

No. 1-11-0018

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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|----------------------------------|---|--------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | ) |                          |
|                                  | ) |                          |
|                                  | ) | Appeal from the          |
|                                  | ) | Circuit Court of         |
|                                  | ) | Cook County              |
| Plaintiff-Appellee,              | ) |                          |
|                                  | ) | No. 08 CR 959001         |
| v.                               | ) |                          |
|                                  | ) |                          |
| FRANCE WHITTEN,                  | ) | The Honorable            |
|                                  | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant.             | ) | Judge Presiding.         |

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JUSTICE BILL TAYLOR delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith concurred in the judgment.  
Justice Epstein dissented.

**ORDER**

¶ 1 *HELD:* The evidence was sufficient to sustain defendant's conviction of first-degree murder and trial counsel's decisions were strategic and did not support a claim of ineffective assistance of counsel.

¶ 2 Defendant France Whitten was convicted of first degree murder, including personal discharge of a firearm, by a jury on June 25, 2009. Subsequently, defendant filed a motion for a new trial which was denied, and on October 28, 2010, defendant was sentenced to a term of 55 years in the Illinois Department of Corrections. Defendant filed a motion for reconsideration of his sentence, which was also denied. On appeal, defendant maintains that he was not proven guilty beyond a reasonable doubt and that he was deprived of effectiveness of trial counsel, because counsel failed to interview witnesses, investigate and introduce evidence to corroborate defendant's claim of self-defense.

¶ 3 **BACKGROUND**

¶ 4 On April 17, 2008, defendant was charged with first degree murder, including personal discharge of a firearm. On June 25, 2009, a jury convicted defendant of said charges. He was sentenced to 55 years in the Illinois Department of Corrections.

¶ 5 The evidence at trial established that on March 13, 2008, the victim, 20 year-old Carlos Merrills was outside his home at 4825 S. Drexel Boulevard, celebrating his birthday with 15 to 20 friends. Defendant pulled up in a van at approximately 2:45pm in front of 4825 S. Drexel to drop off two passengers. After defendant let the passengers out, Carlos, who was talking on his cell phone approached the car. Defendant then stuck a gun out of the driver's side window and shot Carlos twice. After he fell, defendant shot him three more times. Defendant then drove off.

¶ 6 At trial, the State presented Chicago police officer Arends of the department's Information and Strategic Services Unit, who testified that he was working at 4758 S. Drexel Boulevard on the afternoon in question. The unit handled the maintenance of all the police cameras located on street corners throughout the city. He explained that these are the cameras with blue lights flashing and are called pods. Officer Arends was in a bucket truck, and as he was

lowering the bucket around 2:50 p.m. he heard four to five gunshots. He immediately ran in the direction of the gunshots. Officer Arends observed a male down and secured the scene. Officer Arends testified that only 10 to 20 seconds elapsed between the time he heard the shots fired and when he saw the victim's body. Officer Arends went over the security videotape from 4825 S. Drexel. The tape showed him coming into view and immediately searching a person standing by the victim's body. He was also shown on the video searching several other males for weapons. No weapons were found.

¶ 7 The State's next witness, Detective Roger Murphy, an 18 year veteran with the Chicago police department, testified that on March 18, 2008, he and his partner were assigned to investigate the homicide of Carlos Merrills. They spoke with individuals at the scene including friends of the victim. They also spoke with Officer Arends and conducted a canvass of the area, checking to see if any residents saw the shooting.

¶ 8 Detective Murphy and his partner also obtained two videotapes, the security tape from 4825 S. Drexel and the pod videos. The security tape showed the victim getting shot several times, with the shots coming from a light colored van which then fled the scene. The pod videos captured a light colored van driving down the boulevard. The detectives learned that two friends of the victim, Charles Harris and Elijah Henry, were witnesses to the shooting, and both identified defendant as the shooter of the victim.

¶ 9 Detective Murphy further averred that he ran a computer check of nicknames Franco, Smoke and Bobo. He further testified that he showed photo arrays to Henry who identified James Griffin as Smoke and Joe Gaither as Bobo. Detective Murphy did not learn the identity of Franco until March 21. He then showed a photo array containing Whitten's picture to Henry, who identified Franco as the defendant and as the person who shot the victim. Detective Murphy then

obtained a first-degree murder warrant for the arrest of defendant. Defendant was arrested on April 17, 2008.

¶ 10 Nineteen year-old Harris testified that he lived at 4808 S. Drexel and that he was a friend of the victim. Harris testified that while they were celebrating the victim's birthday, defendant pulled up in a van in front of 4808 S. Drexel and an individual named "Smoke," whose given name was Griffin, got out with a gun. Griffin and the victim had words and then Griffin left in the van. Harris testified that the argument was about Griffin selling drugs on the victim's block.

¶ 11 The defendant then drove to 4825 S. Drexel and two passengers got out. Harris testified that the victim was talking on his cell phone and started to walk across the boulevard to where the van was parked. When the victim got within 40 feet of the van, defendant rolled down the driver's side window and shot the victim. Harris also testified that the victim had only his cell phone and some money in his hands which were raised in the air above his head when he was shot. After being shot the victim fell to the ground and the defendant shot him three more times. Harris testified that he was on probation for possession of a controlled substance at the time of trial.

¶ 12 Henry testified that he and the victim had been friends since childhood. He lived at 4825 S. Drexel. He and the victim were celebrating the victim's birthday on March 13, 2008. Henry testified that defendant pulled up in a tan van with Griffin and Gaither. The van than took off and returned. When defendant returned, the victim put his hands in the air and defendant shot the victim. Henry testified that he saw defendant's left hand was on the steering wheel and his right hand was out the window shooting. He saw defendant leave in the van after the shooting. He ran to the victim to try and give him aid and yelled for someone to call for an ambulance.

¶ 13 Henry also testified using the videotape and showed the jury where he ran to help the victim. He also identified defendant as the driver of the van, and he also identified the victim. The video showed Henry running to the aid of the victim, while the van pulled away. Henry had prior felony convictions for possession of a controlled substance and was also under a sentence for robbery with the Cook County boot camp program.

¶ 14 Dr. Tara Jones performed the autopsy on the victim who suffered gunshot wounds of entrance to: the right upper chest, the left upper buttock, penis, upper groin and left thigh. Toxicology results on the victim showed he had a blood alcohol level of .14 and was intoxicated.

¶ 15 Forensic investigator William Moore was assigned to process the homicide. He and his partner photographed and videotaped the scene and recovered a fired bullet. Tracy Konior, a forensic scientist specializing in the area of firearms identification, testified that in her opinion, all four bullets recovered in this case were fired from the same weapon.

¶ 16 After the State rested, defendant testified on his own behalf. He stated that he was convicted of possession of a stolen motor vehicle in June 1999 and served eighteen months in the penitentiary. Defendant testified that on March 13, 2008, he drove his champagne colored van to 4825 S. Drexel to pick up Griffin and Gaither. Once Griffin and Gaither got in the van, Griffin asked defendant to drive to 4808 S. Drexel. Once there, Griffin and the victim had words. Defendant then got out of the van and asked what the problem was. Defendant testified that the victim responded, "This mother fucker think he going to come over here and keep serving the mother fuckers." Then the victim lifted up his shirt, showing a butt of a gun and said "Get the fuck from over here before I do that to you." The defendant and Griffin got back in the van and defendant then drove to 4825 S. Drexel where he dropped off Griffin and Gaither. Defendant

proceeded to leave, drove around the block and then called Griffin to come back down because he had decided to take Griffin and Gaither back to Gaither's house.

¶ 17 While defendant was waiting for Griffin and Gaither, he was watching a DVD and when he turned to change the DVD he saw the victim approaching from about 20 feet away saying, "Didn't I tell you to get the fuck out of here." Two other men were standing behind the victim. Defendant testified that the victim had his hand under his shirt so defendant became afraid and pulled his gun out from the console and said "That's not for us." One of the two men behind the victim said "Fuck that. Fire this motherfucker up." The victim then pulled his gun from under his shirt. Defendant then shot the victim. He testified he could not remember how many times he shot the victim. As he pulled away, defendant testified he heard gunshots.

¶ 18 Defendant then testified that the victim, Henry and Harris were all members of the Mickey Cobra street gang. Defendant stated he had seen the victim in the area with a gun on prior occasions. Defendant also testified that he had known the victim for about five years and had never had any problems with the victim.

¶ 19 On cross-examination, defendant admitted that Griffin and Gaither were members of the Gangster Disciple street gang and that both were drug dealers.

¶ 20 On rebuttal, the State introduced a certified copy of defendant's conviction for possession of a stolen motor vehicle.

¶ 21 Following the above testimony, the defendant was found guilty of first degree murder and personal discharge of a firearm.

¶ 22 Prior to sentencing, private counsel for defendant filed motions for a new trial, asserting that defendant's trial counsel was ineffective for: (1) failing to address the victim's violent history; (2) failing to call Gaither and Griffin as witnesses; (3) failing to elicit the "OMEC" report

of a call of a man with a gun in the area after the shooting; (4) failing to argue that a discharged round from an automatic gun was recovered in the street near the victim; failing to impeach Henry with a letter; (5) failing to show defendant the video prior to trial and (6) failing to disclose to defendant the evidence against him.

¶ 23 Pursuant to *People v. Krankel*, 105 Ill. App. 3d 988 (1982), the trial court ordered a *Krankel* hearing to determine the merit of defendant's allegations. At that hearing, trial counsel testified he met with defendant prior to trial on five occasions to discuss the facts of the case. Trial counsel testified that in preparation for trial, defendant maintained that he was not present at the shooting and that he had lent his van to someone else. Just prior to trial, defendant admitted he was involved in the shooting. Trial counsel also stated that defendant had said Griffin and Gaither were not present when the shooting took place.

¶ 24 Trial counsel averred he did not interview these men in preparation for trial, because they both had criminal records, were drug dealers, and were not present at the shooting. He felt that their criminal records compromised their credibility. Trial counsel stated since self-defense was the only defense, his trial strategy was to establish that drug dealers carry guns and that since the victim was found without a gun and had been surrounded by his friends, left open the possibility that his gun might have been removed from his body.

¶ 25 Trial counsel testified that he could not remember if he was provided with the victim's criminal background prior to trial and that he did not know that the victim had a prior conviction for aggravated battery of a police officer. He stated that evidence of the victim's violent character would possibly be germane to a self-defense case; however, he did not attempt to introduce this conviction into evidence. He stated his decision was based on the fact that defendant never stated he had problems with the victim or had any knowledge of his criminal background. Trial counsel

stated that he did not specifically ask defendant if he knew of the victim's criminal background but that the defendant had stated he had no contact with the victim and that he had never had any bad experiences with the victim.

¶ 26 Trial counsel also testified that defendant showed him a letter defendant had allegedly received from Henry. Trial counsel felt that the letter was a bomb waiting to explode in his face because of authenticity issues as the mailing and return address were that of the defendant. Trial counsel also testified the letter sounded as if Henry was willing to say anything defendant wanted him to.

¶ 27 Trial counsel further testified that he had a handwritten statement from Griffin that the State had tendered to him. In the statement, Griffin stated he had no involvement with the victim being killed. Griffin, subsequent to the statement, went in front of the grand jury and changed his testimony, leaving his credibility at zero. Griffin also had three felonies, two of which involved firearms.

¶ 28 Trial counsel testified that he showed the video of the incident to defendant prior to trial. Trial counsel stated that self-defense was the only defense because there were no witnesses for the defense but the State had several witnesses along with a security camera video.

¶ 29 Henry testified that he had written defendant a few letters because he was being harassed by a lot of people asking him questions. He also testified that after viewing the video at the police station he was told to sign a piece of paper. He was not allowed to review the statement where he identified defendant as the shooter. Henry also testified that he saw the shooting but was "high at the time."

¶ 30 Other witnesses who testified at the post trial hearing were Billy Richmond and Raymond Brown, both of whom met defendant in jail and indicated they were witnesses to the shooting.

Richmond was serving a sentence of 15 years for attempted murder and Brown was in custody pending a triple murder and had been convicted of aggravated vehicular hijacking. Both testified they saw the victim reach for something under his shirt and then hearing shots.

¶ 31 The trial court found that Henry seemed "to flip back and forth" and that Richmond and Brown were not credible. The trial court denied defendant's motion for a new trial finding that counsel was not ineffective and there was a tactical and strategic decision for following the course that he did with respect to the case.

¶ 32 At sentencing, counsel was allowed to re-open the motion for a new trial and argued that there was testimony that the victim had a cell phone and cash in his hands just prior to the shooting; however there was no inventory of these items. It was asserted that trial counsel should have addressed this fact as it supported the notion that the victim's possessions as well as the gun he was alleged to have were taken before the police arrived. The trial court disagreed, finding the video to be "dispositive on the issue as to whether or not the victim had a gun." The trial court further stated; "You could certainly see the victim get shot, you can see the police officer arrive at the scene, you can see part of Elijah Henry and there's no evidence that anyone got to that body first and disposed of a gun. Henry had no gun on him." The trial court stated that the issue of the phone and cash not being inventoried was not germane or central to the case.

¶ 33 The judge imposed a 55-year sentence for the first degree murder conviction, including a 25-year add-on for personally discharging the firearm that killed the victim.

¶ 34 Defendant now appeals his conviction and sentence claiming that the State failed to prove his conviction beyond a reasonable doubt, that he was denied a fair trial due to ineffective assistance of counsel when counsel failed to interview witnesses and investigate and introduce

evidence to corroborate defendant's claim of self-defense. For the reasons set forth below, we affirm defendant's conviction and sentence.

¶ 35 ANALYSIS

¶ 36 Defendant argues the State failed to prove him guilty beyond a reasonable doubt of either charge because the State's witnesses were not credible. Defendant also contends that his counsel provided constitutionally defective representation in (1) failing to investigate or call as witnesses Griffin and Gaither whom he argues would have supported his claim of self-defense and (2) failing to introduce evidence of the victim's prior conviction for aggravated battery to a police officer to further support his claim that he was not the initial aggressor but acted in self-defense.

¶ 37 The State responds that the evidence that defendant committed first degree murder was overwhelmingly established. The State maintains that despite the fact that defendant alleged he killed the victim in self-defense, the video clearly contradicts this. Furthermore, the video corroborates the State's witnesses' testimony. Thus, defendant was proven guilty beyond a reasonable doubt. The State contends that the proposed testimony of Griffin and Gaither would not have proven that defendant had a reasonable belief in the need of self-defense. Moreover, the proposed witnesses' testimony would be of questionable value given their credibility issues. The State also maintains that trial counsel's decision not to interview or call Griffin and Gaither to testify and not introducing the victim's conviction were sound trial strategy.

¶ 38 The due process clause of the fourteenth amendment to the United States Constitution provides that defendant may not be convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008); see also *People v. Brown*, 2013 IL 114196, ¶ 52 ("the

State bears the burden of proving beyond a reasonable doubt each element of a charged offense and the defendant's guilt.").

¶ 39 The standard of review on a challenge to the sufficiency of the evidence 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). The standard applies to all criminal cases, whether the evidence is direct or circumstantial, and it acknowledges the responsibility of the trier of fact to determine the credibility of the witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). As this court has often noted, it is not our function to retry a defendant when reviewing the evidence at trial was sufficient to sustain a conviction. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). A conviction will not be reversed "simply because the evidence is contradictory" or "because the defendant claims that a witness was not credible." *Siguenza-Brito*, 235 Ill. 2d at 229.

¶ 40 In reviewing the sufficiency of the evidence to sustain a conviction on appeal, the court must determine "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." (Emphases in original.) *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Thomas*, 178 Ill. 2d 215, 231-32 (1997). We observe that it is the job of the factfinder to make determinations about witness credibility, and that the factfinder's credibility determinations are entitled to great deference and will rarely be disturbed on appeal. *Siguenza-*

*Brito*, 235 Ill. 2d at 228; *People v. Williams*, 2013 IL App (1st) 11116, ¶ 76; *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976). This deferential standard of review exists because the fact finder is in a superior position to determine and weigh the credibility of the witnesses, observe witnesses' demeanor and resolve conflicts in their testimony. *People v. Jones*, 215 Ill. 2d 261, 267 (2005); *People v. Lomax*, 2012 IL App (1st) 103016, ¶ 19.

¶ 41 Under the Illinois Criminal Code, to prove a defendant guilty of first degree murder, the State must prove the defendant either intended to kill or do great bodily harm to an individual or he or she knew that his or her acts would create a strong possibility of death or great bodily harm. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2008).

¶ 42 We now turn to defendant's claim that he shot the victim in self-defense. Self-defense is an affirmative defense, and once a defendant raises it, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004) (citing *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995)). The elements of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. 720 ILCS 5/7 (West 1998); see also *Jeffries* 164 Ill. 2d at 127-28. If the State negates any one of these elements, the defendant's claim of self-defense must fail. *Id.*

¶ 43 The parties' arguments on this point center on the reasonableness of defendant's belief that the circumstances warranted the use of deadly force. This issue involved credibility determinations made by the jury. It is the function of the jury as the trier of fact to assess the

credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *Lee*, 213 Ill. 2d at 225 (citing *People v. Tenney*, 205 Ill. 2d 411, 428 (2002)). The jury must also resolve conflicts or inconsistencies in the evidence. *Id.* The relevant standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found, beyond a reasonable doubt, that defendant did not act in self-defense. *Lee*, 213 Ill. 2d at 225 (citing *People v. Young*, 347 Ill. App. 3d 909, 920 (2004)).

¶ 44 Defendant, in this case, attacks the credibility of the State's occurrence witnesses. He contends that Henry's testimony created reasonable doubt because of the inconsistencies in his recollections, and that we should find the State's witness's testimony insufficient to prove him guilty of first degree murder. Defendant maintains that Henry cannot be believed because Henry admitted during trial testimony that he did not really remember much about the incident because it occurred last year. The State responds that Henry's trial testimony was corroborated by the video.

¶ 45 Defendant further argues that the witnesses were impeached with the following: Henry testified during trial that the victim did not walk up to the van, while on cross examination, he revealed that he told the grand jury that the victim approached the defendant's side window. Moreover, Henry testified he never heard the victim tell the defendant to hop out of the van. However, in the grand jury transcript, Henry testified he heard the victim tell the defendant to hop out of the van.

¶ 46 Additionally, defendant argues that Harris and Henry are not credible because of disagreements in their testimony. Harris said the victim was a member of the Mickey Cobra gang

while Henry said the victim was not a member. Also, Harris claimed Griffin had a gun in the earlier incident while Henry never saw a gun.

¶ 47 The State maintains that despite any inconsistencies or impeachment it is the jury's function to resolve conflicts in the testimony, and clearly the jury believed the State's witnesses and rejected defendant's claim of self-defense.

¶ 48 Finally, defendant's version of events is that the victim was legally drunk and approached defendant at which time the victim pulled out a gun. Defendant claims he feared for his life and shot the victim in self-defense. The State responds that defendant's claim that the evidence established the victim to be a dangerous, drunk man with a gun who threatened defendant moments before his murder is contradicted by the record and video. The State asserts that clearly, defendant was the only aggressor as he was the only one with a gun. The State maintains that the video and the corroborating eyewitness testimony established defendant's guilt beyond a reasonable doubt.

¶ 49 A trier of fact is free to accept or reject "as much or as little" of a witness's testimony as it likes. *People v. Logan*, 352 Ill. App. 3d 73, 81 (2004). We disagree with defendant that if the jury found the State's witnesses credible and accepted their testimony as evidence of his guilt, it acted improperly. Witness credibility falls exclusively on the jury. Despite any inconsistencies or impeachment, the jury believed Harris and Henry and rejected defendant's claim of self-defense.

¶ 50 We are unpersuaded by defendant's argument that reasonable doubt was created by the inconsistencies in the witnesses' recollections. As this court has previously recognized, it "is not the role of this court to reevaluate the credibility of witnesses in light of inconsistent testimony and ostensibly retry the defendant on appeal. [Citation.] Whether minor inconsistencies in testimony irreparably undermine the credibility of the State's witnesses was a matter for the trier

of facts to decide." *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007). Whether the minor inconsistencies between the recollections of witnesses irreparably undermine their credibility was a matter for the jury to decide. "Although the defendant's and his witness version of events was much different from that of [the State's witness], it was the prerogative of the jury to conclude that [the State's witness]'s version was more credible." *People v. Moser*, 356 Ill. App. 3d 900, 911 (2005).

¶ 51 We hold that, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction for first degree murder. In sum, reviewing the evidence in accord with the standard expressed above, we hold that a rational trier of fact could have found, beyond a reasonable doubt, that defendant's belief that the circumstances justified the use of deadly force was unreasonable. Therefore, the State proved beyond a reasonable doubt that defendant did not act in self-defense and established defendant's guilt.

¶ 52 We next consider defendant's contention that he was denied the effective assistance of counsel, where he alleges his attorney (1) failed to interview witnesses, and (2) failed to investigate and introduce evidence to corroborate defendant's claim of self-defense.

¶ 53 The State asserts defendant's trial counsel did not provide objectively unreasonable assistance. The State contends that evidence that defendant committed first degree murder was overwhelmingly established by the testimony and evidence presented at trial. Further, the State maintains that the proposed testimony would not have proven that the defendant committed second degree murder based on an unreasonable belief in the need for self-defense. Moreover, both proposed defense witnesses' testimony would be of questionable value given the fact that

they were not in the vicinity at the time of the shooting, their criminal records and their credibility issues.

¶ 54 The right to counsel guaranteed by the United States and Illinois Constitutions includes the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 446 U.S. 668, 686 (1984). To prevail on an ineffective assistance of counsel claim "[a] defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688). Under the first prong, a defendant must show that his trial attorney's performance was deficient. *People v. Enis*, 194 Ill., 2d 361, 376 (2000). "There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 377. Defendant's failure to establish either defective representation or prejudice precludes a finding of ineffective assistance of counsel. *Id.* Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have proceeded differently is sufficient to establish ineffective assistance of counsel. *People v. Trotter*, 299 Ill. App. 3d 535, 539 (1998).

¶ 55 Generally, whether to call a particular witness at trial is a strategic decision which, as a matter reserved to trial counsel's discretion, cannot support a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 414 (2000). However, "counsel may be deemed ineffective for failure to present exculpatory evidence of which he or she is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Counsel must also conduct " 'reasonable investigations or make a reasonable decision that makes particular investigation unnecessary,' "

and has " 'the obligation to independently investigate any possible defenses.' " *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). " '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " *People v. Guest*, 166 Ill. 2d 381, 389, 400 (1995) (quoting *Strickland*, 466 U.S. at 691). "Whether failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 56 "Review of the first prong [of the *Strickland* test] contemplates deference to strategic decision making...." *Williams v. Washington*, 59 F. 3d 673, 679 (1995). Ordinarily, when an attorney articulates some strategic reason for a decision, we will defer to that choice. *Strickland*, 466 U.S. at 690-91. It is often times a reasonable exercise of professional judgment to limit or terminate further investigation when counsel determines that a particular investigation would be fruitless. *Hall v. Washington*, 106 F. 3d 742, 749 (1997). A reviewing court must evaluate the attorney's performance from the counsel's perspective considering the circumstances at the time of trial, without the distorting effects of hindsight, and the defendant must overcome the strong presumption that the challenged action might be considered wound trial strategy. *Strickland*, 466 U.S. at 689; *People v. Garza* 180 Ill. App. 3d 263, 269 (1989).

¶ 57 Defendant contends that he made a substantial showing that his trial counsel provided constitutionally defective representation in failing to interview Griffin and Gaither. Defendant contends that their testimony could have corroborated his testimony that the victim was armed in an earlier meeting between the parties on the day of the shooting. Defendant maintains that their testimony could have supported defendant's contention that he was defending himself when he

shot the victim and that he was not the initial aggressor. Further, defendant argues that the State's witnesses also had criminal records and were not credible and thus the evidence in this case was not overwhelming.

¶ 58 In arguing that trial counsel was ineffective in not interviewing Griffin and Gaither, defendant relies on *People v. Truly*, 230 Ill. App. 3d 948, 955 (1992), for the proposition that the failure of a trial counsel to interview witnesses and discover their testimony amounts to ineffective assistance of counsel. In *Truly*, counsel testified that he would not include any witnesses in the proceedings if he had not made contact with them or did not know what their testimony would be. *Id.* at 954. The State argued this was a matter of trial strategy. *Id.* The court found that counsel could not have made a strategic decision since he admitted that he made no contact with the witnesses. *Id.*

¶ 59 The State maintains that, in contrast to *Truly*, trial counsel in the instant case had pretrial written statements from Griffin and Gaither as to what they had seen or not seen. Trial counsel testified at the posttrial hearing that he had a copy of Griffin's pretrial statement that he saw the victim outside, had no involvement in the victim's murder, and did not give a gun to the defendant. Trial counsel further testified that he was aware that Griffin reversed his testimony in front of the grand jury and that Griffin's three prior convictions also damaged his credibility. Trial counsel was also aware of Gaither's statement to a prosecutor that defendant and the victim had an earlier argument on the day of the shooting and had resolved the issue, thereby undermining any notion of self-defense. Trial counsel also testified that strategically, there was no need to interview these witnesses because their testimonies contradicted the defense and their credibility was nonexistent. Moreover, defendant had informed trial counsel that neither was

present at the time of the shooting; therefore, defendant's testimony that the victim was armed would not have been furthered by their testimony.

¶ 60 Defendant argues that although both men made pretrial statements, their statements never answered the question of whether they saw the victim with a gun during their earlier confrontation and that failure to interview these witnesses was unreasonable and prejudiced defendant. The State responds that even if the witnesses were to testify that the victim was previously armed, it would have no bearing on the fact that the victim was unarmed at the time of the shooting. The State maintains that defendant's assertion that the victim was armed at the time of the shooting is contradicted by the video because it shows Officer Arned's arriving within seconds of the shooting and immediately searching Henry and others for weapons, and finding none. The State asserts that even if there was error, the evidence was so overwhelming that there would not have been a different outcome.

¶ 61 We agree with the State. First, defendant testified that these witnesses were not present and could not testify that the victim was armed at the time of the shooting. We observe that, in the instant case, considering the written statements by these witnesses, it was reasonable for trial counsel to conclude that they would not have provided favorable testimony for defendant at the time of his trial, and to forgo interviewing and presenting their testimony at trial. Trial counsel's decision to not interview these witnesses, in light of their pretrial statements and the fact that the only defense for defendant was self-defense, was a sound trial strategy and not ineffective assistance of counsel. Second, as noted, the fact no gun was found is conclusive that the victim was not armed at the time of the shooting, which defeats defendant's claim of self-defense. Accordingly, defendant cannot claim prejudice from trial counsel's strategic decision not to interview Griffin and Gaither.

¶ 62 We note that the trial court, in determining that trial counsel's representation was reasonable, found that he pursued a trial strategy of impeaching the credibility of the State's witnesses who identified defendant as the gunman. The court further stated that trial counsel brought out several discrepancies regarding the testimony at trial and the testimony at the grand jury of the States' witnesses. Additionally, the court believed trial counsel's testimony that defendant maintained right up to trial that he was not at the scene of the crime and that he had loaned his van to some unnamed person on the day of the shooting. A counsel's duty to investigate extends to making reasonable investigations or making a reasonable decision which makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 689. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. *Id.* at 691. Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. *Id.*

¶ 63 We also find that, regardless of whether trial counsel's performance was deficient, defendant has failed to establish a reasonable probability that he would not have been convicted of first degree murder had Griffin and Gaither testified. Our review of the record demonstrates that even assuming, *arguendo*, that this alleged error constituted deficient representation, it would not have altered the result in this case because the evidence of defendant's guilt is overwhelming. A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999).

¶ 64 We next consider defendant's argument that his attorney was ineffective where he failed to investigate and develop defendant's theory of self-defense by introducing evidence of the victim's propensity for violence. Defendant maintains that trial counsel was ineffective in failing

to introduce into evidence the victim's prior conviction for aggravated battery to a police officer, which would have established that the victim was the initial aggressor.

¶ 65 Where a defendant raises self-defense as an affirmative defense and presents evidence in support of the defense, evidence of the victim's violent or aggressive character may be admissible to show the circumstances confronting the defendant, the extent of the apparent danger and the motive or state of mind by which the defendant was influenced. *People v. Davis*, 29 Ill. 2d 127, 129-30 (1963). More specifically, a victim's aggressive and violent character may be admissible to support a theory of self-defense. In *Lynch*, the court held when self-defense is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected 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. *People v. Lynch*, 104 Ill. 2d 194, 199-200 (1984). Under the first approach, evidence is relevant only if the defendant knew of the victim's violent acts. The defendant's knowledge of the victim's tendencies for violence necessarily affects his state of mind in the perception of and reaction to the victim's behavior. *Id.* at 200. The defendant's knowledge of the victim's character is necessary for evidence of this nature to be probative and admissible. *Id.*

¶ 66 Under the second *Lynch* category, a defendant has a right to present evidence of a victim's character for violence when the defendant presents some evidence he acted in self-defense, whether or not defendant knew of the evidence at the times of the event. Where accounts of the incident are incomplete or conflicting, the jury needs all the available facts to decide what really occurred. *Lynch*, 104 Ill. 2d at 200. In other words, this type of evidence is

probative to assist the trier of fact in judging the credibility of the witnesses and to provide the trier of fact with a more complete picture of what occurred. *Id.*

¶ 67 Defendant contends that trial counsel's failure to present evidence of the victim's conviction was objectively unreasonable. Defendant maintains that trial counsel was ineffective because he mistakenly believed the victim's conviction was only relevant if the defendant was aware of it. He contends that the victim's conviction would have supported defendant's claim of self-defense and that he had a right to present evidence of the victim's conviction to support his theory of self-defense and that the victim was the aggressor. Additionally, defendant asserts that trial counsel testified that prior criminal history that involves crimes of violence would support a defendant's claim of self-defense because it demonstrates a propensity for violence by the victim. Defendant maintains that the victim's conviction could have been introduced to show the reasonableness of defendant's state of mind in acting in self-defense or to support defendant's testimony that the victim was the aggressor.

¶ 68 As the State correctly notes, trial counsel testified that defendant did not know of the victim's conviction because trial counsel had asked defendant if he ever had any contact with the victim and defendant said no. Further, trial counsel testified that he had asked defendant what he knew about the victim and that defendant stated he just never had any bad experiences with him. The State maintains that this prior conviction did nothing to change defendant's reaction to the victim's behavior as defendant was unaware of it. Further, defendant told trial counsel prior to trial that he was not afraid of the victim and had no prior altercations with him in the five years that defendant had known the victim.

¶ 69 The State points out that the trial court found that trial counsel's decision was a strategic one and did not support an ineffective assistance claim. We agree. A counsel's duty to investigate

extends to making reasonable investigations or making a reasonable decision which makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 689. Accordingly, defendant has failed to overcome the strong presumption that defense counsel's action or inaction "might have been the product of sound trial strategy." *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 70

#### CONCLUSION

¶ 71 For the foregoing reasons we conclude that defendant has not made a substantial showing that his constitutional right to the effective assistance of counsel was violated and therefore affirm the judgment of the trial court.

¶ 72 Affirmed.

¶ 73 JUSTICE EPSTEIN, dissenting.

¶ 74 I respectfully disagree with the majority's conclusion that trial counsel was not ineffective in failing to investigate or present evidence of the victim's conviction for aggravated battery of a police officer. I would reverse defendant's conviction and remand for a new trial because trial counsel's failure to investigate this evidence was objectively unreasonable and prejudiced defendant's right to a fair trial.

¶ 75 "Trial counsel has a professional duty to conduct 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). "The duty includes the obligation to independently investigate any possible defenses." *Domagala*, 2013 IL 113688, ¶ 38. "[D]efense counsel's failure to present available evidence to support a defense constitutes ineffective assistance of counsel." *People v. York*, 312 Ill. App. 3d 434, 437 (2000).

¶ 76 In *People v. Lynch*, 104 Ill. 2d 194, 201 (1984), the Illinois Supreme Court held "that when the theory of self-defense is raised, the victim's aggressive and violent character is relevant

to show who was the aggressor, and the defendant may show it by appropriate evidence," including evidence of the victim's "[c]onvictions for crimes of violence." Such evidence may be used in two ways: (1) to prove "the defendant's knowledge of the victim's violent tendencies; and (2) "to support the defendant's version of the facts where there are conflicting accounts of what happened." *Id.* at 200.

¶ 77 In this case, counsel's failure to investigate the victim's criminal background and to present evidence of the victim's propensity for violence was unreasonable. At trial, defendant's theory was that he shot the victim in self-defense. As highlighted by defendant's motion for a new trial, the victim had been convicted of aggravated battery of a police officer, a crime involving violence. Pursuant to *Lynch*, evidence of the victim's aggravated battery conviction would have been admissible to bolster defendant's self-defense theory. Trial counsel did not present this evidence to the jury, however. At the hearing on defendant's motion for a new trial, trial counsel admitted that he was unaware of the victim's aggravated battery conviction. Defense counsel's failure to investigate the victim's criminal background and uncover his aggravated battery conviction was unreasonable because it would have supported counsel's chosen theory of defense.

¶ 78 Defense counsel's failure to introduce evidence of the victim's conviction did not constitute a reasonable trial strategy. As trial counsel was unaware of the existence of available evidence supporting self-defense, he did not make a reasonable decision in not presenting that evidence. "[S]trategic decisions may be made only after there has been a 'thorough investigation of all matters relevant to plausible options.'" *People v. Truly*, 230 Ill. App. 3d 948, 954 (1992) (quoting *Strickland*, 466 U.S. at 690); see also *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (concluding that trial counsel did not exercise reasonable strategy where the record

showed that the defendant's "attorney failed to file a timely suppression motion, not due to strategic considerations, but because \*\*\* he was unaware of the search"); *People v. Kubat*, 114 Ill. 2d 424, 447 (1986) (Simon, J., dissenting) ("[I]t cannot be seriously contended that defendant's attorneys made a reasonable strategic decision not to present evidence of which they were unaware.").

¶ 79 The record also shows that trial counsel should have been aware of the possibility that the victim had a criminal background. Trial counsel testified that "everyone knew that [the victim] was a drug dealer, and that the people who were around him were also drug dealers." In his cross-examination of Harris, trial counsel demonstrated that he was aware that the victim and his friends may have been associated with the Mickey Cobras street gang. Trial counsel also knew that Harris and Henry, the victim's friends, had prior convictions. In light of these facts, it was unreasonable for counsel to not investigate the victim's criminal history.

¶ 80 Even if trial counsel had conducted an adequate investigation, his decision not to introduce evidence of the victim's aggravated battery conviction could not have been reasonable trial strategy because counsel incorrectly believed he could not have introduced evidence of the victim's conviction. "If counsel's decision not to raise a defense or present [evidence] in support of that defense is attributable to a misapprehension of the law, that is not a trial tactic or strategy." *People v. Hayes*, 229 Ill. App. 3d 55, 62-63 (1992) (citing *People v. Wright*, 111 Ill. 2d 18, 27 (1986)). At the hearing on defendant's motion for a new trial, defense counsel testified that he would not have presented evidence of the victim's aggravated battery conviction because defendant was not aware of that conviction:

"Q. [Assistant State's Attorney:] Now you were asked about not bringing in the victim's prior aggravated battery, correct?"

A. [Trial counsel:] Yes.

Q. And you indicated that the defendant was not aware of that prior aggravated battery, correct?

A. Right.

Q. And under *Lynch* \*\*\* your client would have had to have been aware of it to be used, correct?

A. Yes.

Q. Especially if the victim was the initial aggressor, as your client was making it sound, correct?

A. Right."

Defense counsel thus believed that, if there was evidence that the victim was the initial aggressor, he could only introduce evidence of the victim's prior conviction if defendant was aware of it.

¶ 81 Trial counsel's testimony reflects his misunderstanding of *Lynch*. In *Lynch*, the Illinois Supreme Court stated, "[E]vidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened. In this situation, *whether the defendant knew of his evidence at the time of the event is irrelevant.*" (Emphasis added.) *Lynch*, 104 Ill. 2d at 200. In this case, defendant testified that the victim approached him and brandished a firearm. The State presented evidence that defendant shot the victim while the victim was unarmed. In light of the conflicting evidence as to who was the initial aggressor, evidence of the victim's propensity for violence would have been admissible regardless of defendant's knowledge of it. As trial counsel misapprehended *Lynch*, any decision

to decline to use the victim's conviction as evidence supporting defendant's self-defense claim could not have been a reasonable strategic decision.

¶ 82 I also respectfully disagree with the majority's conclusion that counsel's failure to investigate the victim's criminal history did not prejudice defendant. In order to establish prejudice resulting from counsel's errors, a defendant must show that counsel's errors were "sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. In considering whether the defendant has suffered prejudice, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695.

¶ 83 In this case, the surveillance video of the shooting does not conclusively establish that defendant was the only person with a gun at the time of the shooting. In the video, the van driven by defendant blocks the view of the shooting. Although the video depicts the victim collapsing after the shooting, it is impossible to see what, if anything, the victim is holding. As defense counsel described the video, it "appeared to show that someone came up to the decedent and immediately looked like they did something to him or removed something from the decedent and then left." In sum, the video does not affirmatively discredit defendant's testimony that the victim was armed or was the initial aggressor.

¶ 84 The remainder of the State's evidence did not undoubtedly refute defendant's self-defense claim. While Harris's and Henry's accounts of the shooting contradicted defendant's testimony, it was the jury's prerogative to decide whether to believe the defendant or the State's witnesses. The physical evidence presented by the State did not prove that the victim was unarmed. Had counsel presented readily available evidence that the victim had been convicted of aggravated battery, such evidence would have afforded defendant's testimony more credence. I believe that counsel's

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failure to introduce the victim's aggravated battery conviction was an error "sufficient to undermine confidence in the outcome" of his trial. *Strickland*, 466 U.S. at 694.

¶ 85 For these reasons, I would reverse defendant's conviction and remand for a new trial.