2021 IL App (2d) 191014-U
No. 2-19-1014
Order filed May 7, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TIMOTHY S. SMITH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 11-CF-520 Honorable Sharon L. Prather, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Bridges and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Because the evidence was sufficient to prove beyond a reasonable doubt that defendant knew his acts created a strong probability of death or great bodily harm, his conviction of first-degree murder would not be reduced to involuntary manslaughter; (2) defendant's conviction would not be reduced to second-degree murder where evidence failed to establish that defendant, at the time he shot the victim, unreasonably believed that his actions were justified in the defense of his wife; and (3) the trial court did not abuse its discretion in denying defendant's motion *in limine*, which sought to admit evidence of the victim's aggressive character.

¶ 2 Following a jury trial in the circuit court of McHenry County, defendant, Timothy Smith, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and sentenced to a

term of 50 years' imprisonment. On appeal, defendant argued that the trial court erred in denying his request to instruct the jury on involuntary manslaughter because there was both direct and circumstantial evidence to support such an instruction. We agreed that there was sufficient evidence under relevant case law to support an involuntary manslaughter instruction. Accordingly, we reversed defendant's conviction of first-degree murder and remanded the case for a new trial. *People v. Smith*, 2015 IL App (2d) 130663-U. On remand, defendant waived a jury and, following a bench trial, was again convicted of first-degree murder and sentenced to a term of 50 years' imprisonment. In this second appeal, defendant argues that he was improperly convicted of first-degree murder because the evidence supports only a finding of guilt on either the offense of involuntary manslaughter or second-degree murder. Defendant also argues that the trial court erred in denying his motion *in limine* to admit evidence of the victim's aggressive character. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On the evening of May 28, 2011, Kurt Milliman was shot at a home located at 4320 Doty Road in Woodstock. Milliman later died from his injuries. Defendant was initially charged by complaint with various offenses related to Milliman's death. On June 23, 2011, a grand jury returned a bill of indictment against defendant charging him with one count of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)), one count of pandering (720 ILCS 5/11-16(a)(2) (West 2010)), one count of obstructing justice (720 ILCS 5/31-4(a) (West 2010)), and one count of pimping (720 ILCS 5/11-19 (West 2010)). Prior to trial, the State informed the court that it wished to proceed solely on the first-degree murder count and that it was dismissing the remaining charges in the bill of indictment.

¶ 5 The matter proceeded to a jury trial. At the close of evidence, defendant proposed a series of instructions on the offense of involuntary manslaughter. Although the trial court denied

defendant's request to instruct the jury on involuntary manslaughter, the jury did receive an instruction on second-degree murder. Ultimately, the jury returned a verdict of guilty of first-degree murder. The trial court sentenced defendant to a term of 50 years' imprisonment, consisting of a 25-year sentence for first-degree murder (730 ILCS 5/5-4.5-20(a) (West 2010)) plus an add-on of 25 years based on a finding by the jury that defendant personally discharged a firearm that caused Milliman's death (see 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)).

¶ 6 Defendant appealed, arguing that the trial court erred in refusing to instruct the jury on involuntary manslaughter. We agreed, concluding that the trial court abused its discretion in denying instructions tendered by defendant on involuntary manslaughter as there was sufficient evidence to support the instructions. *People v. Smith*, 2015 IL App (2d) 130663-U, ¶ 35. As such, we reversed defendant's conviction of first-degree murder and remanded the matter for a new trial. *People v. Smith*, 2015 IL App (2d) 130663-U, ¶ 39.

¶ 7 On remand, defendant signed a jury trial waiver and a bench trial was held before the same judge who presided over the original proceeding. Prior to the second trial, defense counsel filed various motions *in limine*, including one to admit an undated letter written to Milliman by his fiancée, Karen Pratscher, prior to his death. The letter was collected by the McHenry County Sheriff's Department and disclosed to the defense as part of discovery. Defendant sought to admit the letter pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984), and Illinois Rule of Evidence 404(a)(2) (eff. Jan. 1, 2011) to show Milliman's "aggressive character." In the letter, Pratscher described Milliman as a "nice man" who treats her "exceptionally well" and "can be very kind," but wrote that he would "flip[] a switch" and become "Mr. Hyde." Pratscher asserted that as "Mr. Hyde," Milliman was "mean and nasty," "blame[d] others," "set[] up tests," "judge[d] people unfairly," and was "an angry elf." Pratscher further detailed that Milliman was "condescending

and disrespectful" to her, would call her names, would swear at her, and took out his anger on her. In ruling on the motion, the court acknowledged that pursuant to *Lynch*, character evidence may be admissible at trial "to support the defendant's version of facts where there are conflicting accounts of what happened or who the aggressor was." The court continued:

> "In this case, I don't recall there being any conflict or any conflicting evidence as to who the aggressor was. I don't believe that the State has ever tried to present any evidence that [defendant] was the aggressor. It was always the theory that [Milliman] was, in fact, the one that was the aggressor and [defendant's] theory that he was defending himself."

Accordingly, the court concluded that "[u]nless there is evidence presented during the course of the trial that there is some conflict as to who the aggressor was, [defendant's] motion would be denied."

¶ 8 At trial, Deputy Joshua Singer of the McHenry County Sheriff's Department testified that prior to midnight on May 28, 2011, he was dispatched to 4320 Doty Road in unincorporated Woodstock, in response to a 911 call. When Singer arrived, he observed a pickup truck running in the driveway. Singer also observed a male subject, later identified as defendant, on his knees outside of the residence and a female subject pacing near defendant. Singer testified that defendant appeared to be crying. Defendant advised Singer that there was a subject inside the house whom he had shot while trying to protect his wife. Defendant then pointed to a gun a couple of feet away from his location. After Singer secured the firearm in the trunk of his vehicle, he continued to observe defendant and the female subject until other officers arrived.

¶ 9 Deputy Daniel Kramer testified that on the evening of May 28, 2011, he was dispatched to the residence on Doty Road. Upon his arrival, Kramer observed Singer with a male subject and a

female subject, both of whom appeared distraught. Kramer identified the male subject as defendant. After securing defendant and the female subject, Kramer entered the residence. Kramer observed a "very large man" lying face down in the entryway. The man was non-responsive but still alive. Paramedics arrived at around 11:16 p.m. One of the paramedics, Nathaniel Burns, removed the man's shirt to assess the wound. Burns observed an entry wound just below the right shoulder blade. Burns did not find a "complete exit wound," but noted that a "bullet was attempting to exit the left clavicle." After assisting the man with ventilation, Burns applied a trauma dressing to control the bleeding. The man was then secured to a backboard, placed in an ambulance, and transported to Centegra Woodstock Hospital. Kramer followed the ambulance to the hospital, where the man underwent surgery. At some point, a doctor emerged from the operating room and handed Kramer a container with a bullet that had been surgically removed from the man.

¶ 10 Dr. Mark Witeck, a forensic pathologist, performed an autopsy on Milliman. Milliman was 6'6" tall and weighed 378 pounds. It was Witeck's opinion that Milliman died from "a gunshot wound to the back." Witeck explained that the bullet entered the upper right side of Milliman's back. There was a partial exit wound on the left front of Milliman's body. Witeck did not observe any injuries to Milliman's hands. On cross-examination, Witeck explained that there can be evidence of stippling, *i.e.*, tiny pinpoint abrasions or burns on the skin, if a gun is discharged "a few inches" from the body. However, evidence of stippling "goes away" as the barrel of the gun moves more than a few inches from the body. Witeck also stated that soot or powder can be deposited on the skin when the distance between the end of the barrel of the gun and the surface of the skin is two feet or less. Witeck testified that his autopsy did not reveal any evidence of "close-range firing" around the entrance wound. Witeck also noted that Milliman's blood-alcohol level was 0.121.

¶ 11 Sergeant Andrew Thomas and Detective Mike Quick also responded to the scene of the shooting. Thomas testified that he has been trained in preparing maps and diagrams. Thomas was assigned to document evidence collection from the shooting and to prepare a diagram of the crime scene. To this end, Thomas documented where certain items of evidence were found inside and outside the home as shown on the diagrams he prepared. For instance, Thomas testified that a computer was found underneath an overturned washing machine in the mudroom and ammunition was found on a porch. Thomas also testified that a red substance was found in the foyer, a $50 bill was found in a bathroom, and condoms were found in the rear bedroom. In addition, Thomas noted the length of the front hallway of the Doty Road residence was 12'4" and the width of the hallway was 3'3".

¶ 12 Quick testified that he was the detective responsible for collecting evidence in this case. From the front hallway of the Doty Road residence, Quick collected a white shirt covered with a brownish-red substance and a blue shirt. Quick noted that there was a hole in one of the shirts. Quick further testified that he collected a Motorola cell phone outside the east side of the residence. In the mudroom, Quick observed a desktop computer with a washing machine on top of it. Quick took the computer into evidence. Quick also collected a firearm and blood samples from the scene. Quick stated that the weapon was loaded when he took possession of it. Quick testified that no one other than Milliman was bleeding at the scene.

¶ 13 Quick further testified that he had been trained in computer and cell phone forensics by the National White Collar Crime Center and Fox Valley Technical College. Quick performed a forensics analysis of the computer found at the Doty Road residence and discovered more than 1000 pages of Yahoo! Instant Messenger data on the hard drive. Quick explained that Yahoo! Instant Messenger allows subscribers to communicate with each other through a "subscribed

name." The logs extracted from the computer recovered at the scene showed communications between a user named "KMBigtoe00" and "TKSmith8482." Quick testified that through his investigation, he learned that the username "TKSmith8482" was associated with defendant and his wife, Kimberly Smith, while the username "KMBigtoe00" was associated with Milliman.[1] He further learned that Milliman had gone to the Doty Road residence in response to a Craigslist advertisement.

¶ 14 Karen Pratscher testified that she was Milliman's fiancée. Pratscher stated that Milliman's e-mail address was KMBigtoe00@yahoo.com. Pratscher last saw Milliman alive on May 28, 2011.

¶ 15 The parties stipulated that text chats between defendant's Yahoo! username and the one belonging to Milliman and located on the computer recovered from the scene were accurate and the State introduced them into evidence. In the messages, which began on the night in question at 21:03, defendant wrote as if he were Smith (his wife) and said that her husband was out of town. Milliman called Smith's husband "wimpy," and Smith responded that her husband was not wimpy and was a 6'5", 250-pound marine. Milliman asked Smith to meet at his hotel room, but Smith wrote that he had to come to her house. Smith gave Milliman the address and told him to call when he was close. Smith told Milliman she wanted "a donation so don't stiff me." At 21:43, Milliman told Smith that he was on his way.

¶ 16 Detective David Mullen testified that he and Detective Travis McDonald interviewed defendant. Mullen authenticated People's exhibits 92 through 95 as video recordings of the custodial interview with defendant and People's exhibits 89 and 90 as the same interview with long periods of inactivity redacted. The recordings of the custodial interview were admitted into evidence, and the trial court viewed the redacted version of the interview in its chambers.

[1] For clarity, all later uses of "Smith" are in reference to defendant's wife, Kimberly Smith.

¶ 17 In the video, defendant initially told the detectives that he was on his way home when he received a call from his wife. According to defendant, his wife was "freaking out" because someone was in the house. Defendant called 911, but hung up when he reached the residence. Defendant exited his truck, taking with him a gun which he kept in his vehicle. The gun was loaded and defendant cocked back the hammer on the gun when he left the truck. As defendant approached the front door, he heard his wife screaming for help. Defendant tried to enter through the front door of the house, but it was blocked, so he went to the back door. Defendant explained that the back door opens onto a porch where he and his wife store items they do not want. Defendant noted, for instance, that there was "a busted computer" and "a busted dryer" on the back porch. Defendant stated that upon gaining entry, he shoved the dryer out of the way and ran to the hallway near the front door. There, defendant saw a man with his wife. Defendant observed the man strike his wife. Defendant stated that the man was pushing his wife against the door and had one hand on her shoulder. Defendant did not recognize the man, but described him as a "big gentleman."

¶ 18 Defendant told the man he had a gun. Defendant then instructed the man to get off his wife and warned that he would shoot if the man did not leave the premises. The man did not budge, so defendant tried pulling on the man's shirt, causing it to rip. Defendant stated that the gun was loaded and the hammer was cocked back when he placed the weapon against the man's back. Defendant further stated that when he put the gun to the man's back "[his] finger hit the trigger and [the gun] went off." After the shooting, Smith stated, "You shot him." According to defendant, he responded, "Yeah, I shot this guy. I didn't know who the f*** he is." Nevertheless, defendant also told the detectives that "[t]his isn't something [he] would ever f***ing do" and that "never in [his] life *** would [he] intentionally shoot somebody." Defendant stated that he wanted to scare the man but the gun has "a really hairy, hairy trigger." Defendant believed that the man was just a

"random" guy who showed up at his house. Defendant later stated that he "fully admit[ted] to shooting [Milliman]." Defendant felt what he did was "justified" and that he "did what [he] had to do to protect [his] wife."

¶ 19 Following a break in the interview, defendant stated that not everything he previously told the detectives was true. Defendant admitted that he was at home the entire evening. He explained that he and his wife invited Milliman over in response to an advertisement the couple placed on Craigslist. The purpose of the advertisement was to find someone to have sex with his wife in exchange for money. Defendant testified that because "people don't like coming over if the husband is around," he stays in another room and the client does not know he is in the house. Defendant was not aware what happened between Milliman and his wife prior to the shooting. Defendant stated that he responded when he heard his wife scream. When defendant approached, he observed Milliman "all over" his wife. Milliman's hands "were on the fricking door, not letting her move, not letting her do anything." Defendant told Milliman to "[g]et the f*** off [his] wife," but Milliman did not respond. Defendant added that he gave Milliman "fair notice" and announced that he had a gun, but Milliman would not move or leave. Defendant stated that he had the gun on Milliman's back as he tried to pull him off his wife. He acknowledged, however, that when he "pulled the trigger," Milliman was not striking Smith and he did not have his hands around her neck. Defendant stated that after the shooting, his wife was "freaking out." He suggested that they stage a break in. To that end, defendant punched out the glass in one door and tore the computer out of the wall. He then got into his vehicle, drove down the street, and called 911. Defendant admitted that he did not mention the shooting to the 911 dispatcher.

¶ 20 Defendant told the detectives that his actions were "justified." He explained that his "wife's life was in jeopardy," that he "made a judgment call," that he shot the man because the man was

hurting his wife, and he "did what [he] had to do" to defend her. He later stated that he "didn't mean to shoot" but that he was "defending his wife." Defendant also reiterated that the shooting was "justified" because Milliman was attacking his wife. Defendant admitted that the gun was in the house the entire time and acknowledged that he ripped the computer "out of the wall" after he shot the man. He stated that he acted in this manner because he was embarrassed about how he treats his wife. Defendant denied wanting to shoot Milliman again after discovering he was still breathing. Moreover, he told the detectives that although his wife suggested taking the body somewhere else before calling the police, he declined to do so. Defendant acknowledged that shooting is a hobby of his and that he and his friends "shoot" on the weekends.

¶ 21 The gun recovered from the scene by Singer was transported for testing to Julie Steele, a forensic scientist with the Illinois State Police. The court found Steele to be an expert in firearms identification. Steele testified that she was asked to examine the weapon for "trigger pull," *i.e.*, the force necessary to release the sear of a firearm. Steele examined the weapon and testified that there was no indication of a light trigger pull or "hair trigger." Steele testified that it would take 4 pounds of pressure to discharge the weapon if the hammer were cocked, and 12 pounds of pressure for it to discharge if the hammer were not cocked.

¶ 22 Kimberly Smith testified that in May 2011, she and defendant lived in a house on Doty Road in Woodstock. At that time, Smith and defendant were married but they have since divorced. Smith testified that she "rarely" recalled what happened the night of May 28, 2011. The State then impeached Smith with the transcript of her testimony from the first trial on February 27, 2013. Smith admitted that she testified at the first trial in accordance with the transcript, just that she did not now remember. The parties stipulated to the admission of the transcript of the February 27, 2013, trial, and the court later agreed to admit the transcript from the first trial as substantive

evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2018)).

¶ 23 At the second trial, Smith recounted that on the night in question, Milliman came to her house at defendant's request for purposes of a sexual encounter for money. Defendant was communicating with Milliman by computer. When Milliman arrived, he and Smith attempted "very briefly" to engage in a sex act. Milliman removed his pants, but Smith could not remember if she took off her clothes. In her prior testimony, Smith said that she removed her underwear and "proceeded to try to have sex *** very shortly." At the second trial, Smith testified that she and Milliman walked out of the room. Smith remembered arguing with Milliman, but did not remember about what. She also testified that she did not remember whether there was a confrontation between Milliman and defendant. Smith's prior testimony was that Milliman was "aggravated, angry, and frustrated." Smith's prior testimony further reflected that Milliman followed Smith toward the front door and then said he had to use the bathroom. When Milliman exited the bathroom, he tried to hand Smith $40 because he "wanted to finish." Smith returned the money to Milliman, telling him "no thank you" and that she wanted him to leave.

¶ 24 Smith's prior testimony was that Milliman grabbed her left arm and tried to pull her back towards the house. At the second trial, Smith testified that she did remember Milliman grabbing her arm, but could not recall why. In Smith's prior testimony, she stated that she tried to push Milliman away and that Milliman slapped her face. Her prior testimony was that the slap "wasn't very hard at all" and that when Milliman pulled her arm it was "enough to pull [her] back a few steps." Evidence showed that Smith told police on the night of the shooting that Milliman slapped her twice and that all she could remember was "fighting him," referring to Milliman. Smith's previous testimony was that she asked Milliman to "get his hands off of [her]" and then defendant

came around the corner. The State asked her if she saw defendant shoot Milliman and when she did not respond, the court stated, "Miss smith [*sic*], please answer the question." Smith then responded in the affirmative. She stated, "I was standing in front of [Milliman] and I heard a gun go off and that's all I can recall."

¶ 25 Smith testified that she could not remember if defendant said anything to Milliman before the gun discharged. She was impeached with her prior testimony that she heard defendant say, "get your hands off my wife" and the "gun went off" as Smith was standing at the front door. At the first trial, Smith was asked, "how long after saying 'get your hands off my wife,' did the gun go off?" Smith responded "immediately." Smith also previously testified that defendant did not wait to see if Milliman was going to comply before shooting and did not try to resolve the situation before resorting to deadly violence.

¶ 26 At the second trial, Smith testified that she did not recall what happened after Milliman was shot. At the first trial, however, Smith testified that defendant asked her to get Milliman's cell phone out of his truck. Smith complied and gave the phone to defendant. Smith stayed outside and heard defendant smashing things inside the house and windows breaking. At the second trial, Smith could not remember if she called the police, so she was impeached with her prior testimony that defendant told her to make it look like someone broke in and to call 911. She then testified that she knew that she called 911, but did not remember doing it. The State played her 911 call in open court. In the 911 call, Smith told the dispatcher that her husband shot a man who was just sitting in her house when she came home. She testified that what she stated in the phone call was a lie and defendant told her to lead the police to believe that it was a break-in.

¶ 27 On cross-examination, Smith testified that she was granted use immunity and compelled to testify against defendant at the first trial. There was no such agreement for the second trial.

Smith further testified that as a result of her actions, she pleaded guilty to disorderly conduct and filing a false police report and received probation. Smith later served a year for violating that probation. She also had a 2007 conviction for felony aggravated fleeing and had pending charges in Lake County at the time of her testimony at the second trial.

¶ 28 Smith further testified on cross-examination that she did not remember beginning to have sex with Milliman, taking off her underwear, Milliman removing his pants, or Milliman retrieving a condom. She acknowledged that she previously testified to those things, but explained that it was "very hazy." Smith did not recall how much she drank that night. In her prior testimony, Smith said that she had two drinks and was under the influence of alcohol.

¶ 29 Defendant testified that he and Smith lived at property on Doty Road. Although he worked as a parts material driver for a landscaping business and began working as a sales representative for the same company, the couple often did not have enough money to pay their bills. Approximately six months prior to the shooting, he and Smith began placing online advertisements for men to come have sex with Smith in exchange for money.

¶ 30 On the day of the incident, defendant's friend Brian had come over to help defendant with some yardwork. Defendant asked Brian, who did construction, about fixing the bathroom at the house because Smith's foot went through the floor. Brian gave them an estimate of $500. Based on that, defendant and Smith agreed to advertise on Craigslist to solicit someone to pay to have sex with Smith that night. Smith posed for the picture that they used and they composed the advertisement together, with defendant doing the typing and Smith giving her input. The couple received several responses to the advertisement and chatted with many people online via Yahoo! Instant Messenger. Defendant confirmed that People's Exhibit 78 was the chat transcript between him and Milliman. After the chat, defendant believed that Milliman would come over. Milliman

called on the phone and spoke to Smith and she gave him the address.

¶ 31 Before Milliman arrived, a different man came to the house and had a paid sexual encounter with Smith. Defendant testified that he would stay in another room during these encounters because the men did not like the husband in the house. After the first man left, defendant made Smith a drink while she took a shower. Defendant had made Smith several drinks that day, and she had also made herself drinks. Both defendant and Smith were intoxicated when Milliman arrived. Defendant heard the doorbell ring and told Smith. Smith put on a shirt and underwear, quickly finished her drink, and then answered the door. From his vantage point in a side room, defendant saw Smith and Milliman walk by toward the back bedroom and noticed that Milliman was "very large." At the time, defendant was 6'1" and weighed between 260 and 270 pounds.

¶ 32 Shortly later, Smith walked toward the front of the house. Milliman followed her about 30 to 40 seconds later. Defendant moved into a small room near the front hallway to make sure Smith was okay. He could hear Milliman and Smith, but not what was being said. Milliman and Smith started to argue and defendant heard scuffling. Smith said, "get your f***ing hand off me" and then Smith said, "baby, please help."

¶ 33 Defendant had a gun in his hand at that point. He usually had it out during these encounters in case anything happened. When defendant heard the scuffle, he ran around the corner and screamed, "[g]et your hands off my wife, get out of my house." Defendant believed that Smith was being harmed based on what he had heard. Defendant was concerned about Milliman's size because he was a "very, very big man" and Smith was an "average-size" woman. At the time defendant entered the hallway, the front door was shut. Defendant could not see Smith because she was blocked by Milliman and he had pinned her up against the door. Defendant could see Milliman pushing up against Smith. He could see Milliman's back. At one point, Milliman's hands

were up. He could not see Smith, so he did not know if she was injured or bleeding. Defendant yelled at Milliman to get out of his house and grabbed him by his shirt. Defendant put his free hand—his left hand—on Milliman's shoulder and tried to grab Milliman's shirt with his right hand, which held the gun, a little lower and to the side. Milliman pushed back and defendant's arm hit the wall, causing the gun to accidentally discharge. Defendant said he did not plan to kill Milliman.

¶ 34 Defendant testified that he was scared after the gun discharged and that Smith was "[f]reaking out." Defendant called 911. He told the 911 dispatcher that his wife reported an intruder in the house. Defendant made up the story about an intruder because of "everything that we were doing that was wrong, the indiscretions, the promiscuity." After the 911 call, defendant ripped the computer out of the wall and threw it in the back room, where it ended up under an unused washing machine that defendant then pushed over.

¶ 35 Defendant then went outside, got in his truck, and drove down the road and back, parking his truck in front of the house. He told Smith to call him when he drove the truck down the road "to make it look like somebody broke in [the] house." He then sat in his front yard, crying and hysterical. At the time, Smith was pacing behind him. Smith then called 911, but defendant could not remember what she told the dispatcher. When Deputy Singer arrived, defendant pointed out where the gun was located and told him a man was in his house and that he (defendant) had shot him.

¶ 36 Defendant was later transported to the police station where he spoke to Detectives McDonald and Mullen. Defendant testified that he lied to the detectives about a fake break-in because he was in shock and scared and knew that he had done things he should not have done. Eventually, defendant told the detectives the truth.

¶ 37 On cross-examination, defendant acknowledged that he is familiar with guns. He stated that he knows how to load a gun, cock a gun back, and fire a gun. He estimated that prior to the incident with Milliman, he had fired a gun approximately 40 times. The State asked defendant whether it aggravated him when Milliman referred to him as "wimpy" in the chat. Defendant denied that the comment aggravated him. Defendant testified that he did not cock the hammer back on the gun and did not pull the trigger "to defend [his] wife." He lied to detectives when he said that he did pull the trigger. Rather, the gun "just went off." Defendant acknowledged that when he saw Milliman walk to the back of the house with Smith, he did not see him with a gun or a knife. Defendant admitted that he told the police during his interview that when he "pulled the trigger," Milliman was not striking Smith and he did not have his hands around her neck. Defendant also admitted that he did not call for an ambulance, try to render aid to Milliman, or place him in his truck to drive him to the nearby hospital. Defendant explained that he thought when he called 911 that an ambulance would come with the police, based on what his cousin, who was a firefighter, told him previously. The State played defendant's 911 call in open court.

¶ 38 At the close of the evidence, defendant moved for a directed finding. The trial court denied the motion. Defense counsel then renewed his *Lynch* motion. The trial court denied the motion "for the same reasons that the court denied it previously." Defense counsel asked the court to consider both involuntary manslaughter and second-degree murder based on an imperfect self-defense.

¶ 39 In its findings, the court first addressed involuntary manslaughter. The court stated that the only evidence presented with respect to involuntary manslaughter was from defendant. The court observed, however, that defendant offered differing versions of how the shooting occurred. The court remarked:

> "During defendant's custodial interview, he made statements early on *** to the effect that he went to grab the victim telling the victim to get out of the house. The victim didn't move, and he tried pulling on the victim. He ripped the victim's shirt. He put the gun in the victim's back. When I put it into his back, my finger hit the trigger and it went off. He also indicated during his interview that when I hit him and pushed it, my finger was on the trigger and the hammer was back, and it's a really hairy trigger. Also made statements that when I grabbed the gun out of my truck, it was loaded and I cocked it back.
>
> However, after making those statements to the detectives, he thereafter told the detectives he had been lying to them. At that point, he starts telling the detectives that, no, it was really self-defense ***.
>
> At trial, *** the defendant for the first time in seven years testifies that the shooting was simply an accident. He testified that he ran up and grabbed the victim by the shirt, had the gun in his right hand, when the victim pushed back, his arm hit the wall and the gun just accidentally went off. He also testified that the gun was not cocked. He testified he did not pull the trigger. He testified that he did not pull the trigger to defend his wife."

The court found that defendant's testimony at trial was "simply not credible" and contradicted by defendant's statements to the police, the testimony of Dr. Witeck that there was no indication of a close contact wound, and the testimony from the firearm examiner, who indicated that there was no indication of a light trigger pull on the weapon.

¶ 40 The court then noted that before addressing second-degree murder, it had to determine whether the State had proven beyond a reasonable doubt the elements of first-degree murder. The court concluded that it had done so. In this regard, the court stated that there was sufficient evidence presented to prove that defendant performed the acts which caused Milliman's death and

that defendant knew such acts created a strong probability of death or great bodily harm. In support of these findings the court observed as follows. Defendant shot Milliman in the back. Defendant was not a novice to the use of weapons. He made statements to the police that he went shooting with his buddies as a hobby and that he had fired the weapon at issue more than 40 times. As such, the court concluded that defendant "most certainly knew that when you put a loaded gun into somebody's back and pull the trigger, that it was likely to cause death or great bodily harm."

¶ 41 The court noted that once the State has proven first-degree murder beyond a reasonable doubt, the defendant must prove by a preponderance of the evidence that he believed that the circumstances justified using self-defense and that such belief was unreasonable. If evidence of self-defense is raised, the State must then prove beyond a reasonable doubt that the defendant did not have a reasonable belief that it was necessary to use deadly force. The court stated that "there was some evidence presented on self-defense" in defendant's statements to the police. However, defendant also told the police that he did not know what was going on and that he only heard Smith tell Milliman to get his hands off her. The court noted that during the custodial interview, defendant demonstrated to the detectives that Milliman had pinned Smith in the doorway by standing in front of her, but there was no evidence that Milliman was physically hurting Smith. Milliman was not touching Smith, and he was not striking or choking her. As such, the court found beyond a reasonable doubt that defendant was not justified in using deadly force against Milliman by shooting him in the back. The court added that "[e]ven if defendant subjectively believed that the use of force was necessary, there was no evidence presented to warrant any belief that deadly force was necessary and any such belief would not be objectively reasonable." The court added that "the conduct of the defendant after the crime in staging the crime scene, in lying to [the] 911 [dispatcher] and in lying to detectives is not the conduct of an individual who felt that he was

justified in using deadly force." Finally, the court stated that defendant personally discharged a firearm that proximately caused the death of Milliman.

¶ 42 On September 24, 2018, defendant filed a motion for a new trial, which he later amended. In the motion, defense counsel argued that the court erred in denying his motion *in limine* to admit evidence regarding Milliman's character pursuant to *Lynch*. Defendant also argued, *inter alia*, that the court erred in finding defendant guilty beyond a reasonable doubt because defendant did not intend to kill Milliman without legal justification. The court denied the motion.

¶ 43 The court sentenced defendant to 50 years' imprisonment, which sentence included a 25-year firearm enhancement. See 730 ILCS 5/5-4.5-20(a), 5/5-8-1(a)(1)(d)(iii) (West 2010). Defendant filed a motion to reduce sentence, which the trial court denied. This appeal ensued.

¶ 44 II. ANALYSIS

¶ 45 On appeal, defendant raises two principal arguments. First, defendant argues that the State failed to prove beyond a reasonable doubt that he committed first-degree murder. Second, defendant argues that the trial court erred in denying his motion *in limine* to admit evidence of the victim's aggressive character pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). We address each contention in turn.

¶ 46 A. Sufficiency of the Evidence

¶ 47 Defendant argues that the State failed to prove beyond a reasonable doubt that he committed first-degree murder. According to defendant, the State's evidence showed that he acted recklessly in grabbing Milliman while holding a loaded gun, thereby supporting only a conviction for the lesser-included offense of involuntary manslaughter. Alternatively, defendant contends that the State's evidence proved only second-degree murder in that the evidence established that at the time defendant performed the acts that caused Milliman's death, he unreasonably believed that he

was justified in his use of force to protect his wife.

¶ 48 When faced with a challenge to the sufficiency of the evidence in a criminal case, the reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Axtell*, 2017 IL App (2d) 150518, ¶ 61. The reviewing court will not retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court. *People v. Yeoman*, 2016 IL App (3d) 140324, ¶ 18. A reviewing court will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt of the defendant's guilt. *Yeoman*, 2016 IL App (3d) 140324, ¶ 18.

¶ 49 1. Involuntary Manslaughter

¶ 50 Defendant first argues that the State did not prove first-degree murder beyond a reasonable doubt. According to defendant, at most, his conduct evinced that he acted recklessly in grabbing Milliman's shirt while holding a loaded gun as he tried to pull Milliman away from his wife. Hence, defendant asserts that his conviction should be reduced to the lesser-included offense of involuntary manslaughter. The State responds that defendant's claim that he acted recklessly is "wholly rebutted by the evidence."

¶ 51 Defendant was charged with first-degree murder under section 9-1(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(2) (West 2010)). Under this provision, a person is guilty of first-degree murder if he kills an individual without lawful justification and, in performing the acts that cause the death, he "knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1(a)(2) (West 2010). A person commits

the offense of involuntary manslaughter when he unintentionally kills an individual without lawful justification by recklessly performing acts that are likely to cause death or great bodily harm. 720 ILCS 5/9-3(a) (West 2010).

¶ 52 The distinguishing element between first-degree murder and involuntary manslaughter is the mental state that accompanies the conduct resulting in the victim's death. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998), *abrogated on other grounds by People v. McDonald*, 2016 IL 118882. As charged in this case, first-degree murder requires knowledge whereas involuntary manslaughter requires recklessness. Compare 720 ILCS 5/9-1(a)(2) (West 2010) (knowing first-degree murder) with 720 ILCS 5/9-3(a) (West 2010) (involuntary manslaughter); *People v. Givens*, 364 Ill. App. 3d 37, 44 (2005). A person acts knowingly or with knowledge when he is consciously aware that his conduct is practically certain to cause a particular result. 720 ILCS 5/4-5(b) (West 2010); *People v. Leach*, 405 Ill. App. 3d 297, 312 (2010). In contrast, "recklessness" occurs when one "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2010). "In general, a defendant acts recklessly when he is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur." *DiVincenzo*, 183 Ill. 2d at 250. Thus, recklessness involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *DiVincenzo*, 183 Ill. 2d at 250 (noting that involuntary manslaughter requires a less culpable mental state than first-degree murder). Because one's mental state is rarely proven by direct evidence, it must generally be inferred from the character of the defendant's acts and from the circumstances surrounding the commission of the offense. *People v. Eubanks*, 2019 IL 123525,

¶ 74; *People v. Pollard*, 2015 IL App (3d) 130467, ¶ 27; *People v. Lissade*, 403 Ill. App. 3d 609, 613 (2010). The trier of fact is in the best position to determine whether a particular mental state is present. *DiVincenzo*, 183 Ill. 2d at 252; *Pollard*, 2015 IL App (3d) 130467, ¶ 27; see also *People v. Lemke*, 384 Ill. App. 3d 437, 445 (2008) (noting that whether a defendant is guilty of first-degree murder or involuntary manslaughter is a question for the trier of fact).

¶ 53 Defendant frames the issue as whether the evidence proved beyond a reasonable doubt that he "acted with conscious awareness that grabbing Milliman while holding a loaded gun was practically certain to cause death or great bodily harm." However, defendant misconstrues the basis for the trial court's finding of knowing first-degree murder. The trial court's decision was not premised on a finding that defendant's act of grabbing Milliman while holding a loaded gun was practically certain to cause death or great bodily harm. Rather, the trial court concluded that defendant "most certainly knew that when you put a loaded gun into somebody's back and pull the trigger, that it was likely to cause death or great bodily harm." After reviewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that the requisite mental state for knowing first-degree murder had been proven beyond a reasonable doubt.

¶ 54 It is undisputed that defendant was in possession of the gun when it discharged and fatally wounded Milliman. Moreover, there was sufficient evidence from which the trial court could reasonably conclude that defendant deliberately pulled the trigger of the gun while it was pointed in Milliman's direction. In this regard, the evidence establishes that defendant was familiar with guns. He testified that shooting was a hobby, that he knew how to operate them, and that he had fired a gun 40 times prior to the incident involving Milliman. Regarding the circumstances of the shooting, defendant told the police during his interview that he approached Milliman from behind,

informed Milliman that he had a gun, and threatened to shoot Milliman if he did not leave the premises. When Milliman did not comply with defendant's orders, defendant placed a loaded gun against Milliman's back with the hammer cocked and "pulled the trigger." Defendant repeatedly told the police that his actions were "justified." He also told the police that he gave Milliman "fair notice," he "made a judgment call," and he did "what [he] had to do." Based on this evidence, the trier of fact could have reasonably concluded that defendant intentionally discharged the gun and that he knew that doing so while pointing the weapon at Milliman created a strong possibility of death or great bodily harm. See *People v. Cannon*, 49 Ill. 2d 162, 166 (1971) (holding that evidence of the defendant pointing a gun and shooting in the decedent's general direction was sufficient to support a conviction of murder); *People v. Lengyel*, 2015 IL App (1st) 131022, ¶ 51 (noting that the intentional use of a deadly weapon presumes that the individual knows his acts create a strong probability of death or great bodily harm); *People v. Lemke*, 384 Ill. App. 3d 437, 446 (2008) ("It is well established that proof that a death resulted from a defendant's act of deliberately firing a gun in the general direction of his victim is sufficient to sustain a conviction for first-degree murder under section 9-1(a)(2) [of the Code].").

¶ 55 That defendant deliberately pulled the trigger on the gun is also supported by his actions following the shooting. In this regard, we note that defendant did not attempt to render first aid to Milliman, call an ambulance, or otherwise seek help from medical professionals. Rather, he plotted a home invasion to conceal what truly occurred. Only after the staging was complete did defendant call 911. Even then, defendant did not mention the shooting to the 911 dispatcher. See *People v. Garcia*, 407 Ill. App. 3d 195, 201-02 (2011) (considering a defendant's words and conduct after a shooting in assessing the defendant's mental state). Considering the evidence in its entirety, we cannot say that the evidence was so improbable, unsatisfactory, or inconclusive that it left a

reasonable doubt as to whether defendant was consciously aware that death or great bodily harm was practically certain to be caused by his conduct. *Yeoman*, 2016 IL App (3d) 140324, ¶ 18.

¶ 56 Defendant nevertheless insists that he has always maintained that he did not intentionally pull the trigger of the gun. According to defendant, the evidence established that the gun accidentally discharged as he tried to pull Milliman off Smith. In support, defendant points to various statements that he made to the police, including that he did not intend to kill Milliman and that the gun simply "went off." As noted above, however, there was also evidence from which a trier of fact could reasonably conclude that defendant intentionally discharged the firearm. Significantly, defendant was familiar with firearms and he made comments suggesting that he intentionally shot Milliman. Further, the State's firearms expert determined that the gun used in the shooting did not have a "hairy trigger" and would have required between 4 and 12 pounds of pressure to discharge depending on whether the hammer was cocked. In essence, defendant's position amounts to a request that this court ignore the trier of fact's findings and reweigh the evidence in his favor. However, as stated previously, determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court. *Yeoman*, 2016 IL App (3d) 140324, ¶ 18. It is not the function of this court to retry defendant. *Givens*, 237 Ill. 2d at 334. Instead, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt of the charged offense. *Collins*, 106 Ill. 2d at 261; *Axtell*, 2017 IL App (2d) 150518, ¶ 61. Despite defendant's claim that the gun discharged accidentally, the State presented sufficient evidence from which the trier of fact could have reasonably found that defendant pulled the trigger of the gun while aimed at Milliman and that he did so with the knowledge that his act was practically certain to result in

the death of or great bodily harm to another.

¶ 57 Defendant asserts that his trial testimony that the gun accidentally discharged during a struggle with Milliman was "not wholly contradicted" by the testimony of the firearms expert and the medical examiner. Even so, a reviewing court is not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *People v. Hall*, 194 Ill. 2d 305, 330-32 (2000). To the contrary, the issue is after considering all the evidence in the light most favorable to the prosecution, whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261; *Axtell*, 2017 IL App (2d) 150518, ¶ 61. Here, the trial court reviewed the entirety of the evidence and considered defendant's argument that the gun discharged unintentionally. As was its province, the trial court specifically found that defendant's version of events was not credible. *Hall*, 194 Ill. 2d at 331 ("To the extent there exists a conflict in the evidence *** such a conflict is for the trier of fact to resolve."). Based on our review of the evidence, this argument was properly rejected by the trial court.

¶ 58 Defendant also directs us to our decision in his first appeal in support of his argument. In that decision, we found that the trial court erred in rejecting defendant's request for an instruction on involuntary manslaughter because there was some evidence, if believed by the jury, which "could reasonably be considered to constitute reckless conduct resulting in Milliman's death." *People v. Smith*, 2015 IL App (2d) 130663-U, ¶ 35. While it is true that we found that the jury should have been instructed on the lesser-included offense of involuntary manslaughter, we also made it clear in our order that "there is sufficient evidence in this case for a [trier of fact] to conclude that other evidence at the trial, including remarks defendant made during the custodial interview that his actions were 'justified,' could conceivably be construed to support a finding that

defendant acted knowingly and thereby support a first-degree murder conviction." *People v. Smith*, 2015 IL App (2d) 130663-U, ¶ 37. Thus, defendant's reliance on our holding that he was entitled to an instruction on involuntary manslaughter in no way compels a conclusion that the trier of fact was *required* to find that he acted recklessly.

¶ 59 In sum, taking all the evidence in the light most favorable to the State, the trial court could rationally find beyond a reasonable doubt that defendant intentionally fired a gun in the direction of Milliman and that he did so with the knowledge required of first-degree murder. Accordingly, we reject defendant's argument that the trial court erred in finding him guilty of first-degree murder instead of involuntary manslaughter.

¶ 60 2. Second Degree Murder

¶ 61 Alternatively, defendant contends that even if the State's evidence were sufficient to prove that he knew death or great bodily harm would result from his actions, his conviction for first-degree murder should be reduced to second-degree murder. In this regard, defendant maintains that the evidence proved that he was acting under the unreasonable belief that his actions were necessary to defend his wife against Milliman. The State responds that defendant's conviction of first-degree murder should not be reduced to second-degree murder because defendant failed to establish by a preponderance of the evidence that he unreasonably believed that his actions were justified to defend his wife.

¶ 62 As noted above, as charged in this case, a person is guilty of first-degree murder if he kills an individual without lawful justification and, in performing the acts that cause the death, he "knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1(a)(2) (West 2010). Second-degree murder is a lesser-mitigated offense of first-degree murder. *People v. Wilmington*, 2013 IL 112938, ¶ 48. A defendant commits

second-degree murder where the State has proven first-degree murder beyond a reasonable doubt, but, at the time of the killing, a statutory mitigating factor is present. 720 ILCS 5/9-2(a) (West 2010). One such mitigating factor exists when "[the defendant] believes the circumstances to be such that, if they existed, would justify or exonerate the killing *** but [the defendant's] belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2010); *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1993) ("If the defendant's belief as to the use of force was reasonable, self-defense may apply. If the defendant's belief was unreasonable, a conviction of second degree murder may be appropriate."). "This *** form of second-degree murder is known as imperfect self defense, and 'occurs when there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable.' " *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 148 (quoting *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995)).

¶ 63 To prove self-defense, a defendant must establish the following elements: (1) force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed that required the use of the force applied; and (6) his beliefs were objectively reasonable. 720 ILCS 5/7-1(a) (West 2010); *Jeffries*, 164 Ill. 2d at 127-28. A person is justified in the use of force 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 or another. 720 ILCS 5/7-1(a) (West 2010). Once the State has proven beyond a reasonable doubt the elements of first-degree murder, the burden shifts to the defendant to establish the first five elements of self-defense by a preponderance of the evidence. *Castellano*, 2015 IL App (1st) 133874, ¶ 154. A preponderance of the evidence is evidence that renders a fact more likely than not. *People v. Urdiales*, 225 Ill. 2d 354, 430 (2007). If the defendant makes this showing, the burden shifts to the

State to disprove any of those elements beyond a reasonable doubt. *People v. Thompson*, 354 Ill. App. 3d 579, 586 (2004). If the State carries its burden, thereby disproving the defendant's claim that he acted in self-defense, a conviction of first-degree murder may be sustained. *Jeffries*, 164 Ill. 2d at 128.

¶ 64 Whether the defendant has established imperfect self-defense is a question of fact. *Castellano*, 2015 IL App (1st) 133874, ¶ 143. The standard of review on appeal is whether, "viewing the evidence in [the] light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present." *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996). The finder of fact is "not obligated to accept a defendant's claim of self-defense; rather, in weighing the evidence, the trier of fact must consider the probability or improbability of the testimony, the circumstances surrounding the killing, and the testimony, if any, of any other witnesses." *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). In a bench trial, the factfinder makes all credibility determinations. *People v. Bradford*, 2016 IL 118674, ¶ 12. Because it is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts, the reviewing court "will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses." *People v. Gray*, 2017 IL 120958, ¶ 35.

¶ 65 In this case, the trial court found defendant guilty of first-degree murder, a finding we have affirmed above. However, the court rejected defendant's request that the offense be reduced to second-degree murder. In so ruling, the court acknowledged that there was "some evidence presented on self-defense" from defendant's statements to police. Nevertheless, based upon the evidence presented, the court found "beyond a reasonable doubt that the defendant was not justified in using deadly force against the victim by shooting him in the back." The court added

that "[e]ven if defendant subjectively believed that the use of force was necessary, there was no evidence presented to warrant any belief that deadly force was necessary and any such belief would not be objectively reasonable." The court further found that its conclusion was bolstered by defendant's conduct after the crime in staging the scene of the shooting, lying to the 911 dispatcher, and lying to detectives during his custodial interview.

¶ 66 At the outset, we note that is not entirely clear from the trial court's ruling whether its decision not to reduce the offense to second-degree murder rested on defendant's failure to establish the elements of self-defense by a preponderance of the evidence or on a finding that defendant made such a showing of self-defense but the State disproved the elements beyond a reasonable doubt. However, given the trial court's statement that defendant presented "some evidence" on self-defense and its finding "beyond a reasonable doubt" that defendant was not justified in using deadly force against Milliman, we will presume that the court determined that defendant established the presence of the mitigating factor by a preponderance of the evidence but that the State disproved the elements beyond a reasonable doubt. Viewing the evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could have concluded that the State met its burden of disproving beyond a reasonable doubt any of the elements of self-defense.

¶ 67 Defendant contends that he established imperfect self-defense because the evidence shows that Milliman, a 6' 6" man weighing 378 pounds, "cornered" Smith and would not let her move. Defendant argues that if he did act knowingly in shooting Milliman, he did so in Smith's defense. We disagree. Significantly, a rational factfinder could reasonably conclude that defendant did not have a subjective belief that Smith was in such danger that the use of deadly force was necessary to protect her. The evidence is undisputed that Milliman was a large man and Smith was a much

smaller woman. Further, the testimony of both Smith and defendant suggested that Milliman and Smith were arguing, Milliman had her cornered, and Milliman would not let her move. However, defendant himself admitted that he did not know what was being said between Milliman and Smith. When defendant responded to Smith's call for help, there was no evidence that Milliman was physically harming Smith. Although defendant was unable to see Smith and he claimed that Milliman was "push[ed] up against Smith," defendant acknowledged that Milliman's hands were up. This was consistent with what defendant told the detectives during his custodial interview. At that time, defendant indicated that Milliman was not touching Smith. He stated that Milliman's hands "were on the fricking door, not letting her move, not letting her do anything." While testifying at trial, defendant acknowledged telling the police during his custodial interview that he did not observe Milliman strike Smith or place his hands around her neck. Moreover, defendant admitted that he did not see Milliman in possession of any weapon such as a gun or a knife. Based on this evidence, a rational factfinder could reasonably conclude that defendant did not have a subjective belief that Smith was in such danger that the use of deadly force was necessary to protect her.

¶ 68 Indeed, such a finding is bolstered by defendant's activity after the shooting. As noted above, instead of attempting to render first aid to Milliman or get medical help, defendant plotted a home invasion to conceal what truly occurred. Only after the staging was complete did defendant contact law enforcement. Defendant's actions after the shooting are circumstantial evidence of consciousness of guilt, and support the trial court's conclusion that defendant did not shoot Milliman in defense of Smith. See *People v. Williams*, 266 Ill. App. 3d 752, 760 (1994) (noting that a trier of fact may infer consciousness of guilt from evidence of a defendant's behavior after the crime).

¶ 69 The trial court heard defendant's versions of the altercation and found him not to be credible, noting that he offered at least three versions of what happened—a break in, self-defense, and accidental discharge. The trial court is not obligated to accept a defendant's claim of self-defense. *Rodriguez*, 336 Ill. App. at 15. Rather, in weighing the evidence, the trier of fact must consider the probability or improbability of the testimony, the circumstances surrounding the killing, and the testimony of other witnesses. *Rodriguez*, 336 Ill. App. 3d at 15. In sum, viewing the evidence in the light most favorable to the State, as we must, a rational trier of fact could have reasonably concluded that the mitigating factor proffered by defendant—imperfect self-defense—was not present.

¶ 70 Defendant claims that the trial court's comments show that it did not properly apply the law regarding second-degree murder. In support, defendant asserts that the court stated in its findings that "no evidence was presented to warrant any belief that deadly force was necessary and any such belief would not have been objectively reasonable." According to defendant, however, "[t]he question was not whether [his] actions were 'objectively *reasonable*.' The question was whether [he] *subjectively* believed that his actions were necessary to protect [Smith] from Milliman." Defendant's argument is based on a faulty reading of the trial court's ruling. The court actually stated that "[e]ven if defendant subjectively believed that the use of force was necessary, there was no evidence presented to warrant any belief that deadly force was necessary and any such belief would not be objectively reasonable." When read in context, this is an accurate statement of the law. See *Castellano*, 2015 IL App (1st) 133874, ¶ 148; see also *People v. Howery*, 178 Ill. 2d 1, 32 (1997) (noting that a trial court is presumed to know the law and apply it properly; such presumption is rebutted only when the record contains strong affirmative evidence to the contrary).

¶ 71 We are also unpersuaded by defendant's reliance on *People v. Hawkins*, 296 Ill. App. 3d 830 (1998). In *Hawkins*, the defendant fatally stabbed the victim and was convicted of first-degree murder. At trial, the evidence established that the victim pulled a knife on the defendant three days before the fatal encounter. The victim had also pulled a knife on the defendant on several previous occasions and had previously hit the defendant with a brick. On the day of the stabbing, the defendant refused to loan the victim money. The victim responded by reaching into the defendant's pockets and punching the defendant in the head causing him to fall to the floor. While the defendant was on the floor, the victim threw a brick at him. When the victim threatened to kill the defendant and used a racial slur, the defendant pulled a knife. The victim then blocked the defendant's way as the defendant tried to run away, grabbed the defendant, and "swung at him with a closed fist." The defendant stabbed the victim in response. At trial, the defendant testified that he was terrified and scared at the time of the stabbing.

¶ 72 On appeal, the court reduced the defendant's first-degree murder conviction to second-degree murder, finding that the defendant had an actual but unreasonable belief that he had the right to use self-defense against the victim. *Hawkins*, 296 Ill. App. 3d at 838. The court noted the evidence that the victim had acted violently toward the defendant in the past, but there was no evidence that the defendant had suffered any bodily harm during those previous encounters or that the victim had a weapon when he swung at the defendant with a closed fist. *Hawkins*, 296 Ill. App. 3d at 837-38. Therefore, although the evidence did support a finding that defendant believed that the circumstances justified using self-defense, the court also found his belief to be unreasonable and therefore reduced his conviction to second-degree murder. *Hawkins*, 296 Ill. App. 3d at 838.

¶ 73 Here, in contrast to *Hawkins*, there was no evidence in the record that Milliman was ever violent toward defendant. Also, unlike in *Hawkins*, there was no evidence that Milliman was in

possession of a weapon or that he had threatened imminent harm to Smith. For these reasons, defendant's reliance on *Hawkins* is misplaced.

¶ 74 In sum, viewing the evidence at trial in the light most favorable to the State, the trial court correctly concluded that defendant's use of force against Milliman was greater than necessary to prevent any threat that Milliman may have represented to Smith. Because the evidence did not establish that defendant had an actual, though unreasonable, belief that he had to act in self-defense, his argument that his first-degree murder conviction should be reduced to second-degree murder must fail.

¶ 75 3. Defendant's State of Mind After the Shooting

¶ 76 Defendant also argues that the trial court erred in relying on evidence of his state of mind after the shooting to reject his theories of involuntary manslaughter and second-degree murder. Specifically, defendant faults the trial court for observing that his behavior of "staging the crime scene, in lying to [the] 911 [dispatcher] and in lying to detectives is not the conduct of an individual who felt that he was justified in using deadly force." According to defendant, while his state of mind at the time of the shooting was relevant, any "poor decisions" he made after the shooting do not change the fact that at the time of the shooting he did not have the state of mind required for a conviction of first-degree murder. Defendant maintains that his actions can be explained by the fact that he had just shot a man who he thought was going to hurt his wife.

¶ 77 At the outset, we note that defendant cites no authority for the proposition that his actions immediately after the crime are irrelevant to his state of mind at the time of the crime. The failure to cite relevant authority is a violation of the supreme court's rules regarding an appellant's brief and results in forfeiture of the argument on appeal. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (requiring an appellant's brief to include argument containing "the contentions of the appellant

and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *People v. Ziemba*, 2018 IL App (2d) 170048, ¶ 54. Forfeiture aside, as we point out above, one's state of mind can be inferred from a defendant's actions immediately after a crime. *Lengyel*, 2015 IL App (1st) 131022, ¶ 48 (relying on *People v. Mitchell*, 105 Ill. 2d 1, 9-10 (1984)); see also *Garcia*, 407 Ill. App. 3d 195, 201 (2011) (noting that mental state can be inferred from the defendant's words and conduct after a shooting); *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 46 (noting that knowledge could be inferred from a defendant's conduct before and after the conduct at issue). Thus, to the extent that the trial court relied on defendant's actions after the shooting to assess his mental state at the time of the crime, it properly did so.

¶ 78 B. Evidence of Victim's Aggressive Character

¶ 79 As his second point of contention on appeal, defendant argues that the trial court erred in denying his motion *in limine*, which sought to admit evidence of Milliman's "aggressive character" pursuant to *Lynch*, 104 Ill. 2d 194. Defendant contends that the admission of such evidence was relevant to the theory that his actions were justified as self-defense. Defendant further posits that the exclusion of this evidence deprived him of his right to present a complete defense. The State advances multiple reasons why the trial court properly denied defendant's motion *in limine*. Among these, the State asserts that the motion was properly denied because there was no dispute that Milliman was the aggressor in this case. The State further posits that the evidence defendant sought to introduce was devoid of any indication of physical violence or threats attributable to the victim.

¶ 80 It is within the discretion of the trial court to determine whether evidence is admissible and relevant. *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 41. We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Davis*, 254 Ill. App. 3d 651, 660 (1993).

An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Gist*, 2013 IL App (2d) 111140, ¶ 11.

¶ 81 In *Lynch*, the defendant was charged with murder. At trial, the defendant asserted that he had acted in self-defense and moved for the admission of evidence that the victim had three prior battery convictions. The trial court denied the motion. The jury convicted the defendant of voluntary manslaughter. The appellate court affirmed the conviction. The supreme court determined that it was reversible error for the trial court to exclude evidence of the victim's battery convictions. *Lynch*, 104 Ill. 2d at 199-205. The court explained that when a defendant properly raises a theory of self-defense, evidence of the victim's "aggressive and violent character" may be offered for two purposes. *Lynch*, 104 Ill. 2d at 199-200. First, it may be used to show that the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior. *Lynch*, 104 Ill. 2d at 199-200. Second, it may be introduced to support the defendant's version of the facts where there are conflicting accounts of what happened. *Lynch*, 104 Ill. 2d at 200; see also Ill. R. Evid. 405(b)(2) (eff. Jan. 1, 2011) ("In criminal homicide or battery cases when the accused raised the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior violent conduct.").

¶ 82 Under the first prong of *Lynch*, the evidence is relevant only if the defendant knew of the victim's violent acts. *Lynch*, 104 Ill. 2d at 200; *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). The rationale for this is that the same deadly force that would be unreasonable in an altercation with a peaceful citizen may be reasonable in a similar situation involving a citizen with a violent or aggressive character. *Lynch*, 104 Ill. 2d at 200; *Figueroa*, 381 Ill. App. 3d at 844). If,

however, the defendant does not know about the victim's violent nature at the time of the events in question, the character evidence is irrelevant to the defendant's theory of self-defense. *Lynch*, 104 Ill. 2d at 200; *Figueroa*, 381 Ill. App. 3d at 844. In the present case, there is no evidence that defendant knew Milliman prior to the events in question much less that he was aware of any prior act of violence or aggression by Milliman. Thus, the first prong of *Lynch* clearly does not apply here.

¶ 83 Under the second prong of *Lynch*, the defendant's knowledge is irrelevant, but there must be conflicting accounts of what occurred for the evidence to be admissible. *Lynch*, 104 Ill. 2d at 200-01; *Figueroa*, 381 Ill. App. 3d at 841-42. The rationale for the second prong of *Lynch* is that where accounts of the incident are incomplete or conflicting, the trier of fact needs all the available information to decide what really occurred. *Lynch*, 104 Ill. 2d at 200; *People v. Nunn*, 357 Ill. App. 3d 625, 632 (2005). In *Lynch*, for instance, the defendant testified that the victim lunged at him with his right hand reaching behind his back. *Lynch*, 104 Ill. 2d at 198. However, an eyewitness to the encounter testified that the victim's hands were in front of him. *Lynch*, 104 Ill. 2d at 198-99. The supreme court, noting that "[m]uch of the evidence was conflicting," held that it was reversible error to exclude evidence of the victim's battery convictions. *Lynch*, 104 Ill. 2d at 198-205. Here, in contrast, the trial court denied defendant's motion to admit *Lynch* material on the basis that there was no dispute that Milliman was the aggressor. The evidence of record supports the trial court's determination.

¶ 84 Smith's testimony revealed that Milliman became "aggravated, angry, and frustrated" after she refused to complete a sex act with him. According to Smith, when she attempted to escort Milliman out of the house, he grabbed her left arm and tried to pull her back. Smith tried to push Milliman away, but he slapped her face. Smith told Milliman to "get his hands off of [her]."

Defendant then rounded the corner and told Milliman to get his hands off Smith. Smith then heard a gun discharge. Defendant's trial testimony did not differ markedly from that of Smith. Defendant testified that he heard Milliman and Smith arguing. Smith told Milliman to get his hands off her. Defendant then heard Smith ask for help. Defendant ran around the corner and screamed for Milliman to get his hands off Smith and to leave the house. According to defendant, at the time, Milliman had Smith pinned against a door with his hands up. As defendant attempted to pull Milliman away from Smith, the gun discharged.

¶ 85 Defendant also provided multiple accounts of what happened during his police interview. However, they all involved Milliman as the aggressor. Defendant initially told the police that Milliman was an intruder and that Milliman had struck Smith, was pushing her against the door, and had one hand on her shoulder. Defendant later admitted to police that Milliman came over in response to an advertisement he and Smith had placed on Craigslist. Defendant related that when he heard Smith scream, he approached and observed Milliman "all over" Smith. Defendant stated that he told Milliman to get off Smith. Milliman did not respond. When defendant tried to pull Milliman off Smith, the gun discharged.

¶ 86 As the foregoing evidence clearly establishes, defendant alleged that Milliman was the aggressor when he acted to defend his wife. The State never disputed this claim. As there was no dispute that Milliman was the aggressor in this case, we conclude that the trial court did not abuse its discretion in denying defendant's motion *in limine*, which sought to admit evidence of Milliman's aggressive character pursuant to *Lynch*, 104 Ill. 2d 194 (1984). See *People v. Jackson*, 293 Ill. App. 3d 1009, 1014 (1997) (holding that *Lynch* material may be properly excluded where there was no conflict concerning the identity of the aggressor).

¶ 87 Citing various cases, defendant acknowledges that where there is no question that the

defendant was the initial aggressor, the evidence of the character of the victim is properly excluded. See *Figueroa*, 381 Ill. App. 3d at 842 (excluding *Lynch* material, noting there was no question that the defendant was the aggressor where, following an altercation in the street, the defendant went to a house, retrieved a gun, and returned to the scene, thereby escalating the situation); *Nunn*, 357 Ill. App. 3d at 631-32 (holding that the trial court did not err in excluding *Lynch* material where evidence showed that the defendant became the aggressor when the victim got in his car to leave the scene, but the defendant shot at the car rather than avoiding confrontation); *Jackson*, 293 Ill. App. 3d at 1014 (excluding *Lynch* material where the defendant approached the unarmed victim sitting at a bus stop and hit him with a stick 15 minutes after a prior altercation). Defendant insists, however, that where the purpose of the *Lynch* material is to bolster the defense claim that the *victim* was the initial aggressor, it should be allowed into evidence. Defendant, however, cites no authority for this position. Thus, it is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (requiring an appellant's brief to include argument containing "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *Ziemba*, 2018 IL App (2d) 170048, ¶ 54. Moreover, contrary to defendant's argument, there is support for the proposition that *Lynch* material is properly excluded where there is no conflict that the *victim* was the aggressor. See *People v. Morgan*, 197 Ill. 2d 404, 457-58 (2001) (holding that evidence concerning the physical and psychological mistreatment of the defendant's mother by his maternal grandparents 20 to 25 years prior to his being charged with the murders of the grandparents was not admissible to support the defendant's self-defense claim; although the alleged mistreatment of his mother was similar to the mistreatment that the defendant allegedly received from his grandparents, there was no evidence that the defendant knew of his mother's experience and the accounts of what happened on the day of the killings were not conflicting).

¶ 88 Defendant also directs us to *People v. Bedoya*, 288 Ill. App. 3d 226 (1997), in support of his claim that the exclusion of *Lynch* material in this case constituted reversible error. The *Bedoya* court held that the trial court's refusal to admit evidence of the victim's past acts of violence deprived the jury of evidence that would have assisted it in resolving the identity of the initial aggressor. In *Bedoya*, the defendant, an off-duty Milwaukee police officer, was convicted of first-degree murder when his gun discharged during an altercation with a bouncer at a Chicago bar, thereby fatally wounding the bouncer. Defense counsel raised the theory of self-defense and attempted to introduce evidence that the victim was previously convicted of three counts of aggravated battery. Those convictions arose when police officers responded to a domestic-violence call at the victim's home, where the officers learned from the victim's then-pregnant wife that he had "punched her in the head and shoved her across the room." When the officers approached the victim, he was "very irate," pointed a gun at them, and threatened to kill them if they did not leave. When the officers attempted to apprehend the victim, he resisted by "punching, shoving, and kicking the police officers." The trial court determined that the defendant could not introduce this evidence because his claim that the gun fired accidentally during the struggle with the victim precluded a theory of self-defense. In reversing the trial court, the *Bedoya* court held that the defendant's claim that the gun fired accidentally did not preclude him from raising self-defense. *Bedoya*, 288 Ill. App. 3d at 237. The reviewing court then noted that the defendant claimed throughout the trial that the victim was the aggressor in their confrontation. *Bedoya*, 288 Ill. App. 3d at 237. Because the evidence regarding the identity of the initial aggressor was " 'incomplete and conflicting,' " "[t]he evidence concerning [the victim's] prior acts of aggravated battery, especially because they involved police officers, was clearly relevant to the issue of who was the first aggressor in this instance." *Bedoya*, 288 Ill. App. 3d at 238.

¶ 89 The present case is distinguishable from *Bedoya*, which involved an altercation between the defendant police officer and a victim who had previously been convicted of three counts of aggravated battery involving police officers. In *Bedoya*, the court determined that the evidence regarding the identity of the initial aggressor was both incomplete and conflicting, and therefore, evidence of those prior convictions was clearly relevant as to who was the first aggressor. Here, as previously discussed, the evidence as to the identity of the initial aggressor is not conflicting. As noted above, *Lynch* material may be properly excluded where there was no conflict concerning who was the aggressor. *Jackson*, 293 Ill. App. 3d at 1014. Under these circumstances, the trial court did not abuse its discretion in refusing to allow defendant to introduce evidence of Milliman's aggressive character.

¶ 90 Moreover, we also agree with the State that defendant's argument fails for a second reason. To be admissible under *Lynch*, the material must be probative of the victim's propensity for violence or his aggressive character. *People v. Cook*, 352 Ill. App. 3d 108, 127 (2004). The evidence defendant sought to admit here, an undated letter from Milliman's fiancée, was properly excluded as it was not sufficiently probative of Milliman's alleged aggressive character. Nothing in the letter suggests that Milliman ever threatened or engaged in any acts of physical violence. At most, the letter shows that Milliman had a temper and would yell at his fiancée. See *Yeoman*, 2016 IL App (3d) 140324, ¶ 30 (holding that statement that murder victim made regarding his prior road-rage incident was not admissible to show that the victim was the aggressor during the confrontation with the defendant because the statement made by the victim did not show he did anything more than approach the offending vehicle and possibly yell at the driver); *Salcedo*, 2011 IL App (1st) 083148, ¶ 47 (holding that the proposed testimony of the victim's girlfriend that the victim had, on a prior occasion, run his car into a parked car because he was angry was not relevant

to the defendant's claim of self-defense in first-degree murder case that the victim was aggressively driving his vehicle in a manner to threaten or injure the defendant); *People v. Cruzado*, 299 Ill. App. 3d 131, 136-37 (1998) (holding that the victim's arrests for unlawful possession of a firearm and disorderly conduct as a result of gesturing gang signs do not show a propensity for violence and therefore had no probative value in determining who the aggressor was in the altercation). We also point out that the letter is undated and there was no evidence as to when Milliman received the letter from his fiancée. See *People v. Ware*, 180 Ill. App. 3d 921, 928-29 (1988) (holding that *Lynch* evidence may be excluded where it is irrelevant or too general, indefinite, and unreliable). In sum, the letter does little to support any inference that Milliman had a violent or aggressive character. For the reasons set forth above, the trial court did not abuse its discretion in denying defendant's motion *in limine* to admit Pratscher's letter as evidence of Milliman's "aggressive character."

¶ 91 III. CONCLUSION

¶ 92 For the reasons set forth above, we affirm the judgment of the circuit court of McHenry County.

¶ 93 Affirmed.