2025 IL App (5th) 230254-U

NO. 5-23-0254

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Macon County.
	)	
v.	)	No. 21-CF-831
	)	
PHILLIP J. GEHRKEN,	)	Honorable
	)	Thomas E. Griffith Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McHANEY delivered the judgment of the court.
Justices Moore and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence was sufficient for jury to find beyond a reasonable doubt that defendant's killing of victim was not justified as self-defense; (2) jury could reasonably find defendant did not prove the killing was mitigated by unreasonable belief in self-defense to support a finding of second degree murder; (3) trial court properly excluded purported *Lynch* evidence where it was not based on personal knowledge; (4) no ineffective assistance of counsel where defendant failed to establish prejudice from defense counsel's failure to request IPI Criminal No. 3.12X despite the admission of *Lynch* evidence.

¶ 2 Following a jury trial, the defendant, Phillip J. Gehrken, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2022)). The jury found that he personally discharged a firearm that proximately caused the victim's death. The defendant was subsequently sentenced to consecutive sentences of 25 years' imprisonment in the Illinois Department of Corrections for first degree murder and 25 years' imprisonment for the firearm enhancement plus 3 years of mandatory

supervised release. On appeal, the defendant argues the State failed to prove him guilty of murder beyond a reasonable doubt; alternatively, he argues his conviction should be reduced to second degree murder. The defendant further argues that the trial court erred in refusing to admit as *Lynch* evidence charges which were pending against the victim at the time of his murder and that defense counsel was ineffective for failing to strenuously pursue admission of this evidence. Finally, the defendant argues that he was denied his constitutional right to effective assistance of counsel where defense counsel introduced evidence of the victim's prior convictions, violent conduct, and reputation for violence but failed to request a jury instruction advising the jury how to use the *Lynch* evidence. For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 Police officers were dispatched to the defendant's farm in response to a 911 call that the defendant had shot Kevin Cooper. When officers arrived at the scene, they discovered Cooper's body lying face up on the ground, approximately 8 to 10 feet from the defendant's excavator. Although Cooper did not have a gun on his person, he had two knives clipped to his front pocket. The officers secured a handgun found at the scene, took the defendant into custody, and seized his cell phone as evidence. The defendant was cooperative and did not resist arrest.

¶ 5 On July 19, 2021, the defendant was charged by information with three counts of first degree murder for the shooting death of Cooper. Prior to trial, the defendant filed an answer asserting the affirmative defense of self-defense. The defendant also filed pretrial motions seeking to introduce Cooper's prior convictions, pending charges, violent conduct, and reputation for violence. In support of his claim of self-defense, the defendant sought to present evidence pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984), of 11 criminal cases involving the victim. These cases involved both misdemeanor and felony convictions, as well as three cases from 2020 and 2021

which had been dismissed. Additionally, the defendant submitted an offer of proof as to the victim's specific prior instances of violence towards himself, as well as the testimonies of eight other witnesses to the victim's alleged prior acts of violence. In the proffer, the defendant averred that Stacy Fifer would testify that she "believes she saw [the victim] setting her car on fire." He further averred that Jose R. Gallegos would testify that "he thinks he saw [the victim] setting his car on fire."

¶ 6 A hearing was held on the defendant's *Lynch* motion. Both parties agreed to have the trial court view a recording of the shooting from the defendant's cell phone. The trial court noted that *Lynch* evidence may be introduced under two different theories and found that the proposed evidence fit the first theory in which the defendant's knowledge of the victim's violent tendencies could affect his perceptions of the victim's behavior. The trial court ruled that three of the victim's prior battery convictions were admissible and held that defense counsel could call three witnesses to testify about the victim's violent acts and three witnesses regarding his reputation for violence. However, the trial court added that if the defendant took the witness stand and testified that he was fearful of Cooper based on what he knew about Cooper, defense counsel would be allowed to supplement his testimony with additional evidence. The trial court denied admission of the victim's 1994 aggravated battery conviction, finding it was too remote. The trial court also denied admission of the victim's 2020 charges for arson, unlawful vehicular invasion, aggravated battery great bodily harm, and aggravated battery with use of a deadly weapon, and his 2021 charge for violating an order of protection which had been dismissed.

¶ 7 When defense counsel objected to the restriction on the number of witnesses that could be called to present the *Lynch* evidence, the trial court responded that three witnesses to testify about the victim's violent acts and three witnesses regarding his reputation for violence sounded

reasonable under the circumstances. When defense counsel asked the trial court to reconsider its ruling regarding the victim's 1994 conviction, the trial court warned defense counsel that the trial was not about the victim's tendencies for violence; rather, it was a trial about whether the defendant committed first degree murder or something else.

¶ 8 Prior to presentation of the defendant's case, defense counsel asked the trial court to reconsider its earlier ruling and allow four incident witnesses. After getting assurances from defense counsel that their testimony would be relatively brief, the trial court agreed to allow the defendant to present four witnesses.

¶ 9 Prior to defendant's trial testimony, defense counsel once again raised the issue of the charges pending against Cooper at the time of his death. The following colloquy occurred:

> "[DEFENSE COUNSEL]: I approached the subject on Stacy Fifer—approached the subject about her participation in the investigation of Kevin Cooper firebombing her house and throwing bricks through her house. If allowed to do that, I would have shown that his vehicle was seen driving through that area immediately after the cars were caught on fire. They were in the house—Ms. Cooper—Ms. Fifer. It's my understanding the Court barred me from bringing that evidence in.
>
> THE COURT: Because you told me in a sidebar Ms. Fifer had no personal firsthand knowledge of anything that occurred.
>
> [DEFENSE COUNSEL]: That's accurate; and candidly, that's true.
>
> THE COURT: Okay. Anything you'd like to say or respond, [State]?
>
> [ASSISTANT STATE'S ATTORNEY]: No. I don't know if that's a question.
>
> THE COURT: All right. I will stand by my ruling that Ms. Fifer is not allowed to testify regarding the additional incident, based solely on the fact she had no person[al]

knowledge of the incident. And of course as a witness, you're only allowed to testify most of the time in terms of what you've seen, observed, heard, things of that nature."

¶ 10 Defense counsel asked the trial court to allow the defendant to testify to the incident where "he has independent knowledge—although he did not see this—as to the firebombing and throwing the brick through the window." Defense counsel argued that the source of the defendant's independent knowledge was the victim, who told the defendant what had happened when the defendant bonded him out after he was arrested on those charges. The State objected because the defendant did not have personal knowledge, and the trial court denied the defendant's request. The defendant proceeded to a jury trial, where the following evidence was adduced.

¶ 11 A. Cell Phone Evidence

¶ 12 The defendant recorded his interaction with Cooper at the farm using his cell phone. The police extracted two videos from the defendant's cell phone which were published to the jury. The longer video depicted the shooting. The video was less than four minutes long, with the phone positioned on the defendant's right, within the excavator, and showing a side view of the defendant's legs from the knees down. When the video began, the excavator was loud and music played inside as Cooper first approached. The defendant opened the excavator window but left the door shut and turned off the excavator and music. The two men had the following conversation, with Cooper's voice being somewhat muffled:

"COOPER: What's up?

THE DEFENDANT: I just come out here to mow, and you didn't even tell me.

COOPER: Phil, get out.

THE DEFENDANT: I'm not getting out, Kevin.

COOPER: Get out, Phil.

THE DEFENDANT: I'm not getting out. I'm not getting out. I'm not fighting you, Kevin.

COOPER: You need to get out."

¶ 13 At this point, the defendant began reaching for his gun, and Cooper's voice became louder and clearer as he said, "Oh, you got your—" before he was interrupted by the first shot. When the defendant fired the first shot, he held the gun through the open window of the excavator, and his gun appeared level and aimed straight forward. He then fired four more shots in rapid succession while he remained in the excavator. The defendant appeared to set the gun down, began breathing heavily, started the excavator twice and quickly shut it off, and sat there for a few moments before grabbing his gun again. He then opened the door of the excavator, shot downward once, shut the door, opened the door again and said, "What, you ain't dead yet, motherfucker?" He shut the excavator door and told Cooper to "lay there and bleed out," that he had "fucked with the wrong person for the last fucking time," and that he hoped Cooper had "prayed to his maker." The defendant then fired a final shot through the window and started the excavator, shut it off, started it again, and backed up before shutting it off. The video ended moments afterward.

¶ 14 B. Defendant's Testimony

¶ 15 The defendant testified on his own behalf. He had known Cooper for approximately 35 years. They met as teenagers and became friends. Years later, the two had started a construction company together. The defendant testified that Cooper was very violent and was always fighting when they were kids. Cooper was into martial arts, lifting weights and was physically fit. He also wore body armor and carried a gun everywhere he went. The defendant spoke to Cooper daily, either on the phone or in person.

¶ 16 The trial court allowed the defendant to testify to 12 prior instances of violent acts allegedly committed by Cooper. The defendant had only known Cooper for about six to eight months when

he saw him "beat the hell" out of his brother with a fireplace poker. The defendant stopped the fight because he was friends with both. In 1994, the defendant saw Cooper stab Glen Strode, but he did not stop that confrontation because he was scared and Cooper already had his knife out. Around 2000, the defendant and Cooper got into an argument on a construction site. As the defendant walked away from Cooper, Cooper hit him in the back of the head with a two-by-four. The defendant's head gushed blood, and he required stitches.

¶ 17 In 2002, the two again had an argument at a job site. The defendant went home and fell asleep. Cooper came into the defendant's home and woke him up, telling him that he was angry because the defendant left the job site. Cooper hit the defendant in the eye, causing it to swell. In 2005, Cooper had the defendant accompany him while he collected money owed to him by Scott O'Loughlin. Cooper and O'Loughlin argued first, and Cooper "just started beating the hell out of [O'Loughlin]." Cooper punched O'Loughlin in the face and hit the side of his head, and when O'Loughlin fell down, Cooper started kicking him. In 2006, the defendant took time off work after breaking his foot. Cooper told him that if he took time off, Cooper was going to "beat [his] ass and give [him] a reason to take time off work."

¶ 18 In 2009, the defendant and Cooper were remodeling a restaurant when another coworker, Hershel Morris, "smarted off" to Cooper. Cooper attacked Morris and punched him in the face several times. The defendant intervened and was hit in the process. Morris suffered bruising, a swollen face, fat lip, bloody nose, and black eye. In 2010, Cooper and the defendant were working in a restaurant when a man entered wanting to use the bathroom. Cooper told the man that the restaurant was closed, but the man said he would use the bathroom anyway. Cooper ran over and hit the man from behind, knocking him to the ground. Cooper then got on top of the man and started punching him. The defendant intervened, and Cooper threw the man out into the parking

lot. That same year, the defendant fired Cooper, and the two did not talk for a few years. They reconciled a few years later at the funeral for the defendant's mother, and Cooper said he would try to do better and would stay on his medication.[1] The defendant explained that Cooper was like a brother to him, and he kept forgiving him.

¶ 19 In 2017, Cooper referred the defendant for a job, and the defendant promised to pay him a referral fee. Once the job was done, the defendant wrote a check for an amount he thought was fair. Cooper said it was not enough, and the two argued. Cooper threatened to come over and knock the defendant's teeth out. When Cooper arrived at the defendant's house, the two talked at first, but then Cooper "got belligerent." When the defendant turned to walk away, Cooper hit him from behind and then punched him in the face. The defendant fell to the ground, and Cooper kicked him. The defendant's teeth were fractured and cracked as a result, and he had to have his top teeth removed. The defendant's bill for the dental treatment was admitted into evidence.

¶ 20 In 2019, Cooper asked the defendant if he could borrow $5,000, and the defendant refused. Cooper pushed his hand in the defendant's face and gave him a fat lip. The defendant believed Cooper would have injured him further but for other people being present. In June 2020, Cooper and his girlfriend, Fifer, lived in the defendant's rental house. Cooper asked the defendant to come over because the lock had been damaged. The defendant saw Cooper arguing with Greg Talley and then saw Cooper reach into his pocket and grab his knife. While the defendant could not see Cooper stabbing Talley, he saw Cooper's arm moving. He then saw Cooper drive away. Cooper called the defendant afterwards and asked him to tell the police that Talley had attacked Cooper, but the defendant refused to lie to the police.

[1]It is not clear from the record what, if any, medication Cooper discontinued.

¶ 21 After Cooper stabbed Talley, the defendant went with Cooper to visit Dave Chech, Talley's boyfriend. Cooper was trying to negotiate restitution for Talley. Chech was seated in a chair, and Cooper started hitting him. The defendant intervened and believed that if he had not, Cooper would have killed Chech.

¶ 22 Leading up to July 2021, Cooper told the defendant he had stopped taking his medication. The defendant explained that Cooper was a different person without his medicine and that they would not be able to work together or be friends. Cooper's behavior progressively got worse, and the defendant could not have a conversation with him without thinking that Cooper was going to beat him up. Cooper also began carrying his .40-caliber Smith & Wesson everywhere he went. The defendant explained that Cooper carried two utility knives that were about "8 to 9 inches, maybe 12." Leading up to the shooting, the defendant was "very fearful" of Cooper. Although the defendant previously left his doors unlocked, he and his girlfriend, Michelle Guffey, began locking the doors at night. The defendant and Cooper had less contact because the defendant did not want to fight with him on job sites or in front of customers.

¶ 23 On July 4, 2021, one week before the shooting, the defendant and Cooper communicated by text and phone calls. Cooper threatened the defendant and told him he was going to burn down the defendant's farm. Cooper also told the defendant he would put his dead body in the house and burn the house down. This upset the defendant, and he told David Holt about the threat and stayed away from Cooper. The defendant did not believe calling the police was an option because he did not think a restraining order would stop Cooper.

¶ 24 On July 11, 2021, the day of the shooting, before Cooper came to the farm, he called and again told the defendant he was going to kill him and burn down his barn and house. After this conversation, the defendant retrieved his gun to protect himself. The defendant also received a

phone call from Victor Baker who told him that Cooper "was on the warpath." Baker said Cooper told him he was going to burn down the defendant's farm.

¶ 25 Later that day, the defendant went to his farm intending to mow. He put fuel in his small tractor, but the grass was still too wet, so he left. When he returned, the tractor was gone so he decided to use his excavator to pull stumps. The defendant explained that to get into the cab of the excavator, a person had to climb up the tracks on the excavator and then onto another couple runs.

¶ 26 The defendant believed that Cooper had taken the tractor. In one of their phone calls on July 11, the defendant told Cooper he did not want Cooper to borrow his equipment, that he did not want to work with him anymore, and that he did not want to be around Cooper. The defendant hung up and did not answer his phone after that. The defendant testified that by July 11, he was "tired of getting [his] ass beat," and he was scared. He believed Cooper would fulfill his promises because Cooper had never threatened the defendant like he had those last couple weeks. Whenever the defendant saw Cooper, he had a "crazed look" in his eyes like "a madman," and Cooper was going through a hard time over his breakup with Fifer. Cooper texted the defendant saying he was going to knock out the rest of his teeth. He also asked why the defendant was still ignoring his threats when he knew Cooper was violent. Another text warned that Cooper was "going to get" the defendant.

¶ 27 While the defendant was in his excavator, Cooper arrived at the farm. Cooper pulled in "kind of fast." The defendant wanted to let someone know that Cooper was there, so he texted his girlfriend. Earlier in the day, when Cooper threatened to knock out the rest of his teeth, the defendant told him that he would have him arrested if he touched him again. The defendant took out his cell phone to record what happened to "have documentation of [Cooper] beating [his] ass" so that Cooper "couldn't get out of it." Although the defendant had gotten his gun to protect

himself, he did not intend to shoot Cooper and only intended to scare him and let him know that he "wasn't going to mess around with him."

¶ 28 The defendant described the events that occurred immediately prior to the shooting. The defendant testified that he grabbed his gun because Cooper had climbed up onto the tracks and was coming into the cab. There was no other door for the defendant to exit the excavator, and he had nowhere to go. The defendant told Cooper he did not want to fight him, but Cooper kept coming. When Cooper was on the tracks, the defendant thought Cooper was going to pull him out by his feet and kill him. The defendant could see the knives on Cooper's hip, and he thought Cooper would stab him or shoot him. When the defendant pulled the gun out to scare Cooper, Cooper reached toward his side where he usually kept his gun, and the defendant did not want to be shot. When Cooper reached down to his side, the defendant thought he was grabbing his gun, so the defendant shot him. The defendant explained that he shot several times because Cooper "kept coming at [him]," so the defendant "just kept shooting." The first shot was aimed at Cooper, and the shots after that, where the defendant was aiming down, Cooper had gotten down to the tracks and was reaching around to get what the defendant thought was a gun. The defendant had been experiencing complications with his diabetes for about a week prior to the shooting and was shaky and not very coherent when Cooper arrived. As for the defendant's statements during the shooting, he said he did not have a clear memory and felt like he went into shock. As for the last shot on the video, he said he did not shoot Cooper; he shot at the ground to get the bullet out of the gun.

¶ 29 Immediately after the shooting, the defendant called his girlfriend and David Holt and asked them to come to his farm. His girlfriend was the first to arrive. She asked him what had happened, but his face was white, and he was sick and could not make coherent statements.

¶ 30 Willie Singleton testified that he was already headed to the farm that day and arrived after the defendant's girlfriend. He saw that the defendant was "very shaken, pale, stumbling." The defendant had a pistol in his hand, and he "was real shaky" and looked as though he was about to pass out. The defendant said something to the effect of, "I shot him." Although Singleton could not remember the exact wording the defendant used as to why he shot Cooper, it was something akin to, "I wasn't gonna let him whip me." The defendant was vomiting. Singleton explained that the defendant and Cooper had been friends their entire life. Singleton did not care for Cooper except for business dealings.

¶ 31 Holt was the next to arrive after the shooting. When the defendant called Holt after the shooting, Holt could tell that he was "terrified, like something was urgent." When Holt arrived, the defendant appeared "traumatized" and "real upset," and he told Holt he had shot Cooper. Singleton called the police. Holt knew Cooper because he had done some work for Holt. Initially, Holt testified that the defendant said Cooper was "pulling him off and he was scared." However, Holt then clarified that when the defendant told Holt about Cooper trying to pull him off the excavator, he said "something like [Cooper] was back there trying to get up in the machine, like he was going to beat—beat him up a little bit." The defendant did not say that Cooper actually had a hold on the defendant's leg. On redirect, the State asked if the defendant claimed that Cooper had pulled his leg while he was in the backhoe. Holt explained that it had been more than a year and that it was "hard to remember exactly, but he acted like he approached a piece of equipment and was trying to get him off a piece of equipment."

¶ 32 When the police arrived, the defendant was having diabetic complications, and EMTs determined that his blood sugar was very high and that he needed to go to the hospital. When a deputy arrived at the hospital, the defendant asked him if Cooper was dead, and he confirmed he

was. According to the deputy, the defendant stated, "I thought I was dreaming." The defendant was told he was not being charged at that time but that he was being detained for investigatory purposes. The defendant became visibly upset and cried and trembled. The defendant told the deputy, "I thought he was going to kill me."

¶ 33 A crime scene investigator recovered six shell casings from the defendant's farm: five around the victim's body and one additional casing in the excavator. Photographs taken at the scene revealed two utility knives in the victim's right front pocket but visibly clipped to his pocket. Investigators did not locate a firearm on or around the victim.

¶ 34 Dr. Scott Denton performed the autopsy on Cooper. Although Cooper had five gunshot wounds in total, the cause of death was a gunshot wound to his mouth. Dr. Denton did not know the sequence of the gunshot wounds, although he determined they occurred within a short time frame. He did not observe signs of close range firing when examining Cooper's body. Dr. Denton used yellow trajectory rods to indicate how the bullets traversed Cooper's body, explaining that the gunshot wound to Cooper's mouth entered at his lip and went mainly front to back but also slightly upwards and slightly towards the right before lodging in the back of his neck. Cooper had three other gunshot wounds that were ascending, as well as one graze wound. As for the upward trajectory of Cooper's wounds, Dr. Denton could not determine the position of the gun or Cooper's body as it received each wound. It simply meant that the bullet exited at a higher point than it entered and that Cooper could have been standing up, bent over, laying down, or could have had his head turned. Dr. Denton agreed that the wounds could be consistent with Cooper lying on his back on the ground while shot as well as the gun simply being lower than Cooper's body. The toxicology report showed that Cooper had in his system 16 nanograms per milliliter of Delta 9 THC, the active substance in marijuana, which was three times the legal limit allowed for driving.

¶ 35 C. *Lynch* Evidence

¶ 36 The defense presented the following *Lynch* evidence. Glen Strode testified that in 1994 he was at a gravel pit when a big fight broke out. Cooper and two friends dragged Strode into the bushes, and Cooper stabbed Strode in the back, paralyzing him from the waist down. It took Strode more than 10 years to learn to walk again. He could walk by the time of the defendant's trial, but he still suffered paralysis on his right side. After Cooper stabbed him, Strode obtained a $68,000 judgment against Cooper. Approximately four or five years prior to the defendant's trial, Strode saw Cooper, who put a gun to his face and told him to stop telling people that Cooper had stabbed him or that he would kill him. Cooper also told Strode not to try and collect the judgment.

¶ 37 Herman Woodly testified that he did not know the defendant, but he knew Cooper through martial arts. He and Cooper were both members of a motorcycle club so Woodly had the opportunity to observe Cooper often. About five years before the defendant's trial, after a fish fry fundraiser had concluded, Woodly, Cooper, and some friends were standing around talking. After the others had left, all of a sudden, Cooper punched Woodly. Cooper was "very irate" when Woodly called the police. Woodly waited on the police to arrive, and there was a court proceeding at a later date. Woodly did not have any further contact with Cooper.

¶ 38 David Holt testified that he knew Cooper's reputation for violence was not good. Holt and Cooper had confrontations a few times when Cooper worked for Holt. Holt described Cooper as violent, very angry, and he explained that Cooper would fight "at the drop of a hat, and most people were scared of him." Once, when the defendant and Cooper worked at Holt's place, Cooper got really angry and "started saying stuff" to Holt. Holt told the defendant not to bring Cooper back to his property again. Willie Singleton also knew Cooper and had a reputation as being "extremely violent" and someone that Singleton "needed to stay away from."

¶ 39 Stacy Fifer, Cooper's ex-girlfriend, also testified for the defense. Fifer had lived with Cooper but moved out in 2020 or 2021. When she went to the home with her son and his girlfriend, Alexis, to remove her possessions, Cooper did not want her to move out. He was mad that she was leaving and told Fifer that he would "hunt [her] down" and kill her as well as anyone that she dated. Fifer had also called her friends, Greg Talley and Dave Chech, to help her move. Talley and Chech were in their car when Cooper arrived. Fifer saw Cooper approach Talley's car and reach through the front passenger window where Talley sat. Fifer thought that Cooper was punching him, but he was actually stabbing Talley. Cooper then opened the back door and started stabbing Talley again. Talley's vehicle sped off toward the hospital, and Fifer drove off in another vehicle. As Cooper followed Fifer's vehicle, speeding a couple feet from her bumper and trying to get her to stop, Fifer called 911.

¶ 40 Alexis Kemper, Fifer's daughter-in-law, did not know the defendant. However, she testified that she witnessed Cooper stab Talley. Kemper said that Talley and Cooper exchanged words, and their voices were raised. Cooper reached through the window and then opened the door of the car Talley was in and grabbed "an orange thing out of his pocket" that Kemper believed to be a utility knife. Kemper explained that Cooper started swinging and repeatedly slashed Talley. Kemper later saw Talley at the hospital, and he had some lacerations and needed quite a few stitches. Kemper explained that Cooper had a reputation for being very violent. She stated Cooper had a track record "a mile long" and that he was "a very scary man."

¶ 41 D. Jury Verdict and Sentencing

¶ 42 The jury was provided instructions and verdict forms for self-defense, second degree murder, first degree murder, and was asked to determine whether the State had proven that the defendant personally discharged a firearm that proximately caused Cooper's death. The jury found

the defendant guilty of first degree murder and also found the State had proven the firearm enhancement. The trial court denied the defendant's posttrial motion and sentenced him to 25 years for murder plus the 25-year firearm enhancement, for a total of 50 years. The court denied the defendant's motion to reconsider the sentence, and this appeal followed.

¶ 43 II. Analysis

¶ 44 A. Sufficiency of the Evidence

¶ 45 We first turn to the defendant's contention that the State failed to prove him guilty beyond a reasonable doubt of first degree murder. First, the defendant argues that the State failed to prove the killing was not justified under self-defense. Second, if not justified, he argues that his conviction should be reduced to second degree murder where he proved the mitigating circumstance of his unreasonable belief in self-defense.

¶ 46 Due process protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. In determining whether there is sufficient evidence to convict, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 278-79 (2004).

¶ 47 It is not the function of a reviewing court to retry the defendant or substitute its judgment for that of the finder of fact. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 26. A reviewing court gives the State the benefit of all reasonable inferences. *People v. Wheeler*, 226 Ill. 2d 92, 116 (2007). It is the duty of the trier of fact to assess the credibility of the witnesses, assign the appropriate weight to testimony, and resolve discrepancies in the evidence. *People v. Evans*, 209

Ill. 2d 194, 211 (2004). "Whether defendant acted in self-defense and, if not, whether the facts of the incident constitute first or second degree murder are questions to be determined by the trier of fact and this determination will not be disturbed on review unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt as to the defendant's guilt." *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 87; *People v. Sanchez,* 95 Ill. App. 3d 1006, 1011 (1981).

¶ 48 To prove first degree murder as charged, the State must prove that the defendant either intends to kill or do great bodily harm to that individual or knows that such acts will cause death to that individual. 720 ILCS 5/9-1(a)(1) (West 2022). Defendant does not dispute that his conduct satisfied the elements of the offense, rather he claims that his actions constituted self-defense or, alternatively, second degree murder.

¶ 49 B. Affirmative Defense of Self-Defense

¶ 50 The defendant asks this court to reverse his conviction because the State failed to prove beyond a reasonable doubt that he did not act in self-defense when he shot Cooper. In Illinois, section 7-1 of the Criminal Code of 2012 defines self-defense as:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he 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 or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2022).

¶ 51 The affirmative defense of self-defense is recognized as a legal justification to first degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). For a defendant to establish that his use of

force was justified as self-defense, he must establish evidence of each of the following elements: (1) unlawful force was threatened against the defendant, (2) the defendant was not the aggressor, (3) the danger of harm was imminent, (4) the defendant actually and subjectively believed a danger existed that required the use of force, and (5) the defendant's beliefs were objectively reasonable. *Id.* at 127-28. Once the defendant raises the issue of self-defense, the State must disprove at least one element of the defense beyond a reasonable doubt. *Id.* at 128. This is because, as previously noted, lack of legal justification is one of the elements the State must prove in order to convict a defendant of murder. *Id.* A determination of whether a killing is justified under the law of self-defense presents a question of fact to be determined by the trier of fact, and "the fact finder is not required to accept as true the defendant's evidence in support of that defense." (Internal quotation marks omitted.) *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 27. Instead, 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 the other witnesses. *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). Additionally, a trier of fact may draw reasonable inferences that flow from the evidence before it. *People v. Eubanks*, 2019 IL 123525, ¶ 95. A reviewing court will not substitute its judgment for that of the jury and will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Ware*, 2019 IL App (1st) 160989, ¶ 45.

¶ 52 The defendant maintains that he was legally justified in killing Cooper because he knew that Cooper was an extremely violent, dangerous man who was easily angered, with a history of stabbing or beating others into submission. Throughout the years, he had seen Cooper batter numerous people, often attacking them without warning. In the days leading up to the shooting, Cooper threatened the defendant multiple times that he was going to burn down the defendant's

farm and put the defendant's dead body in the house and burn the house down as well. Because of these threats, the defendant brought his gun to the farm to protect himself.

¶ 53 The defendant also maintains that his belief in self-defense was objectively reasonable where he believed that Cooper was going to stab or shoot him. Cooper came to the defendant's farm looking for a fight, armed with two knives, demanding that the defendant get out of the excavator. The defendant reasons that if Cooper simply wished to have a conversation with him, he could have remained seated in the excavator. However, when the defendant refused to get out, Cooper climbed onto the excavator, and the defendant had no escape. Shortly after Cooper arrived at the farm, the video reveals the defendant appearing to reach into his right pocket to retrieve his gun. Cooper's voice can be heard saying, "Oh, you got your—" before he is interrupted by the defendant firing the first shot. The defendant contends that the angle of the gunshot wound to Cooper's mouth—front to back and slightly upwards and slightly towards the right—corroborates his testimony that Cooper was attempting to get into the excavator, showing that Cooper was threatening unlawful force.

¶ 54 Viewing the evidence in the light most favorable to the prosecution, as we must, we find that a rational trier of fact could have found that the State's evidence negated at least one of the elements of the defendant's claim of self-defense—that is, that the defendant was not the aggressor. Even if the jury believed that Cooper was the initial aggressor, the jury could have found that after Cooper was struck by the first bullet, the defendant did not reasonably continue to fear death or great bodily harm. *People v. Lee*, 243 Ill. App. 3d 1038, 1043 (1993) ("The use of deadly force is not justified where the victim, even though initially the aggressor, has been disarmed or disabled."); *People v. Murillo*, 225 Ill. App. 3d 286, 293 (1992) (" '[T]he use of deadly force generally cannot be justified once the aggressor has been disabled or disarmed.' " (quoting *People*

v. Chatman, 102 Ill. App. 3d 692 (1981))). " 'If one responds with such excessive force that one is no longer acting in self-defense but in retaliation, such excessive use of force renders one the protagonist; a non-aggressor has a duty not to become the aggressor.' " *Murillo*, 225 Ill. App. 3d at 293 (quoting *People v. Nunn*, 184 Ill. App. 3d 253, 269 (1989)).

¶ 55 Here, there was ample evidence from which the jury could have concluded that the defendant was responding with excessive force. The autopsy revealed that Cooper had been shot five times. Before firing the final shot, the defendant looked out of the excavator and stated, "What, you ain't dead yet, motherfucker?" He told Cooper to "lay there and bleed out," that he had "fucked with the wrong person for the last fucking time," and that he hoped Cooper had "prayed to his maker." Thus, we find the jury's determination that the defendant's killing of Cooper was not justified as self-defense was not so unreasonable, improbable, or unsatisfactory as to cause a reasonable doubt of his guilt. Once the State has proven each of the elements of first degree murder, and has successfully negated the defendant's claim of self-defense, then the jury may proceed to a determination of second degree murder. *Jeffries*, 164 Ill. 2d at 128-29.

¶ 56 C. Second Degree Murder

¶ 57 We next turn to the defendant's assertion that his conviction should be reduced to second degree murder based on his unreasonable belief in self-defense. Conduct that would otherwise constitute first degree murder instead constitutes second degree murder when either of the two statutory mitigating circumstances are present. A defendant commits second degree murder when he commits first degree murder and one of the following mitigating factors exists at the time of the killing: (1) the defendant acted "under a sudden and intense passion resulting from serious provocation" or (2) the defendant acted under an unreasonable belief in the need for self-defense. 720 ILCS 5/9-2(a) (West 2022). This second form of second degree murder, known as imperfect

self-defense, is appropriate where " 'there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable.' " *People v. Hampton*, 2021 IL App (5th) 170341, ¶ 99 (quoting *Jeffries*, 164 Ill. 2d at 113). It is the defendant's burden to prove a mitigating factor by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2022).

¶ 58 As in the present case, the issues of self-defense and second degree murder based on imperfect self-defense often are raised together. It is only after the State has proven each of the elements of first degree murder, and successfully negated the defendant's claim of self-defense, that jurors may even proceed to consider whether the defendant has demonstrated that he should be convicted of second degree murder based on the mitigating factor of imperfect self-defense. See *Jeffries*, 164 Ill. 2d at 128-29. Once the State proves its case beyond a reasonable doubt, it is the defendant's burden to prove by a preponderance of the evidence that a mitigating factor was present. 720 ILCS 5/9-2(c) (West 2022). When a defendant asserts that his first degree murder conviction should be reduced to second degree murder, a reviewing court considers whether, after 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, 357-58 (1996)

¶ 59 Here, the defendant argues that he proved by a preponderance of the evidence that a mitigating factor of imperfect self-defense was presented to the jury that he subjectively believed he was acting in self-defense even if that belief was objectively unreasonable. He maintains that no rational juror could have concluded that he did not subjectively fear great bodily harm when he saw Cooper climbing up onto the excavator while armed with two knives, given his history of violence.

¶ 60 While the jury heard evidence that Cooper was the aggressor, they also heard additional evidence from which they reasonably could have concluded that the defendant shot Cooper out of anger and revenge. See *People v. Bennett*, 2017 IL App (1st) 151619, ¶ 44 (finding that defendant had not proven unreasonable belief in self-defense when the evidence showed trier of fact reasonably could have concluded defendant was motivated by anger and revenge). The defendant testified to the abuse Cooper had inflicted upon him and others for many years and that he was "tired of getting [his] ass beat" by Cooper. He told Singleton that he shot Cooper because he was not going to let Cooper "whip" him. The defendant's own words and his actions following the first five shots belie his defense of an unreasonable belief in self-defense when he said, "What, you ain't dead yet, motherfucker?" and shot downward once more. He then told Cooper to "lay there and bleed out," that he had "fucked with the wrong person for the last fucking time," and that he hoped Cooper had "prayed to his maker." The defendant then fired a final shot through the window. Although the defendant testified that he continued to shoot Cooper because Cooper kept coming towards him, the jury, as finder of fact, was in a superior position to judge the credibility of the witnesses and to resolve conflicts in their testimony, and we will not substitute our judgment on such matters. *People v. Fretch*, 2017 IL App (2d) 151107, ¶ 95. As such, the defendant's claim of imperfect self-defense fails as we find a rational jury could have found the defendant did not meet his burden to prove by a preponderance of evidence that the offense was mitigated by an actual but unreasonable belief in self-defense.

¶ 61 D. *Lynch* Evidence

¶ 62 The defendant next argues that the trial court abused its discretion in restricting certain *Lynch* evidence from being presented. Specifically, he contends that the trial court abused its

discretion when it prevented him from presenting evidence related to arson, attempted arson, and criminal damage charges which were pending against Cooper at the time of his death.

¶ 63 When a defendant raises a theory of self-defense, he may offer substantive evidence of the victim's aggressive or violent character to support his contention that he reasonably believed the use of force was justified. *Lynch*, 104 Ill. 2d at 199-200. A defendant may offer evidence of the victim's violent character in two circumstances: (1) to demonstrate that the defendant's knowledge of the victim's violent tendencies affected the defendant's perceptions of and reactions to the victim's behavior, and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened. *Id.* at 201. Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Reid*, 179 Ill. 2d 297, 313 (1997). An abuse of discretion will be found only where a trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 64 The defendant insists that the trial court abused its discretion when it ruled that the arson charges were inadmissible since they had been dismissed due to Cooper's death and not due to lack of evidence. In support of his argument, the defendant relies on *People v. Simon*, 2011 IL App (1st) 091197, ¶ 72, for the proposition that a prior altercation or arrest, without a conviction, may be admissible as proof of the victim's violent behavior *when it is supported by firsthand testimony*. Therein lies the rub. The record reveals that when defense counsel argued for the second time that the arson charges should be admitted as *Lynch* evidence, the trial court found that the evidence was not supported by firsthand testimony. Moreover, according to the defendant's proffer, if allowed to testify, Fifer would have testified that she *believed* she saw Cooper set her car on fire and Gallegos would have testified that he *thought* he saw Cooper set his car on fire.

¶ 65 The defendant asserts that the dismissed arson charges were critical evidence of Cooper's violent history and that its exclusion by the trial court prevented him from thoroughly presenting his defense. We disagree. We do not find that the trial court abused its discretion in excluding testimony about the pending arson charges where it allowed Fifer and Gallegos to testify to what they personally knew and experienced regarding Cooper's violent history. Furthermore, the jury was allowed to hear a substantial amount of evidence from other witnesses regarding Cooper's prior convictions, violent conduct, and reputation for violence.

¶ 66 The defendant next claims that the trial court abused its discretion when it arbitrarily limited a maximum of three witnesses to testify regarding Cooper's reputation and three to testify regarding specific acts of violence by Cooper. The defendant fails to cite legal authority in support of this claim, nor does he make an argument, other than to say that the trial court's ruling lacked reasoning and demonstrated a fundamental misunderstanding of the applicable law. Therefore, any assertion of error addressed to that claim has been forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020).

¶ 67 The defendant next argues that defense counsel was ineffective for failing to strenuously pursue admission of evidence of Cooper's pending arson charges. A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29. To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was (1) deficient and (2) prejudicial." *People v. Westfall*, 2018 IL App (4th) 150997, ¶ 61. To establish counsel's deficient performance, a defendant must show that "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14 (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, a defendant must show that a reasonable

probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20 (citing *Strickland*, 466 U.S. at 694). "Failure to satisfy either prong negates a claim of ineffective assistance of counsel." *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 88. Whether counsel was ineffective is a mixed question of fact and law. *People v. Peterson*, 2015 IL App (3d) 130157, ¶ 222. "[T]he ultimate question of whether counsel's actions support a claim of ineffective assistance is a question of law that is subject to *de novo* review on appeal." *Id.*

¶ 68 While the defendant argues that defense counsel was ineffective for failing to "strenuously object" to the trial court's rulings, he fails to cite legal authority to support his argument. Moreover, the record reveals that defense counsel repeatedly raised the admissibility of the arson charges as purported *Lynch* evidence. Defense counsel initially raised the issue by filing a written motion, including a proffer of the proposed testimony; argued in favor of its inclusion during the hearing on the motion; and raised the issue again prior to the presentation of the defendant's case in chief and for a fourth time prior to the defendant's testimony. Accordingly, we find that defense counsel's performance did not fall below an objective level of competence.

¶ 69 E. Jury Instructions

¶ 70 Finally, the defendant maintains he was denied his constitutional right to effective assistance of counsel where defense counsel failed to request an Illinois Pattern Instruction, Criminal, No. 3.12X (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.12X) to inform the jury that evidence admitted under *Lynch* could be considered in evaluating whether the State disproved his self-defense claim beyond a reasonable doubt. Specifically, the defendant posits that the jury received an abundance of *Lynch* evidence which, if properly considered, likely would have

led them to find that his conduct was justified as self-defense or mitigated to second degree murder based on imperfect self-defense.

¶ 71 "A defendant is entitled to a jury instruction where there is some evidence to support it." *People v. Sloan*, 2024 IL 129676, ¶ 14. The purpose of jury instructions is to educate jurors with the appropriate legal principles allowing them to reach a conclusion based on the applicable law and the evidence presented. *Id.* Defense counsel's failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel, if the instruction was so critical to the defense that its omission denied the defendant his right to a fair trial. *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008). As jury instructions should not be viewed in isolation, but rather be considered as a whole, the omission of a particular instruction must be judged in light of the other instructions given. *Id.* (citing *People v. Hester*, 131 Ill. 2d 91, 98 (1989)). Where the adequacy of jury instructions is challenged, a reviewing court must consider all of the instructions as a unit to determine whether they fully and fairly covered the law. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 110.

¶ 72 IPI Criminal No. 3.12X provides:

> "In this case the State must prove beyond a reasonable doubt the proposition that defendant was not justified in using the force which he used. You have [(heard testimony) (received evidence)] of ____'s [(prior conviction of a violent crime) (prior acts of violence) (reputation for violence)]. It is for you to determine whether ___ [(was convicted) (committed those acts) (had this reputation)]. If you determine that ____ [(was convicted) (committed those acts) (had this reputation)] you may consider that evidence in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in using the force which he used."

¶ 73 The defendant argues this jury instruction was critical to instruct the jury how to use the *Lynch* evidence. Had jurors been properly instructed, he argues, they would have understood that they could consider Cooper's multiple convictions; that Cooper had stabbed Strode; that Cooper had stabbed Talley with a utility knife after a brief argument; that Cooper had threatened to kill Fifer; that Cooper had pointed a gun at Strode and threatened to kill him; that Cooper had battered Woodly; Holt's testimony that Cooper was known for being violent, angry, willing to fight at the drop of a hat, and that most people were scared of him; Singleton's testimony that Cooper had a reputation as being someone that was extremely violent and someone to stay away from; that Cooper had battered multiple people in the defendant's presence; and that Cooper had repeatedly battered the defendant throughout the years and had caused extensive damage to the defendant's teeth. The defendant contends that without the jury instruction explaining how to consider the *Lynch* evidence, the jury lacked "the necessary tools to analyze the evidence fully and to reach a verdict based on those facts" (*People v. Sims*, 374 Ill. App. 3d 427, 435 (2007)).

¶ 74 The State counters that in *Sims*, the reviewing court was concerned about the trial court's failure to instruct the jury regarding the affirmative defense of self-defense. *Id.* Here, the issue raised by the defendant is not the total failure to provide instruction on an affirmative defense, but the lack of an instruction as to how the jury should consider the *Lynch* evidence.

¶ 75 Considered as a unit, we find the jury instructions fully and fairly educated the jury as to the appropriate legal principles allowing them to reach a conclusion based on the applicable law and the evidence presented. *Sloan*, 2024 IL 129676, ¶ 14. The jury received the proper instructions regarding the affirmative defense of self-defense, as well as to the lesser-mitigated offense of second degree murder, and rejected both. These instructions allowed the jury to properly consider the evidence of Cooper's prior convictions, violent conduct, and reputation for violence. Thus, we

find that the omission of IPI Criminal No. 3.12X was not so critical to the defendant that he was denied a fair trial. As previously noted, to establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20. We find the defendant failed to establish prejudice.

¶ 76 III. Conclusion

¶ 77 Based on the foregoing, we affirm the defendant's conviction for first degree murder.

¶ 78 Affirmed.