 341-42 (1982) (combined effect of preserved and unpreserved errors required new trial). Indeed, because the appellate court failed to apply the proper harmless-error test to the instructional error, this Court may entirely forego a prejudice analysis of that error and remand for the appellate court to conduct that analysis in the first instance. *In re D.L.H., Jr.*, 2015 IL 117341, ¶¶ 80-81.

And if this Court finds no instructional error, of course, it should reverse the appellate court's judgment on that point and remand for that court to consider Matthew's unresolved claims. (St Br 23-24); *People v. Prante*, 2023 IL 127241, ¶ 88.

1. The State cannot prove the instructional error was harmless beyond a reasonable doubt.

This Court should affirm the appellate court's judgment because the State cannot meet its burden to prove the trial court's erroneous denial of Matthew's request for IPI 24-25.09X was harmless beyond a reasonable doubt. *People v. Woods*, 2023 IL 127794, ¶¶ 55-56.

This is true, first, because the State's evidence that Matthew's conduct could have *only* constituted first-degree murder, as opposed to self-defense or second-degree murder, was not "so overwhelming as to make the jury instruction error harmless beyond a reasonable doubt." *People v. Mohr*, 228 Ill. 2d 53, 69 (2008). The jury was tasked with answering two questions: whether Matthew subjectively believed his use of force was necessary for self-defense and, if so, whether that belief was reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 120-21 (1995).

The circumstances surrounding Matthew's thoughts and actions in the moment were largely undisputed. Both Matthew and David were very drunk when Sara pulled into Matthew's driveway. (R 363-66, 605) David had a blood alcohol concentration of .259. (R 496; E 16) Matthew testified he drank 16 beers and two shots that day. (R 566-67, 609) Sara saw Matthew stumbling to the car when she picked him up, and a police officer described Matthew as "very intoxicated" after his arrest. (R 313, 454) Matthew agreed with the prosecutor that "alcohol ... helped kill [his] brother" because he has "impaired decision-making when [he is] drunk," and he "[doesn't] make good decisions about what's reasonable or not when [he's] drinking." (R 605)

Insofar as Matthew's intoxication was "voluntary," it could not have been an "affirmative defense" at his trial. *People v. Grayer*, 2023 IL 128871, ¶ 22. But at the same time, the jurors could consider Matthew's intoxication in answering the two key questions before them: 1) whether he acted with the mental state charged by the State, or some lesser mental state, and 2)

whether he subjectively believed his actions were necessary in self-defense, however unreasonable that belief was. When a jury is instructed on both self-defense and imperfect self-defense, as here, the jury must assess the defendant's subjective mental state. *People v. Washington*, 2012 IL 110283, ¶ 23. Because "intoxication affects an individual's subjective mental state, a defendant's state of voluntary intoxication may be one of many relevant circumstances for the trier of fact to consider." *Grayer*, 2023 IL 128871, ¶ 24. Matthew's intoxication, and the impairment in judgment it brought, weighs against the State's assertion that its evidence overwhelmingly demonstrated he could only have had the mental state necessary for first-degree murder. *See, e.g., People v. Mocaby*, 194 Ill. App. 3d 441, 449 (5th Dist. 1990) ("Intoxication may contribute to a defendant's mistaken belief [that] self-defense" is necessary); *People v. Collins*, 213 Ill. App. 3d 818, 826 (1st Dist. 1991) (reducing conviction from first- to second-degree murder, in part, because defendant shot decedent during an alcohol-fueled fight).

But even setting Matthew's intoxication aside, the State's evidence that he was not acting in self-defense or imperfect self-defense was far from overwhelming. It was undisputed that Sara and David had guns in their car, including three handguns, and that Matthew knew the guns were there. (R 299-300, 306-07, 313, 373-74, 424-25, 578, 586; E 39-42) Those facts colored everything that happened after Sara pulled into the driveway.

While it is not clear whether there was an "aggressor" in the driveway, or who it was, that is of no importance because after Sara broke up the fight,

Matthew walked away, entered his home, and shut the door. (R 298-301, 314, 581-84; PE28 11:47) Because Matthew withdrew from the physical confrontation, a reasonable jury could have found Matthew believed self-defense was necessary, reasonably or unreasonably, based on what happened next. *See* 720 ILCS 5/7-4(c)(2) (2018) (even an initial aggressor may assert a justification defense if he withdrew from the initial confrontation).

Matthew entered his house and walked to his bedroom. (R 581-84) After Matthew shut the door, David walked to the house, opened the door, and entered without warning. (R 301-02, 314-15) Matthew estimated he heard someone slam the door and enter his house about 30 seconds after he sat down on his bed. (R 581-85) Because it would have taken David only a few seconds to grab a gun from the car, a reasonable jury could have found David had enough time to arm himself before entering the house, and that Matthew was aware of this fact.

Matthew then heard the person who entered his house rapidly approaching his bedroom, as corroborated by Sara, who testified that David was walking quickly. (R 301, 581-85) Matthew told the police and the jury that he believed two things at that moment: that the person who entered his house was the person who had just injured him in the driveway, and that he feared that person intended to do him harm, either by continuing the fight or with a gun. (R 586, 589; PE28 9:35, 9:51, 11:03, 11:40, 52:16, 53:16; 1:00:38, 1:09:13) The fact that Matthew served in the Army National Guard for four years, and testified that his beliefs about the person who entered his house

were rooted in his military training, only makes it more likely that a reasonable jury could have found, at minimum, that Matthew actually believed self-defense was necessary. (R 556, 604; PE28 45:11)

Matthew told the police and the jury that he pointed his shotgun at the man and told him to leave. (R 581, 585, 602-03, 643; PE28 13:40) Sara testified that she did not recall hearing Matthew say anything to David, but admitted her memory of that moment was "foggy." (R 307) Matthew then told the police and the jury that he only fired his gun when the man, who "had access to a carload of guns," continued to advance after Matthew told him to get out. (R 585-88, 602; PE28 10:29, 13:49, 16:38; 18:07, 40:29)

The question is not the sufficiency of the State's evidence, but whether the State can prove to this Court that its evidence of first-degree murder was so overwhelming that no reasonable jury, properly instructed, could have found Matthew not guilty, or guilty only of second-degree murder. The evidence does not allow for such a conclusion.

This is particularly true on the question of whether Matthew actually believed self-defense was necessary. As the State acknowledges, the difference in this case between first-degree murder, on one side, and acquittal or second-degree murder, on the other, depended first upon the jury's determination of Matthew's subjective mental state. (St Br 18-19) Considering Matthew's testimony, intoxication, and the undisputed circumstances of this case, the State did not provide overwhelming evidence that Matthew did not *believe* he was acting in self-defense when he shot his

brother in his own home. Even if a reasonable jury could have found Matthew guilty of first-degree murder, it is equally true that this verdict was not "inevitable." *See, e.g., People v. Murray*, 364 Ill. App. 3d 999, 1007-08 (4th Dist. 2006) (error not harmless where verdict depended upon credibility assessments and conviction "was not inevitable").

The State's arguments fail to demonstrate otherwise. (St Br 20-22)

The State tries to have it both ways with respect to Matthew's intoxication. It argues Sara was more credible than Matthew because she was the "only sober witness," while at the same time questioning Matthew's claim of "extreme intoxication." (St Br 20-21) But it cannot reasonably be disputed that Matthew was intoxicated at the time of the incident. Matthew testified that he had 18 drinks that day. (R 609-10) Regardless of the precise number of drinks he had, however, it was undisputed that Matthew, David, and Klevorn drank all day. (R 363-65, 561-67, 609-10) Sara saw Matthew "stumbling" while carrying guns and a half-empty bottle of tequila to her car. (R 299, 313) And a police officer described Matthew as still being "very intoxicated" after his arrest. (R 454) This evidence demonstrated that Matthew's judgment was impaired by his intoxication, as the State itself established, (R 605), which was relevant to the jury's determination of Matthew's mental state, and weighs against finding the State's evidence on that element was overwhelming. *See, e.g., Mocaby*, 194 Ill. App. 3d at 446-47, 449 (reasonable jury could have found defendant unreasonably believed he needed to act in self-defense due, in part, to his intoxication, even though

defendant was not so intoxicated that he was unable to walk and talk).

The State also overstates the differences between Matthew's and Sara's testimony. Indeed, Sara's testimony hardly differed from Matthew's as to the sequence of events. It was undisputed that Matthew and David fought in the driveway, that Matthew walked away from the fight and entered his own home, and that David entered Matthew's house without warning and quickly approached Matthew. (R 299-302) The only possible conflict in their testimony concerned whether Matthew told David to leave. But Sara did not contradict Matthew on this point. She merely could not recall if Matthew said anything because her "brain [was] so foggy." (R 307)

The State describes Sara as testifying that Matthew's act of firing his gun was "unprovoked." (St Br 20) But the question of whether David's actions provoked Matthew's reaction was for the jury, and it had to be answered by assessing the facts from *Matthew's* perspective. *People v. Whiters*, 146 Ill. 2d 437, 444 (1992). The jury had to decide whether Matthew actually believed self-defense was necessary, and whether that belief was reasonable, where David entered Matthew's home without warning after they fought in the driveway, and Matthew knew there were guns in the car. Sara corroborated Matthew's statements and testimony on every one of these facts. All of this rebuts the State's claim that "there was no evidence of any imminent threat of serious harm" to Matthew. (St Br 21)

The State also claims Matthew "knew that David was unarmed." (St Br 21) Presumably, the State is referring to Matthew's acknowledgment that

he did not see a weapon in David's hand before he fired his gun. (PE28 11:03, 11:40, 1:04:40) But not seeing a weapon is not the same thing as *knowing* the person is unarmed. A reasonable jury may find a defendant's use of lethal force was justified, or was based upon an unreasonable belief in justification, even where he did not see the decedent with a weapon, so long as the evidence showed the defendant had reason to believe the decedent may be armed. *See, e.g., People v. Estes*, 127 Ill. App. 3d 642, 651-53 (3d Dist. 1984) (State failed to prove defendant's use of lethal force in her home was not justified, even where defendant did not see decedent with a gun, where defendant knew decedent had arrived by car and had a handgun in his car). Similarly, a defendant's use of lethal force may constitute self-defense or second-degree murder even if he knew the decedent was unarmed, so long as he had reason to believe the decedent intended to cause him great bodily harm and was capable of doing so. *Id.* at 651-52. In other words, a defendant's knowledge that the decedent was unarmed is not dispositive on the questions of whether the defendant believed self-defense was necessary, and if that belief was reasonable. *See, e.g., People v. Hawkins*, 296 Ill. App. 3d 830, 838 (1st Dist. 1998) (reducing conviction from first-degree to second-degree murder, where defendant used lethal force in response to decedent's non-lethal force, but defendant's belief that self-defense was necessary was unreasonable because decedent was unarmed and both men were intoxicated).

Here, Matthew knew David had access to guns in the car, including a

handgun that David could have put in his pocket or waistband, and knew David had time to grab one of those guns before entering the house. (R 586, 644-46; PE28 1:04:36) Matthew also repeatedly said he feared that the man who entered the house after injuring him in the driveway intended to continue the fight or to shoot him, causing great bodily harm. (R 586, 589, 644-46; PE28 11:03, 11:40) There was thus ample support for Matthew's statements that he did not know whether that man was armed, and that, either way, he believed that man posed an imminent threat of physical harm.

The State argues no reasonable jury could have made such a finding because of Matthew's purported "admissions with respect to motive." (St Br 21) The State points to Matthew's statements that he got an "earful" from David at Klevorn's house, that he believed David's "talking shit was probably going to turn into something different that day," and that he "had enough [of being] bullied." (R 612-15; PE28 35:53, 1:10:04) None of this, however, is inconsistent with Matthew's stated belief that he feared David posed an imminent threat of physical harm. Insofar as Matthew's reference to prior bullying indicated he had a history of being subjected to violent acts by others, this only made it more likely a jury would find he actually believed self-defense was necessary. *See Mocaby*, 194 Ill. App. 3d at 446 (reasonable jury could have found defendant acted under unreasonable belief in justification, even where decedent "did not attack defendant" that day, and the intoxicated defendant told police "he had been taunted for years" by the decedent and "just couldn't take it anymore").

And Matthew never said *he* was going to do "something different" that day. When he said David's words were "probably going to turn into something different," it is equally plausible, if not more plausible, that he was saying he feared *David* would escalate the confrontation. The State tries to portray Matthew as the aggressor here, as it did at trial, but it should be noted that even if Matthew was concerned that David's conduct at Klevorn's house was going to lead to violence, his reaction was to ask for a ride home so he could remove himself from the situation. And when he and David had a physical fight in the driveway, Matthew's reaction was to walk away, enter his home, and close the door. Despite the State's insinuations in its closing arguments, (R 704, 712, 746), there was no evidence Matthew did anything to re-initiate the confrontation with David, or intended to do so. Nothing in the State's brief changes the fact that it was *Matthew* who walked away and that it was *David* who entered Matthew's home without warning and rapidly approached.

The State points to several alleged inconsistencies in Matthew's statements. But any minor differences, or even just the expected uncertainties, in Matthew's recollection of the incident in the house – regarding, for example, the distance between him and David, what David said, or how much time elapsed, (St Br 21) – do nothing to detract from Matthew's consistent statements that he believed the man who entered his house was the man who had just injured him in the driveway, that he knew the man had access to guns in the car, and that he feared the man intended

to do him harm. *See Mohr*, 228 Ill. 2d at 69 (evidence not overwhelming even where defendant "gave inconsistent statements ... about his activities on the night [decedent] was killed").

Lastly, the State asserts its evidence was overwhelming because Matthew "could [not] explain why" he referred to "his brother" in his statement to the police, after telling them he believed the person he shot was "Sara's brother." (St Br 21) Matthew, however, did explain this. At trial, a sober Matthew acknowledged it was David, but told the jury that, in the moment, he did not believe the person he argued with, fought with, and ultimately shot, was his brother. (R 579) Matthew further explained that he continued to refer to the decedent as Sara's brother, even after his mother told him it was David, because he "just couldn't believe it." (R 593-94) Even if a reasonable jury could have agreed with the State's argument that this was evidence of Matthew's consciousness of guilt, a reasonable jury likewise could have believed Matthew's testimony, knowing he was intoxicated during the incident and during his interview, knowing he was talking to the police soon after shooting someone, and hearing Matthew explain from the stand that he was in psychological denial during the interview. *See Mocaby*, 194 Ill. App. 3d at 448 (in assessing evidence of defendant's mental state, noting defendant's testimony provided a basis for jurors to find his lack of memory "may have been due to his unconscious repression of a traumatic event").

Because Matthew's conduct and the circumstances surrounding his conduct were largely undisputed, the jurors' answers to the questions they

faced primarily depended upon their assessment of Matthew's credibility, both in his statements to the police and in his testimony. That fact already weighs against a finding of harmless error based on overwhelming evidence. *See, e.g., People v. Villa*, 2011 IL 110777, ¶ 58 (finding error not harmless, in part, due to "the role the jury's credibility determination necessarily played" in the verdict). Further, it was undisputed that Matthew was confronted by the person who had just injured him in a fight, who had access to guns in his car, and who entered Matthew's house without warning. A reasonable jury could have found Matthew subjectively believed self-defense was necessary, whether or not that belief was reasonable. *See People v. White*, 87 Ill. App. 3d 321, 323 (1st Dist. 1980) (in assessing defendant's stated belief that his actions were necessary in self-defense, it would be "unreasonable" to require that defendant "use inerrable judgment" when making decisions "in the space of a few seconds while ... under great stress"). The State thus cannot meet its burden to show its evidence that Matthew did not act in self-defense or imperfect self-defense was so overwhelming that the instructional error was harmless beyond a reasonable doubt.

This is particularly true because the State likewise cannot show the instructional error did not contribute to the verdict. *People v. King*, 2020 IL 123926, ¶ 40. The outcome of this trial depended entirely upon what the jury believed Matthew was thinking in the seconds between hearing the person enter the house and firing his gun, and, if they found he actually believed self-defense was necessary, whether that was reasonable. Through its

questioning of Matthew and its closing arguments, the State tried to persuade the jury that Matthew had no such belief or, alternatively, that any such belief was unreasonable. One way the State did this was by asking Matthew whether he could have taken steps to avoid the perceived danger, such as by locking the door, by merely threatening force, or by using lesser force. (R 636-46, 705) A reasonable juror may have already questioned whether Matthew had a duty to attempt to escape the danger posed by David inside the house before using force, but the State's questioning and arguments placed this question front-and-center. IPI 24-25.09X would have spoken directly to that question, and would have clarified that Matthew had no such duty if the jury believed he did not provoke David's conduct.

In short, the court's erroneous denial of Matthew's request for this instruction "might have contributed to the conviction." *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). The State thus cannot meet its burden to prove that error was harmless. And that is especially true where its evidence that Matthew could only have been acting with the mental state for first-degree murder was not overwhelming. *See, e.g., Estes*, 127 Ill. App. 3d at 652 (State failed to prove defendant was not justified in using lethal force, despite establishing defendant could have warned decedent before shooting him).

The State makes two arguments for why this error could not have contributed to the verdict. First, the State again asserts that Matthew's "duty to retreat was not at issue." (St Br 18) The State points to the instructions defining second-degree murder and self-defense, and notes that a "duty to

retreat" was not included in the elements of either theory. (St Br 18) But the question is not whether the phrase "duty to retreat" was included in the "elements" of either defense theory. It is whether the parties' evidence and arguments raised a question as to whether Matthew had a legal duty to do something to avoid the danger before using force, such that the judge's erroneous refusal to give IPI 24-25.09X could not have contributed to the outcome. Contrary to the State's argument here, its own questioning and arguments at trial raised that issue. *See, e.g., Estes*, 127 Ill. App. 3d at 649 (State's questioning of defendant and closing argument erroneously suggesting defendant had a duty to avoid the danger before using force "could well have substantially influenced the determination of the jury").

The State also argues the error was rendered harmless by the nature of the jury's verdict. Specifically, the State claims that because the jury found Matthew guilty of first-degree murder, it necessarily found Matthew did not subjectively believe his actions were necessary for self-defense, and thus the jury never reached the questions IPI 24-25.09X would have addressed. (St Br 18-20) This argument hinges upon the State's assertion that this instruction applies only to the *reasonableness* of the defendant's belief that self-defense was necessary, and "is unrelated to the threshold question of whether he *actually believed* that lethal force was necessary to defend himself." (St Br 19) (emphasis added) The State is incorrect, both in general and in the context of this case.

Nothing in the language of the statutes and instructions at issue

shows that IPI 24-25.09X is relevant to the *reasonableness* of a defendant's belief in justification, but not to the jury's determination of whether the defendant *actually held* such a belief. A person is justified in using lethal force in self-defense "if he ... believes that such force is necessary to prevent imminent death or great bodily harm," and that belief is reasonable. 720 ILCS 5/7-1(a) (2018). And a person commits second-degree murder if he believes lethal force is necessary for self-defense, but that belief is unreasonable. 720 ILCS 5/9-2(a)(2) (2018). When it is suggested to a jury that the defendant could have taken actions to avoid the danger before using force, this implicates whether the defendant actually believed it was necessary to act in self-defense, at least as much as whether such belief was reasonable.

If a defendant, like Matthew, acknowledges he could have taken actions to avoid the danger, but did not, a reasonable juror could take this to mean he did not believe his decision to use force was actually necessary. Indeed, that is exactly what the State urged the jury to conclude when it argued that if Matthew truly feared the man he had just fought, he would have locked the door to the house. (R 705) Under such circumstances, IPI 24-25.09X would clarify that the defendant may subjectively believe self-defense is *necessary*, even if it is not his *only* option in the moment. This Court should reject the State's argument that this instruction is "unrelated" to that question, particularly where that argument contradicts its own position at trial. (St Br 19)

The State's evidence did not overwhelmingly demonstrate Matthew could only have been acting with the mental state for first-degree murder, and the instructional error at issue spoke directly to a key question of law before the jury. Because the error thus might have contributed to the conviction, the State cannot meet its burden to prove the judge's refusal to give IPI 24-25.09X was harmless beyond a reasonable doubt. This Court should affirm the judgment of the appellate court on this basis.

2. Alternatively, this Court should remand for the appellate court to conduct a proper prejudice analysis, and, if necessary, to consider Matthew's unresolved claims.

If this Court finds the State cannot meet its burden to prove harmless error, it should affirm the appellate court's judgment on that basis and remand for a new trial because the instructional error alone denied Matthew a fair trial. *People v. King*, 2020 IL 123926, ¶¶ 40, 45.

But this Court may also simply rule on the appellate court's finding of instructional error, then remand to that court for further proceedings.

For example, this Court may elect to forego a prejudice analysis because the parties agree that the appellate court did not apply the proper test for harmless error, and there is thus no ruling on that question below for this Court to review. (St Br 22-23) The appellate court declined to consider the prejudicial impact of the instructional error in light of the trial evidence because, according to the court, "the State's evidence is 'irrelevant' when determining whether the tendered instructions should have been given." *People v. Sloan*, 2023 IL App (5th) 200225-U, ¶ 76 (citing *People v. Stewart*,

143 Ill. App. 3d 933, 936 (1st Dist. 1986)). *Stewart*, however, was applying the test for whether an instruction should have been given at all, not whether an erroneous refusal to give an instruction was prejudicial. (St Br 22-23)

While *Stewart* elsewhere remanded for a new trial without performing a prejudice analysis, that was because the instructional error at issue concerned the affirmative defense of justification. 143 Ill. App. 3d at 935-36. That ruling aligns with precedent from this Court. *See People v. Hari*, 218 Ill. 2d 275, 297 (2006) (erroneous denial of an affirmative-defense instruction constitutes a denial of due process that "entitles a defendant to a new trial").

But while IPI 24-25.09X is related to the affirmative defense of justification, it is not itself an affirmative-defense instruction. A court's erroneous refusal to give this instruction is thus subject to the same harmless-error analysis applied to all other instructional errors. Under that test, the State has the burden to demonstrate "that the result of the trial would not have been different had the jury been properly instructed." *People v. Woods*, 2023 IL 127794, ¶ 55 (internal quotation marks omitted) (quoting *People v. Mohr*, 228 Ill. 2d 53, 69 (2008); *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003)). That is, the State must prove its "evidence was so overwhelming as to make the jury instruction error harmless beyond a reasonable doubt." *Mohr*, 228 Ill. 2d at 69; *Woods*, 2023 IL 127794, ¶ 56.

The appellate court's failure to weigh the instructional error under this harmless-error standard was entirely *sua sponte*. Matthew did not cite *Stewart* below, and never argued the instructional error required automatic

reversal. Instead, Matthew and the State litigated whether the error was harmless under the proper standard. (Appellant's Brief in Appellate Court 27-28; Appellee's Brief in Appellate Court 10-11; Appellant's Reply Brief in Appellate Court 8-9)[5] The appellate court simply declined to apply that test. Therefore, if this Court finds instructional error, it may affirm the appellate court's judgment on that point, but forego a prejudice analysis and instead remand so the appellate court may apply the proper test for harmless error in the first instance. *See In re D.L.H., Jr.*, 2015 IL 117341, ¶¶ 80-81 (where appellate court found error but failed to apply proper harmless-error test, remanding for appellate court to conduct harmless-error analysis).

If this Court remands for that purpose, the appellate court will first determine whether the instructional error denied Matthew a fair trial. If it finds that error alone was not prejudicial, it must consider Matthew's other claims, then weigh the prejudicial impact of all the errors it finds. Where multiple claims of error are raised, a reviewing court may only affirm the conviction after determining which of the alleged errors actually occurred, then weighing the prejudicial impact of whatever errors occurred under the proper test. *Cf., People v. Whitlow*, 89 Ill. 2d 322, 341-42 (1982) (combined effect of preserved and unpreserved errors required new trial).

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[5] *See also* (Appellant's Brief in Appellate Court 19-22; Appellant's Reply Brief in Appellate Court 1-5) (arguing the State's evidence was insufficient to sustain a conviction for first-degree murder, requesting that conviction be reduced to second-degree murder); (Appellant's Brief in Appellate Court 40-43; Appellant's Reply Brief in Appellate Court 17-19) (arguing State could not prove erroneous admission of other-crimes evidence was harmless).

Similarly, this Court may elect to examine whether the State can meet its burden to prove harmless error, but then find it is unable to conclude that the instructional error alone requires a new trial. Under those circumstances, the result is the same: this Court should affirm the appellate court's finding of error, then remand with instructions to the appellate court to consider Matthew's other claims of error and to perform a proper prejudice analysis of the errors it finds occurred.

Under either of these circumstances, it is important that the appellate court have the opportunity to consider Matthew's other claims and to weigh the prejudicial impact of the errors it finds. The appellate court strongly implied that a second error occurred when the trial court admitted other-crimes evidence without first conducting the required balancing test of its probative value versus its prejudicial impact. *Sloan*, 2023 IL App (5th) 200225-U, ¶ 79. But because the appellate court did not resolve the merits of that claim, it is not before this Court.

For the same reason, none of Matthew's other claims of serious error are before this Court. Most significantly, Matthew raised below preserved claims that Klevorn's testimony about the 2004 incident was both irrelevant to any proper use of other-crimes evidence, and was far more prejudicial than probative. (C 176-79); (Appellant's Brief in Appellate Court 31-40); *Sloan*, 2023 IL App (5th) 200225-U, ¶ 78. Matthew further argued that the court compounded this error by failing to give the required limiting instruction at the time the other-crimes evidence was introduced. (R 367-76); (Appellant's

Brief in Appellate Court 41-42); *see* IPI 3.14, Committee Note (to mitigate the "significant prejudice" caused by other-crimes evidence, a court should give this limiting instruction both when the evidence is presented and at the close of evidence).

Matthew also argued that the State committed multiple errors. Matthew claimed the State used the other-crimes evidence for an improper purpose in both its opening statement and its rebuttal argument, when it cited the 2004 incident as evidence of Matthew's propensity to commit similar offenses. (Appellant's Brief in Appellate Court 47-49); (R 285, 745-46); *People v. Pikes*, 2013 IL 115171, ¶ 11. Matthew contended that the prosecutor's statement in rebuttal that Matthew has "a history of ... putting [guns] in family members' faces" was doubly erroneous because there was no evidence that Matthew put a gun in Klevorn's face in 2004. (R 368-70, 745-46) And Matthew argued that the State made two other misstatements of the evidence in its closing argument, when it said Matthew was "thinking about what to say" for "15 or more minutes" before calling 911, and that Sara told the 911 dispatcher, "'[Matthew is] outside and he's looking for me.'" (R 328, 712, 747-48; PE2 1:36, 4:32, 7:53); (Appellant's Brief in Appellate Court 49-52)

While not all of these claims were preserved, no assessment of whether Matthew was denied a fair trial by the combined effect of the errors in this case can be made without first determining which of the alleged errors actually occurred. *Whitlow*, 89 Ill. 2d at 341-42; *People v. Watkins*, 2021 IL

App (3d) 190117-U, ¶ 26. In this case, specifically, even if the appellate court were to find the instructional error alone does not require a new trial, the question of whether the State can prove the errors in this case were harmless beyond a reasonable doubt would look much different if the appellate court also found that none of Klevorn's testimony about the 2004 incident was admissible. *See, e.g., People v. Stechly*, 225 Ill. 2d 246, 306 (2007) (in determining whether evidentiary error was harmless, reviewing court weighs the "properly admitted evidence," without consideration of the evidence the jury never should have heard); *People v. Villa*, 2011 IL 110777, ¶ 58 (error not harmless where State used improperly admitted evidence to urge jury to find defendant not credible).

In sum, this Court should find that the State failed to prove the instructional error was harmless beyond a reasonable doubt, and affirm the appellate court's judgment on that basis. But if this Court declines to conduct a harmless-error analysis, or does not find the instructional error alone requires a new trial, it should affirm the appellate court's finding of error and remand so the appellate court may consider Matthew's other claims of error and perform a proper prejudice analysis of the instructional error and any other errors it finds occurred. And finally, if this Court finds no instructional error, it should reverse the appellate court's judgment and remand for that court to consider Matthew's other claims.

CONCLUSION

For the foregoing reasons, Matthew Sloan, Defendant-Appellee, respectfully requests that this Court affirm the judgment of the appellate court on the basis that the trial court abused its discretion in denying his request for IPI 24-25.09X, and the State cannot prove that error was harmless beyond a reasonable doubt. In the alternative, if this Court finds instructional error, but does not find that error alone requires a new trial, Matthew respectfully requests that this Court affirm the appellate court's finding of error and remand for the appellate court to consider his other claims of error, then perform a proper prejudice analysis of the instructional error and any other errors it finds. In further alternative, if this Court finds no instructional error, Matthew respectfully requests that this Court reverse the appellate court's finding of error and remand for the appellate court to consider his other claims.

Respectfully submitted,

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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 or words contained in 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 Rules 23 and 342, is 14,723 words.

/s/Gilbert C. Lenz
GILBERT C. LENZ
Assistant Appellate Defender

APPENDIX TO THE APPELLEE'S BRIEF

People v. Watkins, 2021 IL App (3d) 190117-U (unpublished order cited pursuant to S. Ct. Rule 23(e)(1))

2021 IL App (3d) 190117-U

Order filed July 13, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2021

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-19-0117 Circuit No. 18-CF-386
JAMES L. WATKINS,	)	Honorable Kevin W. Lyons, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's second degree murder conviction was reversed and remanded because he was prejudiced by his trial counsel's ineffective assistance in failing to request two complete jury instructions.

¶ 2 The defendant, James L. Watkins, appealed his second degree murder conviction and 20 year sentence.

¶ 3 FACTS

¶ 4 The defendant was indicted on July 3, 2018, for second degree murder in the stabbing death of Kang Abel. The indictment alleged that the defendant caused Abel's death by stabbing Abel with a knife, knowing that such an act created a strong probability of death or great bodily harm. The indictment further alleged that the defendant stabbed Abel out of a belief that the killing was justified to prevent imminent death or great bodily harm, but that that belief was unreasonable.

¶ 5 The testimony at trial established that multiple officers with the Peoria Police Department were dispatched to the apartment complex Parkview Estates in Peoria at around 5 p.m. on July 2, 2018, in response to a call that a man had been stabbed. Officer Haley Hergenrother testified that she located Abel next to the wooded area behind the apartment complex. Abel was semi-alert and talking. Hergenrother observed that there was blood all over Abel and there was a trail of blood that led back to the apartment complex. Abel asked for help, but he did not say anything about how he received his injuries.

¶ 6 Officer Thomas Bieneman testified that he followed the blood trail from Abel to apartment H7, where there was a large pool of blood on the back porch. The door to the apartment was locked and no one answered the door. Bieneman gained entry to apartment H7 through an unlocked window. After gaining entry to the apartment, a male was found coming out of the bathroom inside the bedroom. Bieneman identified that man as the defendant. Bieneman handcuffed the defendant and began walking him out the front entrance. Bieneman testified that the defendant stated: "He tried to get $10 from me, so I stabbed him." Detective Sherrell Stinson joined Bieneman in entering apartment H7. Stinson testified that as Bieneman handcuffed the defendant, the defendant stated, "He threatened me." As Stinson was sweeping the rest of the apartment for persons, he observed a knife with blood on it in the kitchen sink. Stinson then took custody of the defendant from Bieneman, and the defendant stated, "He tried to get $10, so I shanked him." The defendant also

complained to Stinson that the defendant had trouble with Abel in the past and that the police did not do enough.

¶ 7 Michael Hughes, the battalion chief for the Peoria Fire Department, testified that when he was called to the scene, Abel was located behind the apartment complex in a wooded area. Abel was conscious and there was a large amount of blood around him. Hughes testified that Abel was a critical patient and his condition deteriorated during the short trip to the hospital. Abel made a few statements but no statements about how he received his injuries.

¶ 8 Dana Craig Wilson testified that he lived in apartment H7. Wilson testified that he had been good friends with the defendant for five or six years, and he had known Abel for about three years. Abel often came to Wilson's apartment to watch movies, play video games, and drink beer. According to Wilson, sometimes Abel would drink too much and Wilson would tell him to leave. Along with the defendant, the three men would hang out together. According to Wilson, the defendant and Abel would sometimes have verbal altercations, generally because Abel would try to annoy the defendant. On July 2, the defendant came to Wilson's apartment to hang out. Wilson left with his girlfriend and did not return until he was told there had been an incident at his apartment.

¶ 9 Dr. Amanda Youmans, a forensic pathologist, testified that Abel had two stab wounds to the abdomen and a cut above his left eyebrow. The stab wounds were consistent with a single-edged blade knife. One of the stab wounds perforated Abel's inferior vena cava, and Youmans opined that the cause of death was multiple stab wounds to the abdomen. Abel's blood alcohol concentration was 0.135.

¶ 10 The defendant testified that he arrived at Wilson's apartment around 3:30 p.m. on July 2, to watch a movie. Wilson left soon after and Abel showed up about 20 minutes later. Abel sat

down to wait for Wilson to come home. Abel asked the defendant several times if the defendant had cigarettes, which the defendant did not. Then Abel asked the defendant if the defendant had any money, and the defendant said he did not. The defendant testified that Abel was intoxicated and becoming aggravated while asking for cigarettes and money. The defendant testified that he suggested three times that Abel leave until Wilson returned, and Abel did not respond. Abel then got up and said "You're not putting anybody out of anywhere. I'm just going to beat your ass." According to the defendant, Abel then rushed at the defendant and put the defendant in a headlock or chokehold while the defendant was still seated. The defendant tried to reach Abel's legs, but could not. Abel then lifted the defendant up by the neck and slammed him to the floor. The defendant testified that he thought that Abel was going to break the defendant's neck and that the defendant was choking and could not breathe. The defendant reached for an ashtray to hit Abel to get him to release his grip, but his hand closed over a nearby knife instead. The defendant stabbed Abel in the abdomen, but Abel still did not release his hold on the defendant. The defendant testified that he was choking and about to pass out so he stabbed Abel a second time. Abel then released his grip but they continued to struggle on the floor. The defendant said that Abel then gave up and walked out the back door. The defendant went into the bathroom to clean a gash on his knee, and he put the knife in the kitchen sink. The defendant denied making any statements to the police at the time of his arrest. The defendant testified that he told Detective Landwehr essentially the same version of events.

¶ 11 Detective Seth Landwehr testified that he investigated the scene and found no evidence of a struggle in the living room of the apartment. He then interviewed the defendant, and the interview was videotaped. Landwehr testified that the defendant never stated that Abel was choking the defendant, or that Abel had the defendant in a chokehold or headlock, or that the defendant could

not breathe, or that the defendant thought that Abel was going to kill him. Landwehr also testified that the defendant never said anything about grabbing for an ashtray and finding the knife instead. Landwehr testified that the defendant stated that the defendant only stabbed Abel once in the torso and the defendant never said that he stabbed Abel more than once. The defendant did make numerous statements that Abel attacked him and that he stabbed Abel to defend himself. Landwehr also testified that the defendant stated "I should have just killed him" during the interview. At that point, Landwehr had not yet told the defendant that Abel had died.

¶ 12 On cross-examination, defense counsel asked Landwehr to confirm that the defendant never made a statement that Abel had the defendant in a chokehold, which Landwehr confirmed. Defense counsel then asked if the defendant ever mentioned a grip on or being grabbed by his throat, and Landwehr denied that defendant ever made any such statements. Both parties rested, and the trial court excused the jury for the night with the plan for closing arguments the first thing the next morning.

¶ 13 The next day, defense counsel sought to reopen proofs to recall the defendant to the stand to lay the foundation for admitting parts of the videotaped interview that contradicted Landwehr's testimony that the defendant never made a statement that Abel had choked the defendant. Defense counsel stated that he should have been more prepared, but he had not thoroughly reviewed and noted each statement made by the defendant during the interview. Defense counsel did not ask Landwehr to return to court, so defense counsel wanted the defendant to testify to lay the foundation. The trial court allowed two portions of the video to be played for the jury, with a stipulation from the parties that the two snippets were a small portion of the entire video interview. In the first portion, the defendant said that he was sitting down and Abel rushed straight at him. Abel grabbed the defendant by the head, and Abel had the defendant by the neck. In the second

portion, the defendant said that Abel grabbed the defendant, they were tussling, and the defendant was trying to get Abel's hands from around the defendant's neck. The trial court did not allow a third portion of the video where the defendant said that he did not owe Abel $10, but the money was not worth Abel trying to choke the defendant.

¶ 14 During closing arguments, the State argued that it was inappropriate to use a knife to end what was essentially a verbal altercation and a fistfight, telling the jury that the defendant was not allowed to use deadly force unless he believed that deadly force was being used against him. Defense counsel did not object. Defense counsel also did not object to the jury instructions tendered by the State, the defense did not tender any further instructions.

¶ 15 The jury returned a guilty verdict. The defendant was sentenced to 20 years in prison, and his motion to reconsider his sentence was denied. The defendant appealed.

¶ 16 ANALYSIS

¶ 17 The defendant argues that the record shows that defense counsel made numerous errors at trial due to counsel's lack of preparation, research, and legal knowledge, which denied the defendant his constitutional right to effective assistance of counsel. The defendant also contends that ineffectiveness should be presumed because counsel failed to subject the prosecution's case to meaningful adversarial testing. The State argues that the defendant failed to show a reasonable probability that, absent defense counsel's alleged errors, the outcome of his trial would have been different.

¶ 18 A criminal defendant is guaranteed the right to the effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const. amends. VI; XIV; Ill. Const. 1970, art. I, § 8. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In assessing counsel's performance, reviewing courts presume that counsel's conduct was reasonable and that counsel was executing a sound trial strategy. *People v. Cloutier*, 191 Ill. 2d 392, 402 (2000). Under *Strickland*, strategic choices made after a thorough investigation into the law and facts are virtually unchallengeable, as are strategic choices made regarding the limitations of investigations. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

¶ 19 The defendant contends that defense counsel was ineffective with regard to counsel's review of the videotape of the defendant's interrogation. Specifically, the defendant argues that defense counsel did not make a thorough review and mark down each phrase used by the defendant in the recorded interrogation until the eve of closing arguments; did not anticipate a rebuttal witness; and did not previously review the video with the defendant. The defendant acknowledges that defense counsel cross-examined the responding officers, emergency medical staff, and the medical examiner. In the discussion prior to allowing the video, in response to the trial court's question as to why defense counsel did not raise the issue as impeachment during Landwehr's testimony, defense counsel stated that he "did not know exactly what the times were" in the video and he did not want to introduce the entire recording. Defense counsel admitted that he had not done a thorough review of "marking down each phrase that was used by my client" prior to Landwehr's testimony. During the evening prior to closing arguments, defense counsel reviewed the video, and then he reviewed the video with the defendant the next morning. Defense counsel acknowledged that he should have been more prepared and should have realized that he would have the opportunity to use the video in surrebuttal. Defense counsel also did not call Landwehr

back into court to further cross-examine, but defense counsel sought to have the defendant lay the foundation for the video. The trial court ultimately allowed two portions of the video to be played for the jury.

¶ 20 We find that, while defense counsel was not thoroughly prepared, he did not fail to subject the prosecution's case to meaningful adversarial testing, so there is no presumption of prejudice. See *United States v. Cronic*, 466 U.S. 648, 659 (1984) ("if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable"). The record does not indicate that defense counsel never reviewed the video, or never reviewed it with the defendant. However, while defense counsel did get the impeachment evidence before the jury, defense counsel did not directly impeach Landwehr. It would arguably have been more effective at the time Landwehr testified, but it did not lose all effectiveness by the next morning.

¶ 21 Since the defendant admittedly stabbed Abel but was claiming self-defense, the defendant's statements, at the scene, during interrogation, and in court, were critical to his defense. Thus, although failing to impeach a witness is generally considered a matter of trial strategy, there is no reasonable trial strategy that would not involve a thorough review of the interrogation, with the defendant, prior to the detective's testimony and the defendant's testimony. See *People v. Zambrano*, 2016 IL App (3d) 140178, ¶ 24. Defense counsel's performance, in that regard, was deficient. Defense counsel recognized that deficiency, though, and was able to introduce the parts of the interrogation video as impeachment prior to closing arguments. While that method was less timely, and arguably less effective, the defendant has not shown that there is a reasonable probability that the results of the proceeding would have been different based on this error alone.

¶ 22 The defendant also argues that his counsel was ineffective for failing to request: (1) the inclusion of language in Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter IPI Criminal 4th) that permits the use of force likely or intended to cause great bodily harm or death to prevent the commission of a forcible felony and (2) IPI Criminal 4th No. 24-25.09X, which discusses when an individual has no duty to retreat. The goal of jury instructions, which are to be read as a whole, is to guide the jury to a verdict based on the applicable legal principles. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). Counsel's choice of jury instructions, including the decision to rely on a defense to the exclusion of other defenses, is usually a matter of trial strategy. *People v. Falco*, 2014 IL App (1st) 111797, ¶ 16. However, the failure to request a specific jury instruction may rise to the level of ineffective assistance of counsel if the defendant was denied a fair trial due to the omission of the instruction. *Id.*

¶ 23 The State offered IPI Criminal 4th No. 24-25.06 but omitted the language about preventing the commission of a forcible felony. The instruction provides:

> "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) (another)] against the imminent use of unlawful force.
>
> [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) (another)]) (the commission of _____)].]." IPI Criminal 4th No. 24-25.06; see 720 ILCS 5/7-1 (West 2018).

¶ 24 The instruction given by the court included both paragraphs, but only included the first parenthetical (justification based on imminent death or great bodily harm to himself). The defendant contends that the State argued that the defendant stabbed Abel because Abel tried to rob

the defendant, so defense counsel should have argued for the inclusion of the second parenthetical (justification based on the commission of a forcible felony). In closing argument, the State paraphrased the justification instruction that was then given to the jury. However, the State also argued in its opening and closing arguments that the defendant stabbed Abel because Abel was trying to rob the defendant. Robbery, which occurs when a person knowingly takes property from another by the use of force or by threatening the imminent use of force, is a forcible felony. 720 ILCS 5/18-1(a), 2-8 (West 2018). The jury was never informed that the defendant's actions were justified under the law if the defendant reasonably believed that such force was necessary to prevent the robbery. The jury was similarly not informed that the State had the burden to prove beyond a reasonable doubt that the defendant was not justified in his conduct if the jury believed that Abel was attempting to commit a robbery and that the defendant's belief that force was necessary was objectively reasonable. See *People v. Pegram*, 124 Ill. 2d 166, 173 (1988) (jury was not informed that the prosecution had the burden of proving beyond reasonable doubt the elements of armed robbery but also that the defendant was not compelled in his conduct). The State contends that defense counsel was not ineffective for failing to request the inclusion of the second parenthetical because robbery was the State's version of events. The defendant did not testify that he stabbed Abel because Abel tried to rob him; the defendant testified that he stabbed Abel because of Abel's use of force and the defendant's fear for his life. However, although it was not the defendant's theory of the case, the defendant is entitled to instructions on those defenses that the evidence supports, even if the evidence is slight or inconsistent with the defendant's own testimony. *People v. Everette*, 141 Ill. 2d 147, 156 (1990). Thus, it was error for defense counsel to not request an instruction that addressed the proof in the case.

¶ 25 Defense counsel also failed to request IPI Criminal 4th No. 24-25.09X, which 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." The defendant argues that the failure was an error and prejudiced the defendant in light of the State's argument that the defendant could have simply left the house. The State contends that the duty to retreat did not direct the jury's finding as to an essential element in the case and did not create a risk that the jury misunderstood the applicable law, nor was the jury deprived of critical law as the defendant contends. In addition, the State contends that the defendant cannot show prejudice, *i.e.*, that any duty to retreat had any bearing on the reasonableness of the defendant's use of deadly force.

¶ 26 IPI Criminal 4th No. 24-25.06 instructs the jury in accordance with section 7-1 of the Criminal Code of 2012 (Code) on the cases when a defendant is justified in the defense of a person. 720 ILCS 5/7-1 (West 2018). Section 7-4 of the Code describes cases when a justification defense is not available, such as when the defendant initially provokes the use of force against himself. 720 ILCS 5/7-4(b), (c) (West 2018). Since there was no evidence that the defendant was the initial aggressor, IPI Criminal 4th No. 24-25.09 was not appropriate. However, since the State argued that defendant could have left, and the defendant introduced evidence through the defendant's testimony and videotaped interrogation that Abel was the initial aggressor, the jury should have been instructed that the defendant had no duty to attempt to escape before using force against Abel in accordance with IPI Criminal 4th No. 24-25.09X. *People v. Hughes*, 46 Ill. App. 3d 490 (1977). As noted above, a defendant is entitled to instructions on those defenses that the evidence supports. *Everette*, 141 Ill. 2d at 156. Since there was evidence to support both of these instructions, and not requesting the two full instructions resulted in a failure to inform the jury of essential elements of the State's burden of proof, the failure to do so was ineffective assistance of counsel. These errors,

especially when considered in conjunction of the impeachment error, prejudiced the defense so as to deny the defendant a fair trial. See *Pegram*, 124 Ill. 2d at 172. There is a reasonable probability that but for counsel's errors the result would have been different. Thus, we reverse the defendant's second degree murder conviction and remand for a new trial.

¶ 27 Since we have found that the defendant was not afforded effective assistance of counsel, we need not address his other arguments. Also, since we are reversing the defendant's conviction on the grounds of ineffective assistance of counsel, we need not address the defendant's argument that his sentence should be reduced or remanded for a new sentencing hearing.

¶ 28 We find that the evidence, when viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find the defendant guilty of second degree murder beyond a reasonable doubt. Thus, the double jeopardy clause does not bar retrial, and this case is remanded to the trial court for retrial. See *People v. Drake*, 2019 IL 123734, ¶ 21 ("Retrial is the proper remedy if the evidence presented at the initial trial, including any improperly admitted evidence, was sufficient to sustain the conviction").

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Peoria County is reversed and remanded.

¶ 31 Reversed and remanded.

No. 129676

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 11, 2024, the Brief and Argument for Defendant-Appellee was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Monica Rios
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