

No. 1-12-1009

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 14476
	)	
STANLEY MCDONALD,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Delort and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in declining to instruct the jury regarding mitigation of first-degree murder to second-degree murder due to serious provocation, as defendant's stabbing of unarmed victim precluded finding of "mutual combat." The trial court's alleged error in failing to instruct the jury regarding involuntary manslaughter, which was not properly preserved at trial, was not plain error and did not cause prejudice under the ineffective assistance of counsel standard. Evidence erroneously permitted as "rebuttal" testimony should have been elicited in prosecution's case in chief, but such error was harmless.

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¶ 2 This appeal arises from the conviction of defendant-appellee Stanley McDonald (the defendant) for first-degree murder in the May 2004 death of his live-in boyfriend, Lawrence (Larry) Gladney.

¶ 3 BACKGROUND

¶ 4 This case was initially tried in 2007, resulting in the defendant's conviction on the charge of first-degree murder. On appeal, we held that the trial court erred in giving a jury instruction relating to the uncharged offense of armed robbery and thus we remanded for a new trial. *People v. McDonald*, 401 Ill. App. 3d 54 (2010). The following facts were elicited at the defendant's subsequent trial in March 2012.

¶ 5 In May 2004, the defendant lived with his boyfriend Larry in a basement apartment at 337 West 111th Street in Chicago, where they had resided since October 2003. The defendant's cousin, Charlotte Davis, also lived in the building in a separate apartment that she shared with her mother and Davis' boyfriend, Calvin Holliday.

¶ 6 At trial, Davis testified that on May 16, 2004, the defendant expressed to her his concern that Larry was "having an affair somewhere," and the defendant was "angry" and "upset" that Larry was not home. The defendant told Davis "he was going to get Larry" and "was going to hurt him" when Larry returned to the residence. Davis also responded affirmatively when asked if the defendant had stated he was going to kill Larry. Davis testified that she observed that the defendant had a knife at the time he made these statements, but she had not believed he would act on his threats. Later that day, at approximately 4:00 p.m., Larry came home. Davis heard Larry return but did not see him as she was working inside the residence.

¶ 7 At approximately 10:15 p.m., Davis heard the defendant and Larry arguing loudly in the backyard near the entrance to the stairway to their basement apartment. She went toward the

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back door and observed that Larry was in the backyard with his bicycle at the entry to the stairway. She testified that the defendant was "down inside the basement" pulling the bike down the stairs toward the apartment, while Larry pulled the bike in the opposite direction. Davis testified that the defendant and Larry were arguing over the bike; she heard Larry tell the defendant "you are not going to mess up my bike." During the struggle over the bike, Davis saw that the defendant held the same knife that she had seen him carry earlier that day.

¶ 8 Davis suddenly heard Larry say "ugh" and grab his face, which began to bleed. Davis ran back into the house and had her mother call the police. She observed the defendant come up the stairs from the basement and go into the back yard, where Larry was lying on the ground. She saw the defendant straddling Larry, saying "wake up, Larry, get up, Larry."

¶ 9 Davis' testimony on the details of the struggle, particularly whether Larry ever struck the defendant, was equivocal and inconsistent. On cross-examination, when asked if Larry had struck the defendant, she responded: "Probably Larry hit Stanley, but I only took notice when I heard Larry holler and was holding his eye." Davis also acknowledged that in 2004, she had testified before a grand jury that there was "a scuffle" between the two men and that "[Larry] may have hit, and that started the whole thing with the knife and everything." Further, Davis conceded that at the defendant's first trial in 2007, when she was asked if "[a]t some point with the struggle with the bike, d[id] you see Larry hit Stanley," she had answered: "Yes. They were struggling. They were fighting, yes."

¶ 10 However, on re-direct examination, Davis also acknowledged that in her 2004 grand jury testimony, when asked if she saw Larry hit Stanley, she had responded: "[Larry] hit out and stuff like this here, but what good was it? Stanley had the knife." The trial court also asked Davis directly: "Did you see Larry hit Stanley?" Davis answered: "No, I didn't."

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¶ 11 Separately, Davis also recalled a prior violent incident between Larry and the defendant that had occurred the previous New Year's Eve. Davis testified the two men had a "big argument" because the defendant thought Larry had said something "flirtatious" to Davis, and that the defendant had cut Larry on the head. On cross-examination, Davis testified that Larry had gone to the hospital "[b]ecause he had a gash in his head." There was no other evidence of this prior incident elicited at trial.

¶ 12 The State also called Calvin Holliday, Davis' boyfriend, who testified that he had also lived at 337 West 111th Street. Holliday recalled that he spoke with the defendant on the morning of May 16, 2004 and that the defendant had been "upset" because he and Larry had had an argument. Holliday recalled that the defendant "said that he was going to kill [Larry]" and that the defendant had a knife when he made this statement.

¶ 13 Sometime later that day, Holliday saw Larry at a liquor store about four or five blocks from the 337 West 111th Street residence. Holliday testified he had a conversation with Larry and then they walked together back to their residence. Holliday acknowledged that, according to his 2004 grand jury testimony, when he and Larry returned to the residence, the defendant was still at the house "talking about hurting Larry again" and still had the knife. Holliday also confirmed his grand jury testimony that the defendant had pointed the knife at Larry and said: "I'm going to kill you today." However, Holliday testified he witnessed no physical altercation between the men that afternoon. At some point after returning from the liquor store with Holliday, Larry again left the residence.

¶ 14 About 10:15 that evening, Holliday was at the house talking on the phone when Davis "came in the house hollering." Holliday went outside and saw Larry lying in the yard and the defendant was "sitting on top of [Larry]" and saying "please don't die." On cross-examination,

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Holliday acknowledged his grand jury testimony that the defendant was "telling [Holliday] to please help, please help me."

¶ 15 Luis Ponce de Leon, a paramedic employed by the Chicago Fire Department, testified that he and his partner arrived at the scene at approximately 10:15 p.m. Ponce de Leon testified that he saw Larry lying on the ground in the backyard with a "very large laceration to his face" and "softball sized swelling to the right side of his face." Ponce de Leon testified that Larry was "combative" toward the paramedics and attempted to fight them off but was eventually placed in an ambulance with the assistance of firefighters. Larry continued to be combative in the ambulance; he broke out of soft restraints, pulled an IV from his arm, and had to be held down. Ponce de Leon estimated that Larry lost about half of his body's blood during the ride to the hospital, and testified that such blood loss could have caused shock and Larry's combative behavior. On cross-examination, Ponce de Leon testified that he smelled alcohol on Larry's breath. He also observed that Larry had "track marks," or scarring on his veins, indicating drug use.

¶ 16 Through stipulation, the defense introduced the testimony of Dr. James Doherty, a trauma surgeon who treated Larry on the night of May 16, 2004. Dr. Doherty testified that Larry had a stab wound to the right side of the face which had severed about three-quarters of the carotid artery, causing a clot. Dr. Doherty testified that Larry had signs of a stroke and cerebral infarction, or brain death due to lack of blood flow. Although the clot was removed, the swelling in Larry's brain continued to worsen, requiring the intervention of a neurosurgeon.

¶ 17 On cross-examination, Dr. Doherty acknowledged that Larry was combative with emergency room personnel and had alcohol on his breath. Larry was found to have an alcohol level of .19, over twice the legal limit, as well as cocaine in his system, which Dr. Doherty

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testified could have contributed to his combativeness. Dr. Doherty also stated that he saw no defensive wounds on Larry's body.

¶ 18 The jury also heard the stipulated sworn testimony of Dr. Gerald Michel Lemole, Jr., a neurosurgeon who operated on Larry. Dr. Lemole testified that Larry suffered a stab wound to the carotid artery, which caused a massive stroke. Larry's brain swelled as a result of the stroke, and Dr. Lemole performed surgery to relieve pressure on the brain. However, despite the surgery, the brain continued to swell, and Larry entered a deep coma. Dr. Lemole testified that, due to Larry's brain damage, a "reasonable outcome" was no longer possible and extraordinary measures to save his life were discontinued. Larry died several days later.

¶ 19 Nancy Jones, chief medical examiner for Cook County, testified that she performed an autopsy on Larry's body on May 22, 2004. Jones observed several abrasions or scratches, as well as three stab wounds. The first stab wound was a two-inch wound on the right side of Larry's face. Larry had also suffered a one-inch stab wound on the left side of his chest, and a third stab wound on his left upper arm, also one inch in length. Jones testified that the wounds to the chest and arm were superficial, meaning they involved skin, muscle and soft tissue but not major blood vessels. However, the facial stab wound went through the cheek and damaged the carotid artery.

¶ 20 Jones testified that "in order for that particular wound to involve the carotid artery, the knife would have to go into the face, through the facial bones, down and towards the center of the body." Thus she testified that it appeared the knife was brought in a downward direction from above Larry. However, she could not tell the order in which the three stab wounds were inflicted. On cross-examination, Jones agreed that "most people if you were trying to hit the carotid would probably go for the neck region," rather than aim for the face. Jones also testified she did not find any defensive wounds on Larry's hands or forearms.

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¶ 21 The State next called Carroll Conry, a Chicago police officer, who testified that she responded to a call at the residence and found the defendant leaning over Larry. She observed that both men were covered in blood and saw a large carving knife on the ground about eight feet from the defendant. Another responding police officer, Reginald Arrington, testified that when he arrived at the residence, he saw the defendant standing over Larry, and that Larry "appeared to be kind of shoving the defendant away from him." Officer Arrington took the defendant into custody and drove him to the hospital, as the defendant "had a scratch on his face and on his knees it looked like he had cuts." The defense called an emergency room physician, Carrie Wilson, M.D., who testified that she treated the defendant on the night of the incident for "a superficial laceration to the upper lip" as well as knee abrasions.

¶ 22 The defense also called Detective Todd Pierce, the lead detective on the case. Detective Pierce testified that on the night of the incident he observed a trail of blood running from the side of the residence to the rear basement door, as well as drops of blood on the stairs leading from the yard to the basement. In the basement area, he saw a bicycle on the ground as well as blood stains in the entryway between the back door and the rest of the apartment. Based on the location of the blood stains, Detective Pierce stated his opinion that the fight started "[a]t the bottom of the stairs just inside the doorway" to the apartment.

¶ 23 At the conclusion of the defense case, the State asked to call Officer Conry back to the stand in rebuttal. The defendant's counsel objected and requested a side bar, during which counsel argued: "This is not rebuttal. They're about to go into a statement that [defendant] made \*\*\* that Larry had been stabbed, he didn't know who had done it. This should have come out in their case in chief, it did not." Defense counsel argued that the defendant's case had not "put on

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any evidence about any statements that [defendant] made" and that the rebuttal testimony was not relevant to Detective Pierce or Dr. Doherty's testimony.

¶ 24 The State responded that it sought the rebuttal testimony because it anticipated the defendant would raise a self-defense argument. The State argued that by eliciting Dr. Doherty's testimony and Detective Pierce's testimony regarding the blood stains, including his opinion as to where the fight had begun, the defendant had "put self-defense into issue."

¶ 25 The court overruled the defense objection and permitted the State to call Officer Conry as a rebuttal witness. Officer Conry thus testified that upon arriving at the scene, she had "asked [the defendant] what had happened" and "[the defendant] said somebody stabbed him." The State then rested its case.

¶ 26 The following day, prior to closing arguments, counsel and the court conferred with respect to jury instructions. The defendant sought jury instructions as to second-degree murder on the theories of both self-defense and provocation, as well as a jury instruction regarding involuntary manslaughter.

¶ 27 The State objected to instructing the jury on second-degree murder due to provocation, because "provocation needs to be mutual combat where both parties have to agree to go into the combat together." The State argued that "this case wouldn't fit where the defendant is taking something from someone, provoking them into defending themselves, that is not mutual combat." The State also argued that the provocation "has got to be proportional which completely does not fit this case where the defendant arms himself with a knife and threatens the victim all day and then attacks the victim when the victim tries to hang onto his property." The State also contended that there was no evidence of self-defense and that the defendant could not

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assert "self-defense after he kills the victim who simply is trying to protect himself and his property."

¶ 28 Defense counsel responded there was evidence of self-defense, citing Davis' testimony that Larry punched Stanley. Defense counsel argued there was "no evidence in the record of how the fight started" and thus there was "no evidence as to who the initial aggressor really was in this case." Defense counsel also emphasized the evidence that Larry "was high on cocaine and alcohol" and was "extremely combative," as well as evidence that the defendant had been injured.

¶ 29 Regarding second-degree murder due to provocation, defense counsel argued such an instruction was warranted "so long as there is some evidence of serious provocation" in the record, and cited Davis' testimony of a struggle in which Larry hit the defendant. Defense counsel cited our decision in *People v. Robinson*, 189 Ill. App. 3d 323 (1989), to argue "the second-degree murder instruction may not be refused even if the defendant was the aggressor at the outset, nor may the instruction be validly refused on the ground that there was evidence that defendant's intent to kill was formulated at an earlier time if there is evidence that the defendant's criminal intent may have arisen during or out of the heat of the altercation." Defense counsel argued that, despite the testimony that the defendant had threatened to kill Larry earlier that day, Davis' testimony "that everything started after Larry started to hit [the defendant]" provided "evidence that the intent to kill arose during the altercation."

¶ 30 Moreover, the defense argued that the provocation instruction could not be denied "just because [defendant] had a weapon and [Larry] did not." Defense counsel cited *People v. Phillips*, 159 Ill. App. 142 (1987), for the proposition that "the mere fact that the defendant had a knife upon his person and the victim was not armed is not alone sufficient to preclude the

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possibility of the mitigating instruction of mutual combat," but that "[t]he question turns on whether the defendant entered the combat with the intention of using the knife." Defense counsel argued there was no evidence that defendant entered the struggle intending to use the knife, especially given the testimony that "nothing happened" when defendant and Larry had spoken in the afternoon. Rather, counsel argued "[t]he knife was only used after [Larry] started to hit" the defendant. Defense counsel also cited *People v. Leonard*, 83 Ill. 2d 411 (1980), which held that a second-degree instruction was warranted where the victim had struggled with the defendant over a gun. According to defense counsel, "what was dispositive [in *Leonard*] was the defendant's injuries and the fact there was a struggle," factors present in this case.

¶ 31 After hearing argument, the trial court decided to instruct the jury regarding "second-degree [murder] for unreasonable belief in self-defense," but declined to give an instruction as to second-degree murder due to serious provocation. The trial court concluded the facts were distinguishable from the cases cited by the defendant, and noted that the case law recognized "[a] vital distinction\*\*\* between a slayer who procured a knife beforehand for the purpose of killing and the sudden use in the heat of combat with a knife which the slayer merely happened to have in the moment." The trial court stated: "Here the evidence is uncontradicted, unrebutted, and even undenied that the defendant is walking around all day long with this large knife, brandishing a knife talking about what he is going to do when he gets ahold of Larry."

¶ 32 The trial court additionally noted that the "parties have to agree to fight on equal terms" for mutual combat to apply, but that in this case "the evidence is uncontradicted and unrebutted and indeed is overwhelming that the deceased did not have a knife or a weapon of any kind." Moreover, the trial court stated "this is not a spontaneous action on the part of the defendant. He had been looking to do it for hours and hours and hours."

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¶ 33 The trial court concluded that "the evidence of provocation in this is very, very, very sketchy. I don't know if it rises to a scintilla." Although the trial court recognized Davis' testimony that Larry may have punched the defendant, it noted "[t]here is no testimony from which one can find exactly when this occurred, where it occurred, under what circumstances it occurred, only that the deceased and defendant were engaged in a tussle over the bike when they were observed."

¶ 34 However, the trial court did find a "scintilla" of evidence to support the instruction on self-defense. The court noted "the defendant had some relatively minor injuries upon him" and found "an argument could be made that [the struggle] started out with a punch." Thus, the court instructed the jury that it could find defendant guilty of second-degree murder upon the mitigating factor that "at the time of the killing the defendant believ[ed] that circumstances exist[ed] which would justify the deadly force he use[d], but his belief that such circumstances exist[ed] [was] unreasonable." However, the trial court did not instruct the jury that it could reach a verdict of second-degree murder based upon the mitigating factor of serious provocation. After closing arguments and jury instructions, the jury returned a verdict finding the defendant guilty of first-degree murder.

¶ 35 On March 19, 2012, the defendant filed a motion for new trial alleging several errors, including that "[t]he Court erred in refusing to instruct the jury as to second degree murder based on provocation, brought about through mutual combat." The motion also asserted the court "erred in allowing the State to call Officer Carroll Conry in rebuttal." However, the motion did not assert error in failing to instruct the jury as to involuntary manslaughter. At a hearing on March 19, 2012, the court denied the defendant's motion for new trial and sentenced the defendant to 27 years' imprisonment. On the same date, the defendant filed a notice of appeal.

¶ 36

## ANALYSIS

¶ 37 The defendant's appeal asserts four issues, only three of which are contested. The defendant first argues that the trial court erred by refusing to instruct the jury that it could reach a verdict of second-degree murder due to serious provocation. Second, the defendant claims the court erred by refusing to instruct the jury regarding involuntary manslaughter. In addition to the alleged jury instruction errors, the defendant asserts the trial court abused its discretion by permitting the State to introduce Officer Conry's testimony on rebuttal that the defendant had stated that "somebody stabbed" Larry. Finally, the defendant asserts, and the State concedes, that the trial court improperly assessed certain fees of \$25 and \$15.

¶ 38 We first address the defendant's contentions regarding whether he was entitled to jury instructions on second-degree murder due to serious provocation and involuntary manslaughter. Notably, the parties disagree about the applicable standard of review. The defendant relies upon the statement by our supreme court in *People v. Washington* that "[t]he question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review." *People v. Washington*, 2012 IL 110283, ¶ 19 (citing *People v. Everette*, 141 Ill. 2d 147, 157 (1990)). On the other hand, the State contends that we must apply an abuse of discretion standard when reviewing the trial court's rulings on jury instructions.

¶ 39 Prior to *Washington*, our supreme court repeatedly and explicitly held that abuse of discretion is the applicable standard in reviewing the trial court's decision whether to grant a requested jury instruction. In a 2008 decision concerning alleged error with respect to instructing the jury on provocation, our supreme court stated:

"There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine

which issues are raised by the evidence and whether an instruction should be given. [Citation.] Instructions which are not supported by either the evidence or the law should not be given. [Citation.] The task of a reviewing court is to determine whether the instruction, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. [Citation.] The proper standard of review is whether the trial court abused its discretion." *People v. Mohr*, 228 Ill. 2d 53, 65-66 (2008) (citing *People v. Jones*, 219 Ill. 2d 1, 31 (2006)).

¶ 40 Likewise, our supreme court in *People v. Jones* stated: "[t]he giving of jury instructions is a matter within the sound discretion of the trial court" and that "[w]here there is evidentiary support for an involuntary manslaughter instruction, the failure to give the instruction constitutes an abuse of discretion." 219 Ill. 2d at 31; see also *People v. Hudson*, 222 Ill. 2d 392, 399 (2006) (applying abuse of discretion standard in deciding whether trial court erred in submitting non-IPI instruction regarding felony murder).

¶ 41 *Washington's* statement regarding *de novo* review appears to contradict this precedent. However, *Washington* does not indicate that the supreme court intended to overrule its prior case law with respect to the standard of review; indeed, the language cited by the defendant is the only sentence discussing the standard. Moreover, in explaining the procedural posture of the case, *Washington* noted that our court had found "it was an abuse of discretion for the trial court to refuse a defendant's request for a second degree murder instruction." *Id.* ¶ 1; see also *id.* ¶ 16 (explaining that our court had found "that the trial court abused its discretion in refusing the tendered instruction"). While acknowledging that our court had applied an abuse of discretion

standard, the *Washington* opinion did not contain any further discussion on this question. Thus, there is no indication that the supreme court intended to depart from precedent establishing an abuse of discretion standard on jury instruction issues. As the weight of authority is still overwhelmingly in favor of this standard, we will adhere to the precedent that "[w]hether to issue a jury instruction is within the province of the trial court," and "[a] trial court's decision not to issue an instruction will not be reversed unless it is an abuse of discretion." *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 50 (2012).

¶ 42 Notably, this standard of review is highly deferential. "[A]n abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court." *People v. Kladis*, 2011 IL 110920, ¶ 42 (citing *People v. Ortega*, 209 Ill. 2d 354, 359 (2004)). Thus, the question is not whether another court could rule differently, but whether the trial court's decision was unreasonable. See *People v. Smith*, 2014 IL App (1st) 103436, ¶ 86 ("While we recognize that a different judge may have instructed the jury regarding involuntary manslaughter, we cannot say that the trial judge's decision here was unreasonable.").

¶ 43 With this standard in mind, we turn to the defendant's contention that the trial court erred by refusing to instruct the jury on the provocation theory of second-degree murder. The Illinois Criminal Code provides that the crime of first-degree murder may be mitigated to second-degree murder if: "At the time of the killing [the defendant] is acting under a sudden and intense passion resulting from serious provocation by the individual killed." 720 ILCS 5/9(2)(a)(1) (West 2010). Thus, "[f]or a defendant to be guilty of second-degree murder, the State must first prove defendant guilty of first-degree murder beyond a reasonable doubt. [Citation.] The burden then

shifts to the defendant to prove serious provocation by a preponderance of the evidence." *People v. Sipp*, 378 Ill. App. 3d 157 (2007).

¶ 44 "Serious provocation" is defined by statute as "conduct sufficient to excite intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2010). However, "[t]he only categories of serious provocation that are recognized by the Illinois Supreme Court are: (1) substantial physical injury or assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the offender's spouse." *Sipp*, 378 Ill. App. 3d at 166 (citing *People v. Chevalier*, 131 Ill. 2d 66, 73 (1989)).<sup>1</sup> "Passion on the part of the slayer \*\*\* will not relieve her from liability for murder unless it is engendered by a provocation which the law recognizes as being reasonable and adequate. If the provocation is insufficient, the crime is murder." *Id.* at 125. The "[d]efendant has the burden of proving there is at least 'some evidence' of serious provocation or the trial court may deny the instruction." *People v. Austin*, 133 Ill. 2d 118, 124 (1989). Moreover, "[t]he evidence upon which defendant relies must rise above the level of a mere factual reference or witness' comment." *Id.*

¶ 45 In this case, the defendant contends there was evidence of serious provocation through "mutual combat," which has been defined by our supreme court as a "fight or struggle which both parties enter willingly or where two persons upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *Austin*, 133 Ill. 2d at 125. In considering "whether defendants have met the threshold burden of proving some evidence of mutual combat," our supreme court in *Austin* held that "[a] slight provocation is not

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<sup>1</sup>"Although these categories were originally components of the predecessor offense of voluntary manslaughter, they apply equally to second degree murder, which has essentially the same elements." *Sipp*, 378 Ill. App. 3d at 166. Thus, the case law regarding the adequacy of provocation necessary to support the offense of "voluntary manslaughter" is applicable to the offense of second-degree murder due to provocation.

enough, because the provocation must be proportionate to the manner in which the accused retaliated." *Id.* Thus, there is no mutual combat if a "defendant attacks a victim with violence out of all proportion to the provocation," and "[t]his is especially true if the homicide is committed with a deadly weapon." *Id.* at 126-27.

¶ 46 In *Austin*, the defendant attempted to board a CTA bus without paying a fare; a physical altercation began after the bus driver demanded that the defendant pay the fare or leave the bus. *Id.* at 122. The driver and defendant exchanged blows "for 30 to 40 seconds" before defendant produced a gun and fatally shot the bus driver. *Id.* Our court had found sufficient evidence to warrant an instruction on serious provocation. *Id.* at 123. However, our supreme court disagreed, reasoning that "[a]t the most, the victim provoked defendant by engaging in a 'fairly even' fistfight for 30 to 40 seconds and forcing her off the bus." *Id.* at 127. Because "[s]hooting the driver was an act completely out of proportion to the provocation," the supreme court concluded that "mutual combat cannot apply" and the defendant was not entitled to the requested jury instruction. *Id.*

¶ 47 This court has since relied on *Austin* to hold that "[t]he mutual combat aspect of provocation does not apply as a matter of law where a defendant on slight provocation attacks a victim with violence that is out of proportion to the provocation." *People v. Young*, 248 Ill. App. 3d 491, 508-09 (1993) (defendant not entitled to jury instruction on provocation "even though the unarmed victim engaged in a fist fight with defendant as had the unarmed bus driver in *Austin*"). "[P]articularly where the homicide is committed with a deadly weapon," there is no mutual combat "where the manner in which the accused retaliates is out of all proportion to the provocation." *People v. Lopez*, 371 Ill. App. 3d 920, 935-36 (2007).

¶ 48 In numerous cases, this court has found mutual combat inapplicable where the defendant used a weapon to respond to provocation by an unarmed victim. See e.g., *People v. Thompson*, 354 Ill. App. 3d 579 (2004) ("Even if we were to consider the second shot to have been fired during mutual combat \*\*\* defendant's response was wholly disproportionate to the provocation" which "consist[ed] of angry words and one punch to the face"); *People v. Jackson*, 304 Ill. App. 3d 883, 893-94 (1999) (where defendant claimed he had stabbed victim in response to unwanted sexual advances, defendant's "retaliation was not proportional," as "arming himself with a knife while the victim remained unarmed could hardly meet the definition of mutual combat, which envisions a fight or struggle on equal terms."); *People v. Green*, 209 Ill. App. 3d 233, 239-40 (1991) (action by unarmed victim in grabbing defendant was "in no way in proportion to the manner in which defendant retaliated" by hitting the victim in the head with a glass decanter).

¶ 49 In this case, given the evidence that defendant fatally stabbed an unarmed victim, the trial court did not abuse its discretion in concluding that the defendant was not entitled to an instruction on second-degree murder based on serious provocation. Indeed, under our supreme court's precedent, the facts appear to preclude a finding of mutual combat.

¶ 50 As defined in *Austin*, mutual combat occurs where "both parties enter willingly" into combat, or "where two persons upon a sudden quarrel and in hot blood, mutually fight upon equal terms." 133 Ill. 2d at 125. In this case, the defendant has not disputed that he used a knife in the struggle while Larry remained unarmed, thus it cannot be said that there was a "fight upon equal terms."

¶ 51 At oral argument, the defendant emphasized that *Austin* uses disjunctive language in defining mutual combat as where "both parties enter willingly *or* where two persons \*\*\* mutually fight upon equal terms." (Emphasis added). *Id.* The defendant thus argues that, even if

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the fight was not on "equal terms" because Larry was unarmed, there could still be mutual combat if the two men had entered the struggle willingly. Although this proposition may be consistent with the cited statement from *Austin*, it is unavailing to the defendant under the evidence presented in this case. First, no one saw the struggle begin, and there is simply *no* evidence that the defendant and Larry voluntarily entered into combat. Davis was the only individual at trial who claimed to have witnessed any part of the altercation. However, she testified that she was inside the residence when the dispute started and only came out after hearing an argument, at which time the two men were already engaged in a struggle. Thus, the defendant cannot establish mutual combat on the basis that Larry and defendant willingly entered the confrontation.

¶ 52 Moreover, even assuming there was evidence that both men voluntarily entered the fight, *Austin* and our precedent clearly hold that a defendant is not entitled to a mutual combat instruction where the defendant's retaliation was out of proportion to the alleged provocation by the deceased. *Austin*, 133 Ill. 2d at 126-27. Here, the only evidence of provocation was Davis' testimony that Larry may have punched or "hit out" at the defendant. Yet, even assuming that Larry struck the defendant first, his response in stabbing Larry three times was clearly disproportionate to the provocation, especially as it involved a deadly weapon. *Id.*

¶ 53 We further find that the decisions primarily relied upon by the defendant are inapposite. The defendant cites our decision in *People v. Robinson*, 189 Ill. App. 323 (1989), for the proposition that the jury should have received a provocation instruction to determine whether the defendant formulated an intent to kill during a heated struggle. The *Robinson* defendant was convicted of murder for the stabbing of his girlfriend in their apartment after the trial court declined to instruct the jury on serious provocation. *Id.* at 326. On review, we noted "there was

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evidence of a violent, heated, argument between the deceased and her assailant" based on testimony of neighbors who heard an argument and a prolonged struggle, as well as evidence that the argument was "provoked by the deceased's break-up with and leaving the defendant." *Id.* at 350. We also noted that "two knives were recovered from the homicide scene," including one near the deceased's body, such that "the jury could have found that a knife was in the deceased's possession at some point during the altercation, or even that the deceased obtained the knife at the outset." *Id.* Thus we held "the jury \*\*\* should have decided whether the presence of two weapons, together with the other evidence, were sufficient to make the homicide voluntary manslaughter rather than murder." *Id.* at 351.

¶ 54 Although the defendant emphasizes *Robinson's* statements that "the voluntary manslaughter instruction is required even if the evidence of mutual combat is only a momentary scuffle," and that "[e]vidence of a heated argument and exchange of blows justifies" such a jury instruction (*id.* at 350), *Robinson's* is not controlling in this case. Most notably, in *Robinson* there was evidence that *both* the deceased and the defendant were armed with knives during a prolonged struggle. In contrast, in this case there was no evidence that Larry ever armed himself before the defendant stabbed him. Moreover, our decision in *Robinson* predated our supreme court's 1989 decision in *Austin*, which established that a jury instruction on serious provocation is not warranted where, as in this case, retaliation with a deadly weapon is out of proportion to the alleged provocation. *Austin*, 133 Ill. 2d at 126-27.

¶ 55 The defendant also relies on our supreme court's decision in *People v. Leonard*, 83 Ill. 2d 411 (1980) which found a jury instruction on serious provocation appropriate in light of evidence that defendant and decedent were engaged in a struggle for control of defendant's gun and that defendant had been injured. *Id.* at 415-16. The *Leonard* court reasoned that, although "the

defendant's intent to kill could have been formulated prior to these events, it is equally true that this intent could have arisen in the heat of this struggle." *Id.* at 421. Our supreme court concluded there was "some evidence of mutual combat" and that a jury should assess "the adequacy of provocation under these circumstances." *Id.* at 422-23.

¶ 56 The defendant argues that in this case, "as in *Leonard*, there is evidence \*\*\* that [defendant's] intent to kill arose, if at all, only during the heat of the struggle." Although we recognize the possibility that the defendant did not actually intend to kill Larry prior to the stabbing, *Leonard* is inapplicable. First, this case is factually distinguishable because, unlike the struggle for the gun in *Leonard*, there was no evidence presented that Larry sought control of the defendant's knife. Moreover, we again note the disproportionate retaliation by the defendant in stabbing Larry with a deadly weapon precludes a mutual combat instruction under the supreme court's holding in *Austin*, decided nine years after *Leonard*. *Austin*, 133 Ill. 2d at 127.

¶ 57 We also address the defendant's reliance on our decision in *People v. Phillips*, 159 Ill. App. 3d 142 (1987), for the proposition that his possession of a knife while Larry was unarmed does not preclude a jury instruction on provocation. In *Phillips*, defendant testified that he had brought a knife into the office of his work supervisor, but had intended only to frighten him. *Id.* at 146. According to the *Phillips* defendant, his supervisor unexpectedly grabbed the knife and attacked him, which provoked a struggle in which the defendant fatally stabbed the supervisor. 159 Ill. App. 3d at 148-49. We concluded there was sufficient evidence of provocation to merit a jury instruction on second-degree murder: "The mere fact that defendant had the knife upon his person while [victim] was not so armed is not alone sufficient to preclude the possibility of mitigation. The question is whether or not defendant entered the combat with the intention of using the knife. [Citation.]" *Id.* at 148. We emphasized that "[a] vital distinction needs to be

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recognized between a slayer who procured a knife beforehand for the purpose of killing and the sudden use, in the heat of combat, of a knife which the slayer merely happened to have at the moment." *Id.*

¶ 58 *Phillips* does not support the defendant's position under the evidence elicited at trial. Here, unlike *Phillips*, there was no evidence that Larry attempted to take the defendant's knife and use it against him. Furthermore, none of the evidence suggested that the defendant had armed himself merely intending to frighten Larry. Rather, in light of the evidence that the defendant had used a knife against Larry on a prior occasion, and that the defendant held the knife while threatening to harm Larry earlier in the day, *Phillips'* emphasis on the distinction between one who procures a knife beforehand and the use of a weapon that a defendant "merely happened to have at the moment" (*id.*) weighs *against* the provocation instruction here. Moreover, we again note that *Phillips* was also decided prior to our supreme court's decision in *Austin* establishing that a defendant is not entitled to a provocation instruction where, as here, the retaliation is disproportionate. Thus, while a different judge or even we ourselves may have reached a different ruling, we cannot say that the trial court abused its discretion in declining to instruct the jury on mitigation due to mutual combat.

¶ 59 The defendant's second argument on appeal is that the jury should have been instructed on involuntary manslaughter because there was evidence that Larry's death resulted from the defendant's mere recklessness, rather than intentional conduct. The defendant concedes that this issue was not properly preserved for our review because, although his counsel requested this jury instruction at trial, it was not raised in the defendant's post-trial motion. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007) ("Generally, a defendant forfeits review of any supposed jury instruction error if he does not object to the instruction or offer an alternative at trial and

does not raise the issue in a post-trial motion.""). Nonetheless, the defendant urges that we consider this issue under a "plain error" analysis, or that we may review it because his trial counsel's failure to preserve the issue constitutes ineffective assistance of counsel.

¶ 60 Subsequent to oral argument in this appeal, the defendant took the unusual step of filing—without notice to or leave of court—a motion for leave to submit supplemental briefing, *instanter*. The substance of that motion was limited to whether the claimed jury instruction error was, in fact, forfeited by trial counsel's failure to assert this error in the defendant's post-trial motion. The motion, which the defendant attempted to file after oral argument, argued that the issue of whether the defendant was entitled to a jury instruction on involuntary manslaughter is a constitutional issue, and as such, it cannot be forfeited merely by not being referenced in the defendant's post-trial brief. Thus, the defendant's motion urged that we consider this issue as if it were properly preserved in the trial court, rather than apply a "plain error" analysis.

¶ 61 However, as a practical matter, the substance of the motion raises a distinction without a difference. Substantively as well as practically, regardless of whether the issue was forfeited, as explained below we cannot say that the trial court erred in overlooking evidence of recklessness presented at trial, sufficient to support a jury instruction regarding involuntary manslaughter. The proposed supplemental briefing offered by the defendant after oral argument does not contain any new argument as to whether any evidence of recklessness was elicited at trial. Thus, our conclusion regarding the lack of evidence to support an involuntary manslaughter instruction would be unaffected by the defendant's attempt to characterize the issue as constitutional. Accordingly, we denied the defendant's procedurally unusual motion for supplemental briefing as it would not change the outcome with respect to this issue.

¶ 62 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565. Here, the defendant asserts that the "closely balanced" prong of the plain error analysis applies. However, we must first determine whether a "clear or obvious error" occurred. See *People v. Luna*, 409 Ill. App. 3d 45, 48 (2011) ("The first step in plain-error analysis is determining whether an error occurred.").

¶ 63 "Involuntary manslaughter is committed when a defendant performs acts that are 'likely to cause death or great bodily harm to some individual, and he performs them recklessly.' " *People v. Hayes*, 409 Ill. App. 3d 612, 621 (2011) (quoting ILCS 5/9-3(a) (West 2004)). " 'A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow \*\*\* and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.' " *Id.* (quoting 720 ILCS 5/4-6 (West 2004)).

¶ 64 "An instruction should be given if there is some credible evidence in the record that would reduce the crime of first-degree murder to involuntary manslaughter." *People v. Sipp*, 378 Ill. App. 3d 157, 163 (2007). "While a defendant is entitled to an involuntary manslaughter instruction if there is 'slight' evidence upon which a given theory could be based, there must be some evidence of the reckless conduct." (Internal quotation marks omitted.) *Id.* at 164.

¶ 65 "[W]hether an involuntary manslaughter instruction is warranted depends on the facts and circumstances of each case." (Internal quotation marks omitted). *Hayes*, 409 Ill. App. 3d at 621.

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"Certain factors may suggest whether a defendant acted recklessly and whether an involuntary manslaughter instruction is appropriate: disparity in size and strength between the defendant and the victim, the severity of the victim's injuries, whether the defendant used his bare fists or a weapon, whether there were multiple wounds, or whether the victim was defenseless." (Internal quotation marks omitted). *Sipp*, 378 Ill. App. 3d at 164.

¶ 66 Assessing the factors in this case, the record indicates that the defendant and Larry were of similar size. With respect to the factor of "severity of the victim's injuries," the fact that two of the three stab wounds were described as merely superficial arguably weighs in favor of reckless, rather than intentional, conduct. Moreover, although the fatal wound to the face nearly severed the carotid artery, defense counsel elicited testimony from the medical examiner that one aiming for this artery would usually be expected to aim for the neck. To the extent this suggests that the defendant did not aim for Larry's neck, this could be interpreted as weighing in favor of recklessness rather than intent to inflict a serious wound.

¶ 67 However, we believe that the factors consisting of the defendant's use of a knife, the presence of multiple stab wounds, and the evidence that Larry was unarmed and relatively defenseless, weigh more strongly against finding the recklessness necessary to support an involuntary manslaughter instruction. Our decision in *People v. Luna*, 409 Ill. App. 3d 45 (2011), which also involved a stabbing death, is instructive on this question. In that case, at trial the "defendant asserted self-defense but testified somewhat inconsistently." *Id.* at 47. Specifically, "at different points in his testimony, [he] stated that he intentionally stabbed the victim in order to save himself from a perceived violent attack or, alternatively, merely swung the knife in order to scare the victim away." *Id.* As in this case, the *Luna* defendant argued that, although not properly preserved for appellate review, the trial court's failure to submit an

involuntary manslaughter jury instruction was reviewable under the plain-error doctrine. *Id.* at 48.

¶ 68 In determining whether an error occurred, we noted " 'involuntary manslaughter requires that a defendant unintentionally kill an individual by recklessly performing acts that are likely to cause death or great bodily harm.' " *Id.* at 49 (quoting *People v. Jones*, 219 Ill. 2d 1, 31 (2006)). Thus, under *Luna's* facts, we said the "primary question" was "whether there is any credible evidence that defendant did not intentionally stab the victim but instead merely swung the knife recklessly in the victim's direction." *Id.* at 49. In that case, the "sole piece of evidence on this point [was] defendant's trial testimony that he intended only to scare the victim away at the time that he swung the knife." *Id.*

¶ 69 Our analysis in *Luna* noted that "a defendant is not entitled to reduce first degree murder to [involuntary manslaughter] by a hidden mental state known only to him and unsupported by the facts." (Internal quotation marks omitted.) *Id.* We then recognized that in case law concerning homicides committed with firearms, "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (Internal quotation marks omitted.) *Id.*

¶ 70 We held that the same reasoning from firearm cases applied to the stabbing in *Luna*, noting "the evidence demonstrated that (1) defendant intended to swing the knife, which, like a gun, is a deadly weapon; (2) defendant either pointed the knife over his shoulder in the direction of the victim or walked up to the victim and pointed the knife at his chest; and (3) defendant swung the knife at the victim." *Id.* at 49-50. We concluded that this evidence "unequivocally

demonstrated that defendant *intended* to swing the knife in the victim's direction, which is all that is required \*\*\* to preclude an involuntary manslaughter instruction." (Emphasis in original.) *Id.* at 50 (reasoning that "defendant's act of intentionally swinging the knife at the victim makes his conduct more than reckless").

¶ 71 In this case, we likewise cannot say that the trial court committed clear error in denying the involuntary manslaughter instruction due to lack of evidence of recklessness. Specifically, we note there was no testimony or evidence that the defendant merely meant to scare Larry or that he merely swung the knife in Larry's direction in a reckless manner, since no witness claimed to have seen the actual stabbing. Although Davis testified that she observed the men fighting over the bicycle, evidence that the defendant and Larry were engaged in a struggle is not necessarily evidence of recklessness. See *People v. Castillo*, 188 Ill. 2d 536, 541 (1999) (defendant's testimony "that he struggled with the victim after the victim drew a gun and threatened to injure him" was "not evidence of recklessness, but was instead some evidence that defendant acted with regard to a *justifiable* risk of injuring the victim in order to protect himself." (Emphasis in original.)).

¶ 72 On the other hand, there was ample evidence that the defendant intentionally stabbed Larry, regardless of whether he actually *intended to kill* Larry by doing so. The State presented evidence that: (1) the defendant had intentionally stabbed Larry after an argument several months earlier; (2) the defendant threatened to hurt or kill Larry while holding a knife in the hours preceding the stabbing; (3) in the struggle for Larry's bicycle, the defendant armed himself with a knife while Larry was unarmed; and, (4) the defendant stabbed Larry not once but three times, including a facial wound with sufficient force to penetrate the cheek and nearly sever the carotid artery. Thus, the defendant's intentional act in stabbing Larry "makes his conduct more

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than reckless, precluding an involuntary manslaughter instruction." *Luna*, 409 Ill. App. 3d at 50. As a result, the denial of this jury instruction was not a "clear or obvious" error, and the plain error doctrine does not apply.

¶ 73 Alternatively, the defendant argues that we should address the failure to instruct the jury on involuntary manslaughter because his trial counsel's failure to preserve this issue constituted ineffective assistance of counsel. We recognize that "[t]he inadequacy of a defendant's trial counsel entitles him to a new trial if his appointed counsel was actually incompetent \*\*\* and if this incompetence resulted in substantial prejudice to the defendant without which the result of his trial would probably have been different." *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that: (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant as to deny him a fair trial." *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). With respect to the prejudice prong of this two-part test, a "defendant must prove there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 342. Because an ineffective assistance claim fails if either prong of the test is not met, "a reviewing court need not consider whether counsel's performance was deficient before determining whether the defendant was so prejudiced by the alleged deficiencies that he is entitled to a new trial." *Id.* That is, "[i]f a court finds that defendant was not prejudiced, it may dismiss on that basis alone, without further analysis." *People v. Land*, 2011 IL App (1st) 101048, ¶ 116.

¶ 74 In this case, for the reasons already set forth with respect to the "plain error" doctrine, the defendant cannot satisfy the prejudice prong of his ineffective assistance of counsel claim.

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Considering the lack of evidence that the defendant acted with mere recklessness, in contrast to the evidence that the defendant intentionally stabbed Larry, we cannot conclude there is a reasonable probability that the result would have been different had the defendant's post-trial motion properly preserved the alleged error of failing to instruct the jury on involuntary manslaughter. Given that the trial court had already denied the defendant's request for this instruction at the jury instruction conference with counsel, it appears extremely unlikely that the trial court would have granted the defendant a new trial on this basis had the defendant asserted this argument in his post-trial motion. Moreover, even assuming the issue had been properly preserved for our review, there was insufficient evidence of recklessness for us to conclude that the trial court acted unreasonably or abused its discretion in declining to give this jury instruction. As the prejudice prong of the ineffective assistance test is not satisfied, we need not decide whether defense counsel's failure to preserve this issue in the defendant's post-trial motion "was so deficient as to fall below an objective standard of reasonableness" under the first prong of the standard. *Perry*, 24 Ill. 2d at 341.

¶ 75 Apart from his contentions regarding jury instructions, the defendant claims the trial court erred in permitting the State to call Officer Conry as a rebuttal witness to testify that the defendant had told her "somebody stabbed" Larry. The defendant argues that this testimony was not proper because it did not actually rebut any evidence put forth in the defendant's case. The defendant notes that he did not dispute that he had stabbed Larry, and that he did not offer any evidence of his prior statements. According to the defendant, the State's argument at trial that Officer Conry's testimony rebutted Detective Pierce's testimony was "a ruse," since Pierce's testimony "had nothing to do with the theory of self-defense."

¶ 76 The parties do not dispute that an abuse of discretion standard governs this alleged error. "[T]he trial court may admit rebuttal evidence where the evidence tends to explain, repel, contradict or disprove the evidence of the defendant. [Citation.] Whether evidence is admitted at trial is a matter within the discretion of the trial court and, therefore, we will not reverse the trial court's decision absent an abuse of that discretion." (Internal quotation marks omitted.) *People v. Woods*, 2011 IL App (1st) 091959, ¶ 34.

¶ 77 For the following reasons, we agree with the defendant to the extent that this testimony was not properly construed as "rebuttal" testimony, but should and could have been elicited from Officer Conry during her testimony in the State's case in chief. Nevertheless, we find that any such error was harmless.

¶ 78 We note that the State's arguments to the trial court for calling Conry as a rebuttal witness were without merit. First, the State claimed anticipatory rebuttal. Specifically, the prosecutor informed the court in a side bar that he *anticipated* that the defendant would claim self defense, therefore, the State wanted to recall Officer Conry to put the defendant's theory to rest. The State argued: "[T]he defense went into not only where Stanley was when Detective Pierce got there but [defense counsel] also went to great lengths to show the picture of the stairwell. It is our belief that the defense is going to argue something relating to self-defense on that. Self-defense is now an issue." This court knows of no legal theory to support allowing a rebuttal witness in *anticipation* of evidence which may or may not be put forward by the defense. Thus, to the extent the trial court premised its ruling on the State's *anticipation of future evidence* or argument on self-defense, as a basis for its admission, that was erroneous.

¶ 79 In the same side bar, the State also cited Detective Pierce's testimony as a basis for Conry's rebuttal testimony, arguing: "[T]he defense put on \*\*\* Detective Pierce's testimony

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regarding the placement of the blood spatter, where it was, [defense counsel] even asked him what his opinion was as to where the fight started. All those things put self-defense into issue." However, as noted by the defendant, Pierce's testimony did not offer a view as to whether Larry or the defendant had started the altercation or otherwise relate to the issue of self-defense. Thus, Officer Conry's testimony regarding the defendant's statement to her did not actually rebut Pierce's testimony.

¶ 80 More importantly, the record indicates that evidence on the theory of self-defense arguably had been placed in issue even before Officer Conry was initially called to testify in the State's case in chief. Thus, the State could have and should have elicited the evidence of the defendant's statement that "somebody stabbed" Larry during Conry's initial testimony. In particular, prior to Conry's testimony, the defendant had called Dr. Carrie Wilson to testify that she treated the defendant for a laceration to the lip on the night of the stabbing; this testimony suggested that Larry had struck the defendant during their struggle. Moreover, in its cross-examination of paramedic Ponce de Leon — which also preceded Conry's testimony in the State's case in chief — defense counsel had elicited testimony that Larry was combative towards emergency personnel and under the influence of alcohol. As evidence arguably pertaining to self-defense had already been presented, the State should have elicited the defendant's statement to Conry during her initial testimony rather than call her as a "rebuttal" witness.

¶ 81 Alternatively, the State also could have sought to elicit the statement at issue by seeking permission from the trial court to reopen its proofs. See *People v. Waller*, 67 Ill. 2d 381, 387 (1977) ("[T]he order of proof in a criminal case is subject to the broad discretion of the trial court."). By characterizing the recall of Officer Conry to the witness stand as "rebuttal testimony" the State created an issue which may not otherwise have been raised.

¶ 82 Therefore, we recognize a procedural error by the trial court in allowing this testimony for the stated purpose of "rebuttal." However, as the evidence at issue could have properly been admitted as part of the State's case in chief, we find that its erroneous characterization as "rebuttal" evidence is harmless.

¶ 83 The introduction of evidence and the order in which parties are allowed to put evidence before the jury are within the sound discretion of the trial court. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007) ("[E]videntiary rulings \*\*\* will not be disturbed absent a clear abuse of discretion."). The defendant's alleged statement that "somebody stabbed" Larry arguably contradicted the theory of self-defense, and its admission as part of the State's case in chief would not have constituted an abuse of discretion. Thus, its admission as "rebuttal" testimony ultimately proved to be harmless. See *People v. Waller*, 67 Ill. 2d 381, 387 (1977) ("[A]lthough testimony that would be proper as evidence in chief should not be reserved for rebuttal, these matters rest largely within the discretion of the trial court and such rulings will ordinarily not be set aside upon review." (Internal quotation marks omitted.)); *People v. Williams*, 209 Ill. App. 3d 709, 723 (1991) ("[T]he fact that the rebuttal evidence could have been introduced by the State in its case in chief will not render the evidence inadmissible in rebuttal."). Accordingly, the defendant is not entitled to reversal on this basis.

¶ 84 Moreover, even if we were to find that the alleged statement by the defendant that "somebody stabbed" Larry should not have been admitted, this error would be harmless and insufficient to order a new trial in light of all the evidence supporting the defendant's conviction. See *People v. Villanueva*, 382 Ill. App. 3d 301, 307 (2008) (admission of victim's testimony did not constitute reversible error as "the evidence \*\*\* even in the absence of the testimony \*\*\* was sufficient to prove defendant guilty."); *People v. Duff*, 374 Ill. App. 3d 599, 604 (2007)

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(erroneous admission of testimony about codefendant's guilty pleas was harmless where "the State's evidence \*\*\* was overwhelming.").

¶ 85 The defendant's final contention, which is not disputed, is that the trial court improperly imposed two fees. First, defendant was assessed a \$25 fee pursuant to section 4-2002.1(b) of the Counties Code, which entitles a municipality to "a \$25 prosecution fee for each conviction for a violation of the Illinois Vehicle Code." 55 ILCS 5/4-2002.1(b) (West 2012). As conceded by the State, this case did not concern the Illinois Vehicle Code and thus the fee was improper. Secondly, defendant notes that he was separately assessed a \$15 fee that lacks any statutory authorization; the State likewise concedes that the \$15 fee was improper. Although the defendant did not contest these fees before the trial court, "a sentence, or portion thereof, that is not authorized by statute is void" and may be challenged at any time. See *People v. Thompson*, 209 Ill. 2d 19, 23-25 (2004). Thus, the fines and fees order should be corrected to credit the defendant for both the \$25 and the \$15 fees noted above.

¶ 86 For the foregoing reasons, we affirm the defendant's conviction and sentence, but we order the correction of the fines and fees order to credit the defendant for the \$25 and \$15 fees noted above.

¶ 87 Affirmed; fines and fees order corrected.