FIRST DIVISION
December 11, 2017

No. 1-15-0138

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. 12 CR 14809
	)	
MICHAEL SIMMONS,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied his right to present a defense where the testimony barred by the trial court was not relevant, and where defendant through his own testimony was able to present his theory to the jury. Also, defendant was not denied his right to a fair trial where the prosecutor properly made the challenged remarks in rebuttal as a response to defense counsel's closing argument, and the evidence did not support a jury instruction on a serious provocation theory of second degree murder. We further find that defendant's sentence of 28 years' imprisonment for first degree murder was not excessive.

¶ 2 Defendant, Michael Simmons, appeals his conviction of first-degree murder after a jury trial, and his sentence of 28 years' imprisonment. On appeal, defendant contends he was denied

his right to a fair trial where (1) the trial court did not allow testimony about the victim's paranoia by her ex-husband or by the victim's doorman; (2) during closing arguments the prosecutor improperly argued, in rebuttal, that no evidence was presented regarding the victim's paranoia although it was the State that requested exclusion of that evidence; and (3) the trial court refused to give the jury an instruction on a serious provocation theory of second-degree murder. Defendant also contends that his sentence of 28 years' imprisonment is excessive. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on November 5, 2014. Defendant filed a motion to reconsider which the court denied on December 12, 2014. A notice of appeal was filed on December 17, 2014. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5 BACKGROUND

¶ 6 Defendant was charged by indictment of first degree murder in the death of Elle Ollivierre. He was 54 years old at the time of his arrest. At trial, Orbiton Ollivierre, testified that Elle was his sister and he and defendant grew up together on the island of Bequia in the Caribbean. Defendant was close to Orbiton's sister Avilla and was like a brother to him. In 1991, Orbiton moved to Canada with his mother and some of his siblings, including Elle.

¶ 7 In January 2012, Orbiton spoke to defendant who was living in Florida at the time. Defendant told him that he lost his job as a certified nursing assistant and was homeless, blind in one eye, and had lost a kidney. Orbiton and his siblings arranged for defendant to come to

Chicago, where Elle was living, and then to Canada. Orbiton wanted defendant to stay with his mother so she could have someone to look after her. After defendant had been in Canada for six weeks, Orbiton's family decided to send defendant back to Florida and he was taken to the bus terminal with a ticket to Florida. Orbiton subsequently learned that instead of going to Florida, defendant traveled to Chicago to stay with Elle.

¶ 8 Dr. Charles Mills testified that he met Elle when they were living in Canada, and they married in 1993. In 1995, Dr. Mills moved to Chicago and Elle joined him in 2000. They lived in an apartment at 6157 North Sheridan Road until they divorced in 2010. After the divorce, they continued to live in the same building but Elle lived in unit 22C while Dr. Mills lived in unit 16G. They spoke regularly and Dr. Mills would occasionally see Elle in the building pushing her personal belongings in a shopping cart. Dr. Mills stated that he never saw Elle display a weapon and she was never violent when she lived with him.

¶ 9 Dr. Mills met defendant once at Elle's apartment. He knew that defendant was a friend of Elle's family and had been close to Elle's sister. At the time, defendant had been living in Elle's apartment for several months. On July 9 and July 10, 2012, Elle called Dr. Mills several times from New York, and while she drove from New York back to Chicago. She told him that she was going to tell defendant to leave her apartment immediately and that she would find a motel for him. She asked Dr. Mills to use their frequent flyer miles to get a one-way ticket to Florida for defendant. Dr. Mills reserved a one-way ticket to Fort Meyers on July 11, 2012, in defendant's name, but wanted to confirm the details with Elle before completing the reservation. However, Dr. Mills never heard from Elle and around 4:00 a.m. on July 11, 2012, the police came to his door and informed him that Elle had been killed in her apartment.

¶ 10 During Dr. Mills' testimony, the trial court sustained several objections by the State when defense counsel tried to ask Dr. Mills questions about Elle's mental health in the days leading up to her death.

¶ 11 Annette Stowe, Elle's cousin, testified that Elle flew to New York in July 2012 to apply for a travel document and passport. Stowe saw Elle on July 9, 2012, before Elle's flight back to Chicago. She learned that defendant had been living with Elle, and that Elle was planning to move back to Canada. When Elle could not board her flight back to Chicago, Stowe arranged for a car so Elle could drive home. On July 10, 2012, during her drive to Chicago, Elle spoke with Stowe several times. She told Stowe that when she got home, she planned to take defendant to a hostel for the night and to the airport the next morning. Elle last spoke with Stowe at 10:40 p.m. Alvin Sherron, a doorman at 6157 North Sheridan, testified that Elle returned to the building just after 12:00 a.m. on July 11, 2012. He used a building shopping cart to help Elle with her luggage and groceries.

¶ 12 Andre Miller testified that he took calls at the Office of Emergency Management and Communication on July 11, 2012, and received a call at 1:51 a.m. about a woman stabbed at 6157 North Sheridan. The 911 call was replayed in court and a document transcribing the call was introduced into evidence. In the call, defendant said, "I think you guys need to come over here," and that "me and the owner got in a fight. And I stabbed her." When asked whether he still had the knife, defendant responded, "Well the knife is in-right there by-by the-by her bedroom door." Defendant told the dispatcher, "I asked her not to do what she's been doing, don't treat me like that. But she feels because I don't have any money, she can treat me the way she treats me." The dispatcher asked if defendant was talking about his wife and defendant answered, "No, she is nothing to me." Defendant told the dispatcher that "she came in. She came in like five after

one or something like that. And she started arguing with me and I needed to get out of the house."

¶ 13 Officer Mark Januszewski and his partner, Anthony Zamora, arrived at 6157 North Sheridan around 2:00 a.m. and defendant met them at the door to Elle's apartment. Officer Januszewski asked defendant if someone had been stabbed and defendant answered, "Yes." The officer handcuffed defendant and read him his *Miranda* rights. Defendant stated, "Nobody knows what I am going through with this woman."

¶ 14 Officer Zamora, Detective Edward Heerdt, and forensic investigator Paul Presnell processed the scene. They observed "a lot of stuff" in Elle's apartment, including shopping carts, and in several areas aluminum foil had been placed around the fixtures and in other areas of the bathroom. They also noted locks on various closets and the bedroom door, as well as on the front door. There was a black garbage bag on the floor outside the bedroom.

¶ 15 Detective Heerdt found Elle lying almost face down on the bathroom floor. She had a key ring in her left hand. He observed two stab wounds, one to her back and one to the upper chest area. He noticed blood near the bathroom, first droplets and then an increase in the volume of blood as he got closer to the bathroom. There were smeared handprints of blood and long drips of blood that trailed the length of the wall between the bathroom and the bedroom. Detective Heerdt found a kitchen knife with red droplets on a box outside the bathroom. He found another knife, a serrated bread knife, under a black plastic bag. This knife had no apparent blood stains. Presnell inventoried both knives. A third knife was found on the sink behind some items in the bathroom. It had no signs of blood and there were no blood stains on the sink around the knife. They photographed the knife but it was not inventoried.

¶ 16 At the police station, Detective Heerdt collected defendant's clothes including boxer briefs that appeared to have blood on them. He did not notice any injuries to defendant, but observed blood on the bottom and around the edges of his feet. Presnell was present when defendant's clothes were collected and inventoried, and he photographed defendant. He did not observe any injuries to defendant's body. The blood from the knife and the boxer briefs were preserved for testing. A blood standard was collected from Elle and a buccal swab was collected from defendant. Testing on the blood preserved from the knife and boxers showed a human female DNA profile that matched Elle's profile.

¶ 17 Dr. James Filkins performed the autopsy on Elle. An external examination showed two stab wounds, one to the upper left chest area and one to the back. The stab wound in the chest entered just below her collarbone and hit her left lung, her heart, and her liver. Dr. Filkins stated that this wound would have caused fatal internal bleeding. He testified that Elle could have been in motion when she was stabbed in the chest, and the "V" shape of the wound could have been caused either by a repositioning of the blade or by movement in a particular way. Dr. Filkins did not find defensive wounds on Elle's body, and noted the absence of injury to her hands.

¶ 18 The State rested and defendant made a motion for a directed verdict which the trial court denied.

¶ 19 Defendant testified that he was born in Bequia and lived in Florida where he worked as a certified nurse assistant. He lost his job around the end of 2011 or beginning of 2012, and was evicted from his rental house. Defendant grew up knowing Elle's family and was close to Elle's sister, Avilla, and her brother, Orbiton, both of whom now live in Canada. After defendant had been evicted, Orbiton reached out to him by phone and asked defendant to come to Canada to watch Orbiton's mother. Orbiton did not pay defendant to watch his mother.

¶ 20 In February 2012, Elle bought defendant a bus ticket to travel from Florida to Chicago. She paid for defendant's housing while he was in Chicago, and in March 2012, Elle bought defendant a bus ticket to Canada. Defendant stayed in Canada for about five or six weeks until Elle informed him that he was going back to Florida. When defendant arrived at the bus station, however, he discovered that his ticket was to Chicago. He arrived in Chicago on April 28, 2012, and stayed in a motel for four or five days before Elle asked him to stay with her "to watch her things." Elle did not give defendant a key or sensor to get into the apartment building, so if he left and wanted to come back into the building, he had to sign at the front desk and have them call Elle. Defendant got to know some of the doormen at the building, but only remembered Aijani (AJ). Elle also gave defendant a cell phone but he could only make calls to her phone or call 911.

¶ 21 Defendant testified that when he entered Elle's apartment, he noticed that "[i]t was in bad shape." Defendant stated that the apartment was "full with stuff" and "you couldn't even push the front door." He described having to "walk[] on things" and he had to leave his suitcase outside and move some things around before he could get inside. Among the items in her apartment were shopping carts. Elle gave defendant some black garbage bags and asked him to move things in order to make room for an air mattress in the center of the living room. Defendant slept on that air mattress while he stayed with Elle.

¶ 22 Defendant testified that Elle put a lock on the inside of the front door to her apartment, and she also had a lock on her bedroom door. She installed an alarm system on her front and bedroom doors, and she would activate it with a remote device whenever she left the apartment. There was a monitor on the wall going to her bedroom which Elle covered in foil. She also covered the bathroom mirror in foil. Defendant stated the Elle nailed all of the windows shut, but

he could open one window because he was able to remove the nail. She would leave the apartment with five or six "big bags over her back," and defendant had to stay in the apartment to watch her things. Defendant would vacuum, clean and pack things to make space in the apartment. Every day, Elle would tell defendant that she was having trouble getting him a ticket to Florida.

¶ 23 On July 9, 2012, around 6:00 a.m., Elle woke defendant and told him to get ready because she was going to rent a van to take him to Florida. She took a knife from her bedroom and put it in a vase in case defendant needed to peel a mango. She put his phone on the computer table and told him that she would return at 9:00. Defendant received a call from Elle around 11:00 p.m. She told him that she was in New York and could not fly back to Chicago, but she would get a car and drive to Chicago. Defendant did not know that Elle had gone to New York.

¶ 24 Elle called defendant on July 10, 2012, around 6:00 a.m., asking if he was ready. She said she would be home in five minutes, so defendant showered and moved his luggage to the door. When he had not heard from Elle by 5:14 p.m., defendant called 911. He thought the police would help him pay for a bus ticket to Florida. When the police arrived, defendant opened the door and activated the alarm. Since defendant did not have a key to the apartment, the police told him to stay until Elle returned because he could not secure the apartment door if he left.

¶ 25 Defendant fell asleep and when he awoke he saw Elle standing at the door with a shopping cart. She noted that the alarm was turned off and she threw her shoes at defendant, hitting his head. Elle told defendant he needed to get out of her apartment, and she called him a "gutter man." She grabbed defendant by the neck and squeezed 18-19 times while telling him that "I will f***ing kill you." She kept squeezing although defendant pleaded with her to stop. Defendant was able to move his body to face Elle and she started kissing him on his neck and

face. She told defendant, "you been f***ing my sister. You wouldn't f*** me. Why you don't want to f*** me?" Defendant stated that he turned to her and said "you stink." He asked her to let him go but she kept squeezing him.

¶ 26 Defendant moved so he could reach the vase that contained the knife for peeling mangos. Defendant "touched her in the back" with the knife and Elle felt "the stick in her." Defendant said, "now you better let me the f*** go" and Elle kept squeezing and laughing, so defendant "press[ed] the knife down" into her back. Elle released him, turned around, and tried to touch her back. Elle called him a "son of a b****" and said he was lucky that she did not see blood on her hand. Elle then ran into the kitchen and returned with a steak knife. She came towards defendant, swinging the knife, and said "I'll kill you tonight." Elle plunged the knife at defendant but it missed him and went into a table instead. She pulled the knife out of the table and said, "I got you son of a b****, you f***ing ass." When she came at him again, defendant "pushed [his] knife towards her chest." Defendant stated he struck her once in the chest. Defendant testified that he stabbed Elle "[b]ecause she is evil, and she lied so much to me. She came to me with the knife." Defendant thought she was going to kill him.

¶ 27 After he stabbed her in the chest, Elle went to her bedroom door and fell on her knees, crying. She then stood up with the knife in her right hand and stumbled to the bathroom. She rested her hand on the sink and faced defendant. He did not see the knife in her hand. She told him, "You are going to jail" and she went down on her knees before falling to her side. When a police officer entered the apartment, defendant was standing in the kitchen with his hands in the air. Defendant showed the officer the knife he used to stab Elle, which was on a box, and the location of Elle's body. The officer stated that Elle was dead and he took defendant outside the

apartment where defendant was given his rights and handcuffed. On cross-examination, defendant denied telling Detective Heerdt that Elle did not have a weapon.

¶ 28 On cross-examination, defendant stated that he did not pay for rent or utilities while he stayed with Elle. Elle asked defendant to sleep with her but Elle had her period every month and he did not want to sleep with "someone who bleeds." Defendant stated that sometimes he would awaken to find Elle in his bed next to him. Defendant was also shown an airline ticket in his name for travel from Chicago to Miami, scheduled to depart at 9:50 a.m. on the morning he stabbed Elle. He acknowledged that he knew Elle asked Dr. Mills to purchase a ticket for defendant, but did not know she had the ticket. Defendant stated that when Elle was home, he would leave the apartment and ask people to pay for a ticket to Florida. Defendant also tried to call Orbiton from a phone at an "Indian store" but Orbiton did not return his calls. Orbiton testified in rebuttal that he never received a call from defendant.

¶ 29 Defendant testified on cross-examination that he did not know whether the knife Elle held was bloody, and he did not know when she picked up the keys that were found in her hand. When Elle was on the bathroom floor, defendant did not check to see if she was breathing or if she had a pulse. Defendant changed his shirt because it had blood on it and thought about taking a shower, but instead he called 911. Defendant told the 911 operator that he had a fight with Elle and stabbed her. When the operator asked where the knife was, defendant told her that it was by the bathroom. Defendant said that he "asked her not to do what she had been doing. Don't treat me like that, but she feels because I don't have any money, she can treat me the way she treats me." When asked what his relationship was to the victim, defendant responded, "she is nothing to me." He told the operator that Elle wanted him out of the house, but also that he needed to get out but Elle did not want him to leave.

¶ 30 Defendant tried to call Aijani Bryson, a doorman at Elle's building, as a witness. The State objected and defense counsel presented an offer of proof that if called to testify, Aijani would state that Elle told him on July 10, 2012, that she was coming back from New York and wanted to send defendant back to Florida. Elle also told Aijani that defendant was stealing jewelry from her and asked that he prevent defendant from leaving the building. The court would not allow the testimony as to Elle's belief that defendant was stealing her jewelry, but told defense counsel the witness could testify about the rest. Defense counsel decided not to call Aijani as a witness.

¶ 31 The parties stipulated that if called to testify, Rose Cecerra would state that she transcribed an emergency call placed on July 10, 2012, at 5:14 p.m. Defendant stated that he needed the police to come to 6157 North Sheridan Road, apartment 22C. He said, "I cannot get out because the girl that brought me here didn't tell me she was going to New York. She's in New York. She said this morning when she called she was three hours away and she didn't show up. I was supposed to leave everything. I was supposed to go back to Florida. And what she do, she turns on the alarm so I can't go to get anything to eat. I'm here since yesterday." Defendant said he could not open the door because the alarm would go off and he was afraid of what the police would do when they answered the alarm. The dispatcher told defendant that the police would come and then he could get out of the apartment if that was what he wanted. Defendant said he did not have a ticket to Florida and that if he did, he would have already left. He said that Elle was "playing" with him and "lying" to him. The dispatcher said that the police would get defendant and his luggage out of the apartment and defendant asked, "Then where am I gonna go?" The dispatcher said it was not for her to decide, and instructed defendant that when the

police "knock on the door you're going to grab your things and you're gonna walk out and you're all gonna close the door, correct?" Defendant responded, "Right, thank you."

¶ 32 The parties presented closing arguments and the trial court gave jury instructions, including instructions for self-defense and unreasonable self-defense. The court refused, however, to instruct the jury on a serious provocation theory of second-degree murder. The jury found defendant guilty of first-degree murder. Defendant filed a motion for a new trial, which the trial court denied. Following a hearing, the trial court sentenced defendant to 28 years' imprisonment and defendant's motion to reduce sentence was denied. Defendant filed this timely appeal.

¶ 33 ANALYSIS

¶ 34 Defendant contends on appeal that he was denied his constitutional right to present his defense when the trial court did not allow Dr. Mills to testify about Elle's irrational and paranoid behavior. "When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.'" *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773 (2002)). This offer of proof may consist of counsel's representations regarding the contents and admissibility of the excluded testimony. *Id*. However, the offer of proof must be more than the unsupported speculation of counsel as to what the witness would say. *Yassin by Yassin v. Certified Grocers of Illinois, Inc.*, 150 Ill. App. 3d 1052, 1066 (1986). It must set forth with particularity the substance of the evidence. *People v. Andrews*, 146 Ill. 2d 413, 421 (1992). "An offer of proof that merely summarizes the witness' testimony in a conclusory manner is

inadequate." *Id*. Instead, the offer must "demonstrate, both to the trial court and to the reviewing courts, the admissibility of the testimony which was foreclosed by the sustained objection." *Id*.

¶ 35 Defendant's offer of proof states that if he were allowed to answer, "Dr. Mills would testify that his ex-wife had become paranoid and irrational. He would state that he couldn't reason with her at all." Also, Dr. Mills would state that "he couldn't reach her mentally" and "tried to get Elvie Mills to go to counseling" and to seek professional help for her paranoia, "but to no avail." The offer of proof further states that if allowed to answer, "defense counsel believes that [Dr. Mills] would testify that [Elle] was paranoid and believed that people were stealing her belongings while she was not in the apartment. Furthermore, if allowed to answer the question as to why [defendant] came to stay in the apartment, Dr. Mills would state that was the reason [defendant] came to stay with her."

¶ 36 We find defendant's offer of proof inadequate, as it is conclusory and improperly relies on the speculation of defense counsel. Although "a lay witness may give his opinion on the mental condition of an individual," it must be "based on personally observed facts, which must be stated in detail." *People v. Wright*, 111 Ill. 2d 128, 148 (1985). The offer of proof states no personally observed facts that would lead Dr. Mills to conclude that Elle was paranoid or could not be reasoned with. Also, in the offer defense counsel merely speculated that Dr. Mills would testify that Elle was paranoid because she believed people were stealing her belongings.

¶ 37 Even if an offer of proof is sufficient, we will uphold the trial court's refusal to admit evidence that is not relevant. *People v. Stewart*, 229 Ill. App. 3d 886, 889 (1992). Evidence is relevant if it tends to make the issue of guilt more or less probable than it would be without the evidence. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 33. The trial court may reject the offered evidence as irrelevant "if it has little probative value due to its remoteness, uncertainty or its

possibly unfair prejudicial nature." *People v. Ward*, 101 Ill. 2d 443, 455 (1984). The admissibility of evidence is within the sound discretion of the trial court, and a reviewing court will not overturn that determination absent an abuse of discretion. *Id*.

¶ 38 Defendant contends Dr. Mills' testimony would establish that Elle had become paranoid and irrational, and believed people were stealing her belongings when she was not in her apartment. For this reason, Elle asked defendant to stay in her apartment. Defendant argues that this testimony is relevant because it would tend to make more probable "that Elle's paranoia caused her to attack [defendant] for breaking her security by setting off her home alarm, and that [defendant] stabbed her in self-defense."

¶ 39 Generally, "when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor." *People v. Lynch*, 104 Ill. 2d 194, 200 (1984). However, the evidence used to show the victim's violent character must be "appropriate." *Id*. "Proffered evidence will be excluded where it does not make the proposition that the victim was the aggressor more probable." *People v. Huddleston*, 176 Ill. App. 3d 18, 29 (1988). The mere fact that a person suffers from a mental illness is not sufficient to show a propensity for violence. See *In re Schumaker*, 260 Ill. App. 3d 723, 728-29 (1994) (finding, in the context of an order for involuntary admission, that although the respondent suffered from bipolar affective disorder in which the sufferer may become angry and destructive, no evidence was presented that the respondent acted in a violent or hostile manner that posed a serious physical danger to herself or others).

¶ 40 It follows that evidence of Elle's paranoia, without more, does not show a propensity for violence. Dr. Mills' testimony, as set forth in the offer of proof, only states his belief that Elle was paranoid and irrational. He does not state that the paranoia caused her to become violent, nor

does he allege any acts of violence by Elle. Rather, he testified in court that he never saw Elle display a weapon nor was she ever violent when she lived with him. Since evidence of Elle's paranoia alone "does not make the proposition that [she] was the aggressor more probable," it is not relevant to the issue of self-defense and the trial court did not abuse its discretion in refusing to allow Dr. Mills to testify about her paranoia. See *Huddleston*, 176 Ill. App. 3d at 29.

¶ 41 Furthermore, defendant was not denied an opportunity to present his theory that Elle was paranoid and irrational. Defendant testified that Elle's apartment "was in bad shape" and so "full with stuff" that "you couldn't even push the front door." He stated that among the items in her apartment were shopping carts Elle used to take things with her when she left the apartment. Defendant testified that Elle would leave the apartment with five or six "big bags over her back," and he had to stay in the apartment to watch her things. Defendant testified that Elle put locks on the inside of the front door to her apartment, and on her bedroom door. She also installed an alarm system on her front and bedroom doors, and would activate it with a remote device whenever she left the apartment. She gave defendant a phone that he could only use to call her or 911. Defendant stated that Elle nailed all of the windows shut and he had to remove a nail in order to open one of the windows. He described how Elle had covered various parts of the apartment in foil. The officers who first arrived at the apartment and processed the scene corroborated portions of defendant's testimony. They testified that they observed "a lot of stuff" in Elle's apartment, including shopping carts, and in several areas aluminum foil had been placed around the fixtures and in other areas of the bathroom. They also noted locks on various closets and the bedroom door, as well as on the front door.

¶ 42 From defendant's testimony, the jury could infer that Elle was extremely concerned about her apartment's security and did not trust defendant, but wanted him to stay in her apartment to

watch over her belongings. Defendant acknowledges as much, arguing that Dr. Mills' testimony "would have corroborated [his] nearly identical testimony, and directly supported the defense theory that Elle's paranoia led her to attack [defendant]." Since defendant was able to present his version of crucial facts to the jury, he was not denied his right to present his defense when the trial court barred Dr. Mills' testimony. *People v. Manion*, 67 Ill. 2d 564, 577 (1977). For these same reasons, defendant was not denied his right to present a defense when the trial court barred Aijani from testifying that Elle told him defendant was stealing her things and she did not want defendant to leave her apartment, where defendant wanted to use this evidence "to illustrate Elle's paranoia *** and her attitudes towards [defendant]."

¶ 43 Next, defendant argues he was denied a fair trial when the prosecutor remarked during closing arguments that there was no evidence of Elle's paranoia, and emphasized that Dr. Mills did not testify she was paranoid and erratic. Defendant has not preserved this issue for appeal because he did not raise the issue in a post-trial motion. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Although defendant asks this court to review the issue as plain error, we must first determine whether any error occurred. *People v. Smith*, 2016 IL 119659, ¶ 39.

¶ 44 A prosecutor has great latitude in making closing arguments and may remark on the evidence presented and reasonable inferences arising therefrom, even if they are unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). During closing argument the prosecutor may "argue to the jury the evidence, or the lack of evidence, the inferences to be derived from the evidence, or lack of it, and [has] the right to attempt to persuade the jury to decide the case" in favor of the State. *Chuhak v. Chicago Transit Authority*, 152 Ill. App. 3d 480, 492 (1987). Furthermore, even if closing remarks are improper, they do not constitute reversible

error unless they result in substantial prejudice to the defendant. *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998).

¶ 45 Initially, we note that defendant's argument, as set forth in his brief, is not a completely accurate representation of the remarks he challenges. The prosecutor did not remark about Elle's paranoia or irrational behavior. Rather, defense counsel objected to the following remarks made by the prosecutor: "[Elle] was a woman who came from a large family. You met a couple of her relatives. You heard from her ex-husband who she still talks to or still talked to. Nobody said she was crazy." Defendant argues that the only reason "Nobody said she was crazy" is because the State objected to Dr. Mills' testimony that he thought she was paranoid, and the testimony was barred as a result. Defendant contends that the prosecutor cannot remark on the absence of evidence which the trial court excluded due to the State's own objections. As support, defendant cites *People v. Mullen*, 141 Ill. 2d 394 (1990). Our supreme court in *Mullen*, however, held only that it was improper for the prosecutor to comment on the substance of testimony that the trial court explicitly excluded during trial. *Id.* at 404-05. Here, the prosecutor did not refer to the substance of Dr. Mills' barred testimony.

¶ 46 Additionally, the prosecutor made the challenged remarks in response to defense counsel's closing argument. Defense counsel argued to the jury that "[t]he police knew what you know now, there was something wrong with Elle Mills, and when you're trying to decide if [defendant] could reason with a crazy person, could reason with a woman who would do the things that Elle Mills did *** the locks, the alarm, alarm on her door, *** a woman who came in angry at him because he had set off her alarm. He had broken her security, security that was more important to her than anything." Defense counsel argued that defendant "tried to reason with a crazy person and say, 'Let me go.' She wasn't letting him go." In rebuttal, the prosecutor

responded, "Nobody said she was crazy." The prosecutor further argued that defense counsel "talks about a crazy woman, a woman who is in her grave for two years and says she's crazy. She was a woman who had a lot of stuff in her house. She went through a rough divorce with a husband who got up here and told you that." "She wasn't proud of the way she lived *** But crazy? Crazy? Because if she says crazy, you'll say not guilty. If she says crazy, you'll say second degree." A prosecutor may "respond to comments by defense counsel that clearly invite a response." *People v. Alvidrez,* 2014 IL App (1st) 121740, ¶ 26.

¶ 47 Defendant also contends that he was denied his right to a fair trial when the trial court refused to instruct the jury on a serious provocation theory of second-degree murder. Although the trial court did give the jury instructions on self-defense and on second-degree murder based on an unreasonable belief in self-defense, defendant argues that it should have also given the serious provocation instruction because he testified at trial "that Elle Mills choked him and attacked him with a steak knife."

¶ 48 Whether to issue a jury instruction is within the trial court's discretion, and a reviewing court will not overturn that decision absent an abuse of discretion. *People v. Lopez*, 371 Ill. App. 3d 920, 934 (2007). Defendant "has the right to have a jury instructed on [his] theory if there is some evidence in the record to support the theory." *Swartz v. Sears, Roebuck and Co.*, 264 Ill. App. 3d 254, 265 (1993). An instruction on second degree murder based on serious provocation should be given only when there exists in the record some evidence of serious provocation that, if believed by the jury, would reduce the crime to second degree murder. *People v. Cook*, 352 Ill. App. 3d 108, 130 (2004). Serious provocation is "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2014). Courts have recognized four categories of provocation sufficient to warrant a second-degree murder instruction: (1) mutual combat; (2)

substantial physical injury or assault; (3) illegal arrest; and (4) adultery involving a spouse. *Cook*, 352 Ill. App. 3d at 129-30. Defendant argues that evidence presented at trial supports a serious provocation instruction based on substantial physical assault.

¶ 49 We note, however, that defense counsel argued for the provocation instruction based on mutual combat, not substantial physical assault. "Generally, the trial court is under no obligation either to give jury instructions not requested by counsel or to rewrite instructions tendered by counsel." *People v. Underwood*, 72 Ill. 2d 124, 129 (1978). Also, the record does not indicate that defendant offered a provocation instruction based on substantial physical assault. A party may not raise the failure to give a jury instruction on appeal unless that party tendered the instruction. See Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994).

¶ 50 Nonetheless, the evidence did not support a provocation instruction based on substantial physical assault. "Passion on the part of the [defendant], no matter how violent, will not relieve [him] from liability for murder unless it is engendered by a provocation which the law recognizes as being reasonable and adequate." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Thus, courts have looked for evidence that the defendant suffered serious injury from a physical assault before finding sufficient provocation to mitigate first degree murder to second degree murder. See *People v. Strader*, 278 Ill. App. 3d 876, 884 (1996) ("slapping and shoving of defendant did not amount to substantial physical injury or assault, as defendant sustained no injury from her behavior"); see also *People v. Fausz*, 95 Ill. 2d 535, 539 (1983) (stating that mere words or gestures are not sufficient to mandate a serious provocation instruction). Here, defendant suffered no visible injuries from Elle's alleged assault.

¶ 51 Furthermore, although defendant stated he "was just going nuts" when he stabbed Elle, he testified that during the ordeal he "touched" her back with the knife when he was trying to

escape from her chokehold, and he stabbed Elle in her chest after she plunged at him with a knife saying she was going to kill him. "Struggling with an attacker in an effort to ward off or defend one's self against an attack is not sufficient to warrant a conviction for second degree murder based on provocation." *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 92. The trial court did not abuse its discretion in refusing defendant's serious provocation instruction. See also *People v. Cox*, 121 Ill. App. 3d 118, 122 (finding that "[w]hile acts of passion or a sudden desire for revenge may indicate a state of mind which would entitle a defendant to a voluntary manslaughter instruction based on provocation, if the defendant's actions were merely defensive or motivated by fear and a desire to escape the victim," it is proper to refuse such an instruction).

¶ 52 Defendant argues, however, that the evidence did support such an instruction and cites *People v. Dortch*, 20 Ill. App. 3d 911 (1974), *People v. Stowers*, 133 Ill. App. 2d 627 (1971), and *People v. Harris*, 8 Ill. 2d 431 (1956) as support. In *Dortch*, witnesses provided conflicting testimony about the events leading to the death of Lerdie Dortch. Lerdie and defendant were involved in an earlier altercation. The State's five eyewitnesses testified that later, while Lerdie and her companions were in front of her house, defendant arrived in a car with his brothers and a friend. *Id*. at 913. Defendant got out of his car holding a .25 automatic weapon in his hand. He threatened one of Lerdie's brothers and then intentionally and deliberately shot Lerdie. *Id*. According to defendant and his three eyewitnesses, however, Lerdie came at defendant with a knife as he was about to get out of his car. At the same time, Lorraine and Lillian Dortch both came at him with knives, and Thomas Dortch approached defendant armed with a bottle. *Id*. The trial court gave the jury an instruction on self defense, but refused to give an instruction on the lesser crime of voluntary manslaughter based on provocation. *Id*. The appellate court found that although an instruction on self-defense was proper, the trial court "should also have recognized

that an assault by several persons armed with knives is provocation which will reduce an intentional killing from murder to voluntary manslaughter." *Id*. at 914. It reasoned that "where there is evidence which if believed by a jury would reduce a crime to a lesser included offense, an instruction defining that offense should be given." *Id*. The court concluded "that the trial court erred in refusing to give the jury any instruction on voluntary manslaughter." *Id*.

¶ 53 *Dortch* merely represents the general holding by courts "that when the evidence supports the giving of a jury instruction on self defense, an instruction on second degree murder must be given as a mandatory counterpart." *People v. Washington*, 2012 IL 110283, ¶ 56. Unlike the case in *Dortch*, the trial court here gave the jury an instruction on second degree murder based on unreasonable self defense, along with an instruction on self-defense. *Stowers* and *Harris* are distinguishable because the defendants in those cases suffered serious injuries during the assault and, as a result, the jury could find that they acted from a sudden and intense passion. *Stowers*, 133 Ill. App. 2d at 631; *Harris*, 8 Ill. 2d at 434-35. Defendant here suffered no physical injuries as a result of the alleged assault.

¶ 54 Defendant argues in the alternative that his trial counsel was ineffective for failing to argue "substantial physical assault" as the basis for a serious provocation instruction instead of mutual combat. However, we have found that the trial court did not err in refusing to give an instruction based on provocation caused by substantial physical assault. Where no error occurred, counsel cannot be ineffective for failing to raise the issue. *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 24.

¶ 55 Defendant's final contention is that his sentence of 28 years' imprisonment is excessive. We review the trial court's sentencing determination under an abuse of discretion standard since the trial court, "having observed the defendant and the proceedings, is better suited to consider

sentencing factors." *People v. Decatur*, 2015 IL App (1st) 130231, ¶12. A sentence within the statutory range is presumed proper, unless it is "greatly at variance with the purpose and spirit of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999). A minimum sentence is not warranted merely because mitigating factors exist. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). In fact, when mitigating factors are presented to the trial court, it is presumed that the court considered them in determining defendant's sentence absent evidence to the contrary. *People v. Burton*, 184 Ill. 2d 1, 34 (1998).

¶ 56 At the sentencing hearing, defendant presented mitigating evidence including letters from people who attested to defendant's kindness and generosity, and defense counsel argued that defendant had no criminal history and given his age and physical condition, "he is unlikely to commit another crime." After argument, the trial court stated that it considered the evidence presented at trial, "the presentence investigation, the evidence offered in aggravation, mitigation, the statutory factors in aggravation, mitigation, the financial impact of incarceration, the arguments of the attorneys, as to what they believe is appropriate, the victim impact statement from the decedent's Brother, and the multiple letters that [it] received on behalf of [defendant]." The court called the case "tragic," and acknowledged that the crime was an "aberration" in defendant's life, but found it was "not some random thing." The trial court sentenced defendant to 28 years' imprisonment for first degree murder, which was well within the statutory range of 20 to 60 years' imprisonment for first degree murder, absent any enhancements. See 730 ILCS 5/5-4.5-20(a) (West 2014). The trial court did not abuse its discretion in sentencing defendant.

¶ 57 Defendant disagrees, arguing that his sentence is a *de facto* life sentence given his age, and does not properly take into account that the offense was an "aberration" where "the recently-homeless [defendant] stabbed a paranoid and irrational woman who attacked him in the

middle of the night, after she had effectively trapped him in her apartment for a number of weeks." The jury, however, did not believe defendant's version of the events when it convicted him of first degree murder. Defendant essentially asks this court to make different findings from the facts and to re-balance the sentencing factors in order to reduce his sentence to the minimum of 20 years' imprisonment. We must decline defendant's request, for it is the jury's responsibility to resolve conflicts in the testimony, weight the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. Similarly, a reviewing court will not reweigh the sentencing factors considered by the trial court, even if it would have balanced the factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 58 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 59 Affirmed.