2017 IL App (1st) 143870-U
Order filed: May 19, 2017
Modified upon denial of rehearing: June 16, 2017

SIXTH DIVISION

No. 1-14-3870

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 19772
	)	
RICARDO VASQUEZ,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder and his 35-year sentence are affirmed over his arguments that his conviction should be reduced to second degree murder based on a mitigating factor of an unreasonable belief in the need for self-defense, and the trial court failed to consider relevant factors at sentencing.

¶ 2 Following a bench trial, defendant Ricardo Vasquez was convicted of the first degree murder of Carlos Cartegena (the victim), and was sentenced to 35 years' imprisonment. On appeal, defendant contends that his conviction should be reduced to second degree murder because he established that he had an actual belief, though unreasonable, of the need to use deadly force to defend himself against the victim. Defendant further asserts that his sentence fails

to reflect his rehabilitative potential, or the objective of restoring him to useful citizenship. We affirm.

¶ 3 Defendant was charged by indictment with two counts of first degree murder. The evidence at defendant's bench trial was uncontroverted that defendant fatally stabbed the victim in the early morning hours of October 23, 2011. Several State witnesses recounted the events leading up to that fatal confrontation. However, only defendant offered testimony as to the actual stabbing. An initial altercation took place involving the victim and defendant's cousin, Michael Klee, during a party attended by all of the witnesses, the victim, and defendant. The fatal encounter between defendant and the victim occurred several hours later.

¶ 4 Nina Kantowski, testified that, at about 2 a.m., on October 23, 2011, she went to the party with the victim, her boyfriend at that time. The party was at a home on May Street "behind Wilson Park." During the party, a group, which included defendant, the victim, and Mr. Klee went to a nearby bank parking lot on 34th Place. While there, the victim and Mr. Klee argued. Marissa White held Mr. Klee, and Ms. Kantowski stood between the two men. Ms. Kantowski "got pushed out of the way," and Mr. Klee punched the victim in the face. After the group left the parking lot, Ms. Kantowski and the victim, but not defendant, nor Mr. Klee, returned to the party, which ended soon thereafter.

¶ 5 Ms. Kantowski refused a ride home from the victim as he had been drinking. The victim did drive Steven Morris to his house. But as Ms. Kantowski was walking home, the victim pulled up and stopped his vehicle near the park. As the two were talking, defendant appeared, went to the parking lot, and said that he was looking for his keys. The victim got out of his vehicle and asked defendant who had hit Ms. Kantowski during the earlier altercation. Defendant responded it was not him and warned the victim "he would be dead in a week."

Defendant was holding the handle of a knife which was in the pocket of his hooded sweatshirt. Ms. Kantowski told defendant several times to put the knife away, which he eventually did. The victim was not armed and did not threaten defendant at any time.

¶ 6 Defendant made a call and claimed during that call that the victim had threatened him by saying "he was going to be dead in a week," which was what defendant had just said to the victim. The victim responded that defendant should "tell the truth because he never said that."

¶ 7 Ms. Kantowski advised the victim that they should leave; they walked away with the victim behind her. A man ran up to them wearing a black hooded shirt covering his face. The victim warned Ms. Kantowski to "run, to get help, to get [her] mom, to call the cops." As Ms. Kantowski ran away, she heard the sound of something crashing into a chain-link fence.

¶ 8 On cross-examination, Ms. Kantowski stated that, during the earlier argument between the victim and Mr. Klee in the parking lot, the victim did not throw any punches but "stood there and got hit in the face" by Mr. Klee. She was struck in the jaw and "got thrown to the ground." She was not sure who did this, but explained it was not defendant. On redirect, Ms. Kantowski agreed that, during the earlier argument, the victim "was trying to calm down [Mr. Klee]."

¶ 9 The victim, Mr. Morris, and some of the victim's friends belonged to an organization called the Three Ones.

¶ 10 Marissa White testified that she went to the party with Mr. Klee, her then-boyfriend. Christian Delgado, her former boyfriend, was also there, and the two men argued. She explained that a group, which included defendant, the victim, and Ms. White, moved from the party to the parking lot in order to prevent a physical altercation between Mr. Klee and Mr. Delgado. While in the parking lot, defendant had a "box cutter." The victim did not have any weapons.

¶ 11 On cross-examination, Ms. White stated she did not see defendant hit anyone while the group was in the parking lot. The victim "hugg[ed]" Mr. Klee to "stop him from running" after Mr. Delgado. After the group dispersed from the parking lot, Ms. White, defendant and Mr. Klee searched the lot for the keys to defendant's father's vehicle. A police vehicle arrived, and the officers shone a light on the lot to help them find the keys. When the keys were not found, the officers drove them to Mr. Klee's sister's house. Defendant, at some point, left the house to return to the parking lot and search for the keys.

¶ 12 Mr. Morris testified that, at the party, Mr. Klee and Ms. White argued with Mr. Delgado, and the victim tried to stop the argument. Mr. Delgado, Mr. Klee, Ms. White, defendant, and Matthew Aguirre also then left the house.

¶ 13 About 10 minutes later, Mr. Aguirre called and asked him to come to the parking lot where the group had assembled. When Mr. Morris arrived there, Mr. Klee and the victim were arguing because the victim had stopped Mr. Klee from fighting with Mr. Delgado. Defendant was holding a knife in his hand and was opening and closing the blade. The victim told defendant to put the knife away. The victim was not carrying a weapon.

¶ 14 Mr. Morris testified that the argument between Mr. Klee and Mr. Delgado was "a slight incident." Mr. Morris said the victim was not trying to start a fight with anyone, but was trying to stop Mr. Klee from fighting Mr. Delgado.

¶ 15 The victim drove Mr. Morris home when the party ended. A short time later, the victim called Mr. Morris to say he would pick him up. However, about three minutes later, the victim called again and asked Mr. Morris to call an ambulance. The victim sounded "[l]ike he needed an ambulance." A friend drove Mr. Morris to the scene, where the victim was lying "unresponsive"

on the sidewalk. The victim, according to Mr. Morris, was 5 feet, nine inches tall and weighed 275 pounds.

¶ 16 On cross-examination, Mr. Morris stated that, during the initial incident, as Mr. Klee and the victim argued, words were also exchanged between defendant and the victim. The victim did not seem angry that Ms. Kantowski was pushed to the ground. Mr. Morris testified that the Three Ones was a group which supported a music label owned by a friend.

¶ 17 Mr. Aguirre, testified that, at the party, Mr. Klee "seemed mad" at Mr. Delgado when he spoke to Ms. White. When Mr. Delgado left the house, Mr. Klee was on the porch and attempted "to get after him." The victim came out of the house and grabbed Mr. Klee in a "bear hug" at the front gate to stop him, but Mr. Klee ran after Mr. Delgado to the parking lot. The group, including defendant, went to the parking lot, where the victim tried to calm Mr. Klee down.

¶ 18 Defendant became angry and asked the victim: "Why are you talking to my cousin [Mr. Klee] like that?" and called the victim a "b***h." Defendant held a switchblade in his hand, but he eventually put it away. The victim was unarmed. Mr. Klee punched the victim, and Mr. Aguirre shoved Mr. Klee to the ground. The victim then walked away, but returned to the group. Defendant and the victim "got into it again." Defendant pulled his knife back out, "flicking it open and closed" while facing the victim. Mr. Aguirre and Mr. Morris told him to put it away. Mr. Aguirre left the parking lot with the victim, Ms. Kantowski, Mr. Morris. Mr. Aguirre then went home.

¶ 19 Defendant had his nickname "Spooks," shaved into his hair.

¶ 20 On cross-examination, Mr. Aguirre said that when defendant confronted the victim during the initial scene at the parking lot, the victim told defendant this had nothing to do with him and to "shut the f**k up."

¶ 21 Chicago police officer William Stec, an evidence technician, testified that, at about 6:45 a.m., he and his partner were called to 1050 West 34th Place, where they found the victim's bloody body, lying on the sidewalk next to a chain link fence. There was blood on the fence. No weapons were recovered from the victim.

¶ 22 Chicago police officer, Willella McKinney, arrived near the scene at 7 a.m. on October 23, 2011. She spoke to defendant's father who told the officer and her partner that defendant had gone to his grandmother's house at 934 West 36th Street. The officers went to that address and found defendant walking down the street. Defendant said he had been at his girlfriend's house and took a shower. His head was shaved.

¶ 23 Assistant Cook County Medical Examiner (AME), Dr. Ariel Goldschmidt, testified that, in performing the victim's autopsy, he observed scrapes and bruises on the victim's face and body, and two knife wounds. A deep wound was inflicted to the victim's jugular vein under his left ear. The course of the neck wound "was downward four inches in depth or greater and extended through the skin and soft tissue to the left internal jugular vein." AME Goldschmidt observed "injuries around the stab wound" that "may or may not represent twisting of the knife." The victim also had an incise wound on the proximal aspects of his right forearm, which the AME characterized as being consistent with a defensive wound. The AME concluded that the victim died as a result of the stab wounds and his death was a homicide.

¶ 24 On cross-examination, AME Goldschmidt stated that some of the victim's bruises were consistent with being punched, and the scrapes and abrasions could have resulted from a fall.

The medical examiner could not determine which wound was inflicted first: the forearm wound, or the neck wound.

¶ 25 In response to a question from the trial court, the AME testified that, after the stabbing, "there would be a period of time where [the victim] would still be conscious and able to move around." The victim could move "[t]o a full extent," for "at least a few seconds," but not more than a few minutes.

¶ 26 The defense presented the testimony of defendant's father, Ronald Vasquez. At about 6:15 a.m. on October 23, 2011, he received a call from defendant and heard a raspy voice in the background saying: "I gots you [*sic*], mother*****r." Mr. Vasquez searched for defendant and found him at 35th Street and Morgan Avenue and brought him home. After defendant informed him of the stabbing, Mr. Vasquez went outside and saw squad cars headed toward his mother's home. Mr. Vasquez went to his mother's home and then called defendant and told him to come there. Defendant was arrested upon his arrival.

¶ 27 Defendant testified that, at that time, he was 21 years old and had known the victim since 2007. The victim had a reputation for violence, and the Three Ones was "[b]asically a street gang." Defendant saw the victim carrying an automatic handgun in 2007.

¶ 28 On October 22, 2011, at 4:30 a.m., he and Mr. Klee went to the party. Defendant drove them in his father's vehicle.

¶ 29 At the party, Mr. Klee, who was sixteen years old, argued with Mr. Delgado and wanted to fight him. Mr. Klee followed him out of the house and to the parking lot. Others from the party, including defendant, also went to the parking lot. The victim held Mr. Klee back and they "pushed each other a few times," and "threw a few punches." Mr. Klee hit the victim, and Mr.

Aguirre pushed Mr. Klee to the ground. Ms. Kantowski also fell to the ground during the altercation.

¶ 30 Defendant testified that Mr. Klee and the victim were arguing "back and forth." The victim called Mr. Klee a "b***h or something," and defendant "told [the victim] not to talk to my cousin like that." The victim responded that defendant should "shut [his] b***h a** up and get [himself] away from the parking lot." Defendant testified that he pulled out a folding knife and held it by his side "so they wouldn't come near me." Mr. Aguirre made a phone call, and Mr. Morris arrived at the scene with another person.

¶ 31 After the altercation ended, at about 6 a.m., defendant, Mr. Klee, and Ms. White searched the parking lot for the keys to his father's vehicle. The police drove by the parking lot and helped them look for the keys. When the keys were not found, the police drove them to defendant's grandmother's house. However, defendant returned to the parking lot 10 minutes later to continue searching for the keys. While defendant searched, he heard "tires screech" and saw the victim jump out of a van. Ms. Kantowski also emerged from the area of the van. The victim accused defendant of hitting Ms. Kantowski earlier and said to him: "[W]hat's up, b***h? I got you now. Your cousin ain't here." Defendant told the victim he did not hit Ms. Kantowski. According to defendant, the victim was angry and was shouting and "swearing a lot." Ms. Kantowski stood between defendant and the victim and told defendant to leave. Defendant responded that he was still searching for the keys. Ms. Kantowski turned to the victim and said that they should leave.

¶ 32 The victim called someone from his phone and told them to "bring that thing over here" and stated their location. Defendant did not know who the victim called. Defendant called his

father to say that the victim was going to shoot him. Ms. Kantowski ran away. Defendant walked away from the victim, who "charged" and tackled defendant.

¶ 33 Defendant testified that he was afraid the person whom the victim had called would bring a gun to the parking lot and shoot him and he thought he was going to die. Defendant stabbed the victim once or twice with the knife "to get him off me." He "thought" the stabs were to the victim's shoulder. The victim stood up and defendant ran in the direction of his home and tossed the knife in an alley.

¶ 34 On cross-examination, defendant admitted that, during the party, he drank alcohol and, while in the parking lot, he took out his knife "so no one trie[d] to attack me," although no one was doing so. He never saw the victim with a gun or knife at that time. At the later encounter, defendant pulled the knife from his pocket as soon as the victim exited the van.

¶ 35 When defendant was asked about the phone call made by the victim where the victim stated "bring that thing over here," defendant testified that he took that to mean bring a gun. Defendant never observed the victim holding a gun. Defendant said he called his father, instead of the police, because his dad was close by. After calling for help, defendant "jogged" away from the victim, passed three houses, and then turned around when he heard the victim approach. Defendant held the knife "open" inside his jacket pocket. The victim tackled defendant to the ground and was on top of defendant. When asked whether he "plunged" his knife into the victim's neck, defendant answered: "Yes, to get him off me." Defendant said he stabbed the victim and took the knife "right out. I did not twist it or anything." After he stabbed the victim, the victim stood up. Defendant fled the scene because the victim had "just made a phone call," and someone "was going to come help him."

¶ 36 Defendant went to his father's home and shaved his nickname from his hair so that the members of the Three Ones would not be able to identify him. Defendant did not call the police and did not know the victim had died until about one day later, when he was brought in to the police station.

¶ 37 The trial court asked defendant if he stabbed the victim in the neck and the arm. Defendant responded that he only remembered stabbing him "around the shoulder area."

¶ 38 The parties stipulated that a 9-1-1 call was made on October 23, 2011, at 5:17 a.m. reporting an altercation between a white male, a Hispanic male, and a Hispanic female at Wilson Park. The responding officers found a van parked nearby which was registered to the victim, and the victim was lying on the sidewalk. Photographs of the crime scene were entered into evidence.

¶ 39 The trial court ruled that it would consider the victim's two prior convictions for aggravated assault as evidence of his aggressive or violent character under *People v. Lynch*, 104 Ill. 2d 194 (1984).

¶ 40 In finding defendant guilty of first degree murder, the trial court referred to the victim's death as "senseless." The court found the elements of self-defense had not been established stating:

> "As the State pointed out, and I totally agree, [defendant] had no reasonable or unreasonable reason to believe that the stabbing was necessary. Even reasonable or unreasonable. The evidence shows in my mind that for whatever reason [defendant] wanted to join the beef that was with his cousin [Mr. Klee] and the former boyfriend of [Mr. Klee's] then current girlfriend. It wasn't his beef, but he wanted to join in for some reason.

> Maybe he is mad that someone called his cousin [Mr. Klee], pardon my language, b***h and there is back and forth language about that nonsense. He is the one with the knife, he being [defendant]. Even he says he doesn't see a gun or anything else."

The court rejected defendant's account as to the stabbing, stating:

> "It defies belief that [defendant] somehow or another was on the ground on his back with a guy 5-8, 210 over him and he is able to get his hand in his pocket and pull the knife that is already open and stick the guy once in the neck causing a four-inch deep knife to the man in his neck and cuts him in the arm also and not believe he hurt the guy at all. He just got up and he ran off and that was the end of the story."

The court also noted that, instead of remaining at the scene, defendant quickly left, "ditche[d] the knife somewhere," and then shaved his head to remove his nickname. The court found that the crime scene photographs were "pretty grim," and showed "the victim laying on the ground with blood all over the place."

¶ 41 After denying defendant's motion for a new trial, the court held a sentencing hearing. The State presented victim impact statements from several members of the victim's family. Defendant's mother addressed the court in mitigation, and defendant presented a statement in allocution. The trial court sentenced defendant to 35 years' imprisonment.

¶ 42 On appeal, defendant first contends that his conviction should be reduced to second degree murder because the evidence established his actual belief, although unreasonable, that he needed to act in self-defense. The State responds that defendant's first degree murder conviction should be affirmed because defendant attacked the victim and did not act out of a need to defend himself.

¶ 43 A person commits the offense of second degree murder when he commits first degree murder and a mitigating factor is present. 720 ILCS 5/9-2(a) (West 2010). Once the State proves the elements of first degree murder beyond a reasonable doubt, the burden shifts to the defendant to establish, by a preponderance of the evidence, proof of a mitigating factor. *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995); *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 3.

¶ 44 Here, defendant does not challenge the proof as to first degree murder. Rather, he contends that he presented sufficient proof of a mitigating factor to support the reduction of his conviction to second degree murder, namely that he acted on his unreasonable belief that deadly force was necessary against the victim. See 720 ILCS 5/9-2(a)(2) (West 2010); *Jeffries*, 164 Ill. 2d at 113 (noting this theory is known as "imperfect self-defense" because sufficient evidence exists that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable).

¶ 45 A self-defense claim will fail where a defendant uses force that was "unnecessary and excessive under the circumstances." *People v. Belpedio*, 212 Ill. App. 3d 155, 160 (1991). "Self-defense consists of six factors: '(1) force is threatened against a person, (2) the person is not the aggressor, (3) the danger of harm was imminent, (4) the threatened force was unlawful, (5) the person actually and subjectively believed a danger existed that required the use of the force applied, and (6) the person's beliefs were objectively reasonable.' " *Castellano*, 2015 IL App (1st) 133874, ¶ 149 (quoting *People v. Washington*, 2012 IL 110283, ¶ 35). To be found guilty of second degree murder, the defendant must prove, by a preponderance of the evidence that the first five factors existed. *Id.* ¶ 149 (citing *Jeffries*, 164 Ill. 2d at 128-29). To sustain a charge of first degree murder after a defendant raises the issue of self-defense, the State must prove beyond

a reasonable doubt that at least one of the six factors was not present. *Castellano*, 2015 IL App (1st) 133874, ¶ 149 (citing *Jeffries*, 164 Ill. 2d at 128).

¶ 46 Here, the trial court found that defendant did not provide sufficient proof of the elements of self-defense. The power of a reviewing court to reduce a first degree murder conviction to second degree murder should be "cautiously exercised." *People v. Hooker*, 259 Ill. App. 3d 394, 403 (1993) (a conviction should only be reduced where there is an "evidentiary weakness" as to an element of the offense). Whether the defendant's actions were committed under mitigating circumstances is a question of fact. *Castellano,* 2015 IL App (1st) 133874, ¶ 144. In reviewing that determination, this court will not reverse if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present." *People v. Blackwell,* 171 Ill. 2d 338, 358 (1996); *People v. Romero*, 387 Ill. App. 3d 954, 968 (2008). During a bench trial, it is the purview of the trial court, as the trier of fact, to weigh the evidence and draw reasonable inferences from the facts. *People v. Brown,* 2017 IL App (1st) 142877, ¶ 39 (citing *People v. Slim,* 127 Ill. 2d 302, 307 (1989)).

¶ 47 On appeal, defendant contends he acted with an actual, though unreasonable, belief that the need to use deadly force to defend himself from the victim was required. Defendant asserts that the victim was the initial aggressor and, based on defendant's testimony as to the victim's threats during the initial altercation involving Mr. Klee, as well as the later confrontation and argument between him and the victim during which time the victim made a phone call ordering someone to "bring that thing over here," which defendant thought was a reference to a weapon, defendant believed that the victim and his friends would either shoot or severely beat him. We disagree.

¶ 48 The evidence as to the circumstances surrounding the initial altercation does not serve to establish that defendant was the aggressor or that he threatened to harm defendant. Although angry words were exchanged between the victim and Mr. Klee, and the victim and defendant, the evidence showed that the victim had no weapon at that time and was trying to prevent a physical altercation between Mr. Klee and Mr. Delgado. There was nothing about the initial altercation which would indicate that the victim had threatened the use of unlawful force, or posed a danger to defendant which would require defendant to use deadly force against the victim. Instead, it was defendant who openly and menacingly displayed his knife during this earlier encounter.

¶ 49 Furthermore, the evidence as to the circumstances immediately leading up to the stabbing does not show that the victim was the aggressor or threatened defendant with unlawful force.

¶ 50 Defendant pulled his knife as soon as the victim exited his vehicle. Ms. Kantowski testified that the victim was not armed at the time of the fatal confrontation, and defendant did not testify that he saw the victim holding a weapon. Police found no weapon on the victim at the scene. While it is not necessary that the aggressor be armed for a defendant to succeed on a self-defense theory, it still must "appear that the aggressor is capable of inflicting serious bodily harm without the use of a deadly weapon, and is intending to do so." *People v. Hawkins*, 296 Ill. App. 3d 830, 837 (1998).

¶ 51 Defendant's account that the victim threatened him was also contradicted by Ms. Kantowski, who testified that it was defendant who told the victim "he would be dead in a week" while holding his knife. Defendant's testimony that the victim called someone and told them to "bring that thing over here"—meaning, bring a gun—was contradicted by the State's evidence. Ms. Kantowski testified the victim called someone on his phone, but said nothing. Mr. Morris

testified that the victim called him during the victim's encounter with defendant and said he would pick up Mr. Morris.

¶ 52 Defendant testified that, during the later encounter, after he called his father for help, the victim "charged" and tackled him. Again, this version was contrary to Ms. Kantowski's testimony. Ms. Kantowski urged the victim to leave with her and they began to walk *away* from defendant. When a man approached, the victim told Ms. Kantowski to "run, to get help, to go get [her] mom, to call the cops."

¶ 53 The trial court heard conflicting accounts as to what preceded the physical altercation between defendant and the victim, and the court found defendant's version unbelievable. We find no reason to reject the court's credibility determinations. In a bench trial, a trial court "[has] the responsibility of weighing the credibility of the witnesses rests with the trial court." *Castellano*, 2015 IL App (1st) 133874, ¶ 145 (quoting *People v. Coleman*, 301 Ill. App. 3d 37, 42 (1998)). " 'This court will not substitute its judgment for that of the trial court on questions involving the credibility of witnesses.' " *Id.* (quoting *In re Jessica M.*, 399 Ill. App. 3d 730, 738 (2010)).

¶ 54 Defendant claimed that he stabbed the victim in the shoulder only "to get him off me." However, the medical evidence showed that the victim suffered a defensive type wound to his arm and a deep and downward neck wound under his left ear. The trial court rejected defendant's testimony—that he took an open knife out of his pocket and inflicted a deadly wound while the victim, although large in size, was lying on top of him. "The trier of fact is not obligated to accept a defendant's claim of self-defense; rather, in weighing the evidence, the trier of fact must consider the probability or improbability of the testimony, the circumstances

surrounding the killing and the testimony of other witnesses." *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002) (citing *People v. Baggett*, 115 Ill. App. 3d 924, 933 (1983)).

¶ 55 After reviewing the evidence in a light most favorable to the State, we cannot conclude that no rational trier of fact could have found, as the trial court did, that the evidence here did not support a finding of imperfect self-defense.

¶ 56 Defendant relies on *Hawkins* to support his assertion that he had the actual but unreasonable belief in the need to defend himself. In *Hawkins*, the victim pulled a knife on the defendant three days before the fatal encounter. *Hawkins*, 296 Ill. App. 3d at 834. On the day of the fatal stabbing, the defendant refused to loan the victim money, and the victim punched the defendant in the head and threw a brick at him. *Id*. When the victim threatened to kill the defendant, using a racial epithet, the defendant pulled a knife, and the victim blocked the defendant's way, grabbed the defendant and "swung at him with a closed fist." *Id*. The defendant then stabbed the victim. *Id*. On appeal, this court reduced the defendant's first degree murder conviction to second degree murder, finding he had an actual but unreasonable belief in the right to use self-defense against the victim. *Id*. at 837-38.

¶ 57 The facts of this case are not comparable to those in *Hawkins*. Here, the evidence showed that the victim had not been armed during the earlier encounter, nor during the later fatal encounter. The victim did not use any weapon against defendant before, or during the fatal offense. Although defendant testified that the victim belonged to a group that was "[b]asically a street gang," and was seen carrying a weapon in 2007, that was four years prior to these events, and there was no evidence that defendant had been previously threatened by the victim or the Three Ones.

¶ 58 Viewing the testimony in the light most favorable to the prosecution, the trial court correctly concluded that defendant was the aggressor, and that his use of force against the victim was greater than necessary to prevent any threat that the victim may have represented. Because the evidence did not establish that defendant had an actual, though unreasonable, belief in the need to act in self-defense, his argument that his first degree murder conviction should be reduced to second degree murder is rejected.

¶ 59 Defendant's remaining contention on appeal is that, for various reasons set out below, his prison term should be reduced to the statutory minimum of 20 years' imprisonment for first degree murder. Defendant was convicted of first degree murder pursuant to section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2010)), which carries a term of between 20 to 60 years' imprisonment. 730 ILCS 5/5-4.5-20(a) (West 2010)).

¶ 60 A sentence that is within the statutory limits will not be deemed excessive unless it is greatly in variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A reviewing court grants the trial court's sentencing determination great deference because the trial court is generally is a better position to consider factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Higgins*, 2016 IL App (3d) 140112, ¶ 29. It is axiomatic that a trial court has wide latitude in sentencing a criminal defendant, so long as the court does not consider improper factors in aggravation or ignore relevant factors in mitigation. *Id*. Furthermore, the weight to be assigned to factors in aggravation and mitigation and the balance between those factors is a matter within the trial court's discretion. *People v. Lefler*, 2016 IL App (3d) 140293, ¶ 31. Accordingly, this court will

not substitute its judgment for that of the trial court merely because it would have balanced the appropriate sentencing factors differently. *Alexander*, 239 Ill. 2d at 212.

¶ 61 Defendant first contends he is a relatively young offender and that the trial court did not adequately consider his rehabilitative potential. Relying on *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), where the United States Supreme Court found unconstitutional the imposition of mandatory life sentences for juvenile offenders, defendant asserts that his age at the time of these events "explains and mitigates his actions" as being attributable to a lack of maturity and being prone to peer pressure and outside influences. Those cases are not applicable here, where defendant was 18 years old at the time of this offense. *People v. Thomas*, 2017 IL App (1st) 142557, ¶¶ 26, 48 (citing *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10 (a criminal defendant, 18 years of age or older, is an adult offender to whom *Graham*, *Miller*, and similar decisions do not apply)). This court noted in *Thomas* that our supreme court in *Reyes* "did not indicate it would extend the protections of *Miller* to adult offenders." *Thomas*, 2017 IL App (1st) 142557, ¶ 26. But see *People v. Harris*, 2016 IL App (1st) 141744, *appeal allowed*, No. 121932 (May 24, 2017) (76 year sentence for 18 year old offender convicted of first degree murder represents *de facto* life sentence and violates the proportionate penalties clause); *People v. House*, 2015 IL App (1st) 110580 (mandatory natural life term for 19 year old defendant convicted under an accountability theory violates the proportionate penalties clause).

¶ 62 Defendant also argues that the State did not present significant evidence in aggravation that would justify a 35-year sentence, a sentence which is "15 years over the statutory minimum." He asserts his rehabilitative potential is demonstrated by his lack of a previous criminal record, his supportive family and his plans to join the United States Air Force, and his statement to the court at sentencing in which he expressed remorse for his actions. The trial court

was presented with those facts via a presentence investigation report, the testimony of defendant's mother in mitigation of his sentence, and defendant's statement in allocution. Where mitigation and a sentencing report have been submitted to the trial court, it is presumed, absent any evidence to the contrary, that the court considered the evidence and took into account the defendant's potential for rehabilitation. *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994).

¶ 63 The trial court's statements at sentencing indicate that the court gave weight to the seriousness of the offense, which is the most significant factor in imposing sentence. See *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. A sentencing court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.* (citing *Alexander*, 239 Ill. 2d at 214). Defendant's 35-year sentence is not only within the applicable statutory range, but is in the lower half of that range.

¶ 64 The trial court remarked that the victim's death was "senseless" and noted the confrontation between the victim and defendant followed an earlier disagreement between Mr. Klee and Mr. Delgado that did not directly concern defendant. Although defendant contends the trial court was incorrect in stating that defendant became involved in a dispute that was not his "beef," we do not find the trial court misstated the evidence, as the testimony at trial reflected that the initial argument was between Mr. Klee and the victim and that defendant inserted himself into the situation by calling the victim a "b***h" and asking why he was talking to his cousin like that during the dispute. Moreover, although defendant further claims the trial court improperly relied on a factor inherent in the offense, *i.e.*, the victim's death, in aggravation of his sentence, defendant does not further develop that contention. The trial court may consider, as an aggravating factor, the manner in which the victim's death occurred, as well as the nature and

circumstances of the offense. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). For all of those reasons, the trial court's imposition of a 35-year sentence in this case did not constitute an abuse of discretion.

¶ 65 In conclusion, for all of the reasons set forth above, defendant's conviction for first degree murder and his 35-year sentence are affirmed.

¶ 66 Affirmed.