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

2023 IL App (5th) 200225-U

NO. 5-20-0225

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

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

ORDER

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

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

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

¶ 3 I. Background

¶ 4 A. The Charges

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

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

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

¶ 7 B. Motion *in Limine*

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

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

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

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

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

¶ 13 The trial court ruled:

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

The court continued:

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

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

¶ 14 C. The Trial

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

¶ 16 1. Opening Statements

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

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

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

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

¶ 21 2. The State's Evidence

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

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

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

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

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

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

underneath his head." Sara ran from the home.

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

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

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

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

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

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

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

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

¶ 35 3. Defendant's Case

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

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

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

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

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

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

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

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

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

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

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

¶ 44 4. Jury Instructions

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

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

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

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

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

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

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

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

¶ 50 5. Closing Arguments

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

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

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

¶ 53 6. Verdict

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

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

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

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

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

¶ 58 D. Sentencing

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

¶ 60 This timely appeal followed.

¶ 61 II. Analysis

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

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

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

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

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

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

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

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

¶ 68 The law instructs that "[a] person who has not initially provoked the use of force against himself has no duty to escape the danger before using force against the aggressor." IPI Criminal 4th No. 24-25.09X; see also *In re D.N.*, 178 Ill. App. 3d 470, 475 (1988) ("A nonaggressor has no duty to retreat, but he does have a duty not to become the aggressor."); *People v. Moore*, 43 Ill. App. 3d 521, 528 (1976) (recognizing that "a nonaggressor is not required to retreat from a place where he has the right to be"). Furthermore, "[i]t is a firmly established rule that the aggressor need not have a weapon to justify one's use of deadly force in self-defense [citations] and that a physical beating may qualify as such conduct that could cause great bodily harm." *People v. Reeves*, 47 Ill. App. 3d 406, 411 (1977). When a defendant claims that his use of deadly force was

justified, it is his "perception of danger, not the actual peril, which is dispositive." *People v. Whiters*, 146 Ill. 2d 437, 444 (1992).

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

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

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

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

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

¶ 72 Additionally, defendant testified that he felt the need to protect himself from an imminent danger of bodily harm when someone entered his home uninvited and unannounced. By determining that there was no evidence of who the initial aggressor was, and by suggesting that the events constituted mutual combat, the trial court ostensibly found that the defendant's testimony regarding his subjective belief was not credible. A defendant's credibility can only be resolved by the jury, however, and the trial court is restricted to deciding whether there was any evidence that the defendant had a subjective belief. *People v. Lockett*, 82 Ill. 2d 546, 553 (1980); *People v. Stewart*, 143 Ill. App. 3d 933, 935 (1986); *People v. Rodriguez*, 96 Ill. App. 3d 431, 436 (1981). The instructions at issue must be given "when any evidence is offered showing the defendant's subjective belief that use of force was necessary." *Stewart*, 143 Ill. App. 3d at 935. "It is for the jury to weigh the evidence and determine whether that subjective belief existed and whether it was objectively reasonable or unreasonable." *People v. Washington*, 2012 IL 110283, ¶ 48.

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

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

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

¶ 75 Whether the events in question constituted separate confrontations and whether the defendant had assumed the role of aggressor were issues for the jury to decide. See, *e.g.*, *People v. Heaton*, 256 Ill. App. 3d 251, 258 (1994) (finding that a jury question was presented as to whether the defendant had been the aggressor where he could have chosen not to pursue the provocateurs as they retreated); *People v. Russell*, 215 Ill. App. 3d 8, 13 (1991) (concluding that, "while there was evidence to support a finding that the defendant was the initial aggressor, that evidence was not so compelling that no other finding could have been made"); *Barnard*, 208 Ill. App. 3d at 350 ("We believe that evidence of defendant's act of pointing a loaded gun at [the victim] was sufficient to at least allow the question of who was the initial aggressor to go to the jury for resolution."); *People v. Smith*, 195 Ill. App. 3d 878, 881-82 (1990) (determining that whether the events that led to the victim's death constituted two or three separate incidents was a matter for the jury to decide). Ultimately, without the tendered instruction, the jury "lacked the necessary tools to analyze the evidence fully and to reach a verdict based on those facts." *People v. Hari*, 218 Ill. 2d 275, 297 (2006). "Such an error is a denial of due process and requires that defendant be granted a new trial." *Id.*

¶ 76 The State alternatively argues that the trial court's failure to give the requested instructions was harmless because the State's evidence clearly established that the defendant was guilty of first degree murder. However, the State's evidence is "irrelevant" when determining whether the tendered instructions should have been given, because "[t]he test focuses only on defendant's evidence, not its reasonableness." *Stewart*, 143 Ill. App. 3d at 936.

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

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

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

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

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

¶ 81 III. Conclusion

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

¶ 83 Reversed and remanded.