2018 IL App (1st) 153321-U

No. 1-15-3321

Order filed May 4, 2018

Sixth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 7823 |
| | ) | |
| JIMMI DIAZ, | ) | Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge, presiding. |

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

**ORDER**

¶ 1 *Held*: Trial court's finding defendant guilty of second degree murder affirmed over defendant's contention that the State did not prove beyond a reasonable doubt that his actions were not justified as self-defense. In finding defendant guilty, trial court did not improperly consider matters outside the trial record. Defendant was not prejudiced by the prosecutor's comments made in the State's opening statement.

¶ 2 Following a bench trial, defendant Jimmi Diaz was found guilty of second degree murder (720 ILCS 5/9-2) (West 2012)) and sentenced to 10 years in prison.[1] On appeal, defendant contends that his conviction should be reversed because the State did not prove beyond a reasonable doubt that his actions were not justified as self-defense. He also contends his due process rights were violated because, in finding him guilty of second degree murder, the trial court used information outside the trial record. Lastly, defendant contends that he was deprived of a fair trial because the prosecutor presented facts in her opening statement that were not supported by the evidence presented at trial and the trial court based its findings on those comments. We affirm.

¶ 3 In March of 2013, defendant was charged with two counts of first degree murder for stabbing and killing Eber Ochoa-Deleon. Before trial, the State filed a motion to use proof of other crimes as evidence, requesting leave to introduce as evidence a prior incident from November 2012 in which defendant stabbed another individual with a folding pocket knife. Defendant was arrested and charged with misdemeanor battery for this incident, but the State ultimately dismissed the case. At the hearing on the State's motion, it argued that, in the instant case, on March 18, 2013, defendant and Ochoa-Deleon "engaged in a verbal argument which then escalated and that the defendant pulled out a folding pocket knife" and stabbed Ochoa-Deleon multiple times. The State argued that the earlier November 2012 incident should be allowed as evidence because it established defendant's intent and lack of mistake or accident. The trial court denied the State's motion, finding that the November 2012 case was never

[1] The notice of appeal spells defendant's first name as "Jimmie." However, the parties' briefs, the charging document, the mittimus, and the transcript of proceedings spell his name as "Jimmi." We will therefore spell defendant's first name as "Jimmi."

prosecuted and, "[w]ithout a judicial finding," did not "have the indicia of reliability about this incident." The case proceeded to a bench trial.

¶ 4 In the State's opening statement, it told the court that defendant, Ochoa-Deleon, and Ochoa-Deleon's brother, Wosbely Ochoa, came to the United States from Guatemala to work and send money home to their families.[2] It stated that, on March 18, 2013, Ochoa-Deleon and defendant got into a verbal argument because Ochoa-Deleon believed that defendant was not sending sufficient money home to his family. The argument led to a physical altercation during which defendant removed a folding knife and stabbed Ochoa-Deleon multiple times. Wosbely physically separated the two men and was injured when he tried to grab the folding knife from defendant. In response, defendant asserted in his opening statement that Ochoa-Deleon was larger than defendant, pinned defendant down on the couch, and defendant responded by "protecting himself."

¶ 5 Jorge Ordonez testified that both defendant and Ochoa-Deleon were his friends and they were all born in the same town in Guatemala. Defendant, Ochoa-Deleon, Wosbely, and two unknown individuals lived in a basement apartment together. On March 18, 2013, defendant invited Ordonez over to the apartment. Ordonez arrived at about 3 or 4 p.m. Defendant, Ochoa-Deleon, Wosbely, and Eliu Lopez-Hernandez, another friend from Guatemala, were also at the apartment.[3] Ordonez, defendant, Ochoa-Deleon, and Lopez-Hernandez drank beer in the living room. Wosbely was in his bedroom. Ordonez had about 8 or 10 beers.

[2] The transcript of the proceedings identifies Ochoa-Deleon's brother's name as "Woseely Ochoa" but the parties' briefs and arrest report identify him as "Wosbely Ochoa." As Wosbely Ochoa and the victim, Eber Ochoa-Deleon, share similar last names, we will refer to Wosbely Ochoa by his first name.

[3] In his testimony, Ordonez referred to Eliu Lopez-Hernandez as "Eliu." However, the arrest report identifies Eliu's last name as Lopez-Hernandez. We will refer to him by his last name.

¶ 6 At one point, Ordonez, defendant, Ochoa-Deleon, and Lopez-Hernandez went to the store to buy more beer. When they returned to the apartment, Ordonez and Lopez-Hernandez sat by the stairs near the door and talked. Defendant, who was sitting on the couch in the living room, was talking softly to Ochoa-Deleon, who was sitting on a stool. Ordonez was about four to five feet from defendant and Ochoa-Deleon. At one point, Lopez-Hernandez left to go to the bathroom so Ordonez looked at his phone and finished the beer he was drinking.

¶ 7 Before Lopez-Hernandez returned from the bathroom, Ordonez saw Wosbely "running and [defendant and Ochoa-Deleon] were on the couch fighting." Wosbely "separated them." Defendant "got up from the couch" and "tried to go up the stairs through the front door." Wosbely got in defendant's way to prevent him from leaving the apartment. Lopez-Hernandez came out of the bathroom and helped Wosbely stop defendant from leaving. Ordonez went to Ochoa-Deleon who was shaking and bleeding on the floor in front of the couch. Ordonez "was hugging" Ochoa-Deleon and "trying to do something so he could survive." When Ordonez was helping Ochoa-Deleon, he observed a knife on the floor.

¶ 8 On cross-examination, Ordonez testified that, when Wosbely separated defendant and Ochoa-Deleon, Ochoa-Deleon was on top of defendant and they were "hugging on the couch." When Ordonez went to help Ochoa-Deleon, he could not lift him up because he was bigger and taller than Ordonez. Ordonez did not see defendant or Ochoa-Deleon with a knife.

¶ 9 Chicago police sergeant Raul Moreno testified that, on March 18, 2013, when he arrived at the basement apartment, he saw Ochoa-Deleon on the floor with blood on his face and a bloody towel on his chest. Wosbely pointed towards defendant and said, " 'he did it, he did it.' " Moreno directed the other officers to put defendant in handcuffs. When defendant was in

handcuffs, he "was screaming" and telling Wosbely "to shut up, you're next." Defendant smelled like alcohol and was "very angry," "highly agitated," and "stomping his legs, feet, and kind of indicating towards Wosbely with a head gesture." Moreno testified that, in response to defendant's comments, Wosbely "just kept saying it was him that did it." Moreno testified that defendant went to a hospital to receive treatment for a minor cut to his right hand.

¶ 10 Moreno observed a small brown folding knife about one foot from Ochoa-Deleon's body. Moreno identified People's Exhibit No. 7 as a photograph showing the area where Ochoa-Deleon was lying on the floor and the folding knife that was near his body.

¶ 11 On cross-examination, Moreno testified that all the individuals in the apartment smelled like alcohol. He testified that, before defendant said to Wosbely "you're next," defendant said to Moreno, "I stabbed him. He came at me."

¶ 12 Chicago police evidence technician Abdala Abuzanat testified that, when he arrived at the apartment, he saw blood on a wall by the stairs, on a banister by the staircase, and on the couch in the living room. He observed four knives in the apartment: two in the living room, one in the kitchen, and one in a bedroom.

¶ 13 Abuzanat took photographs of the crime scene and, at trial, he identified various photographs from the scene, including a photograph of the overall view of the living room showing the couch, a folding knife on the floor, and a knife handle underneath the couch. Abuzanat identified People's Exhibit No. 4 as the folding knife he recovered from the middle of the living room.

¶ 14 Abuzanat identified People's Exhibit Nos. 51 through 55 as the photographs he took of Wosbely at the police station after the incident. The photographs showed a bandage on

Wosbely's right little finger, his right hand without the band aid, and an overall view of Wosbely and "the injury to his right little finger."

¶ 15 On cross-examination, Abuzanat identified Defense Exhibit No. 3 as a photograph showing the living room, the blood-stained couch, and a knife handle sticking out from underneath the couch. Abuzanat testified that he inventoried the knife recovered from underneath the couch and agreed it was "like a steak knife."

¶ 16 Abuzanat identified Defense Exhibit Nos. 4, 5, and 6 as photographs he took of defendant's face, chest area, and upper body after the incident. Abuzanat testified that the photographs showed "band aids on his arms," "something on his right hand," "some marks on his chest," "some red on the eye," and "redness to the chest area."[4] Abuzanat testified that Defense Exhibit No. 7 was a photograph of defendant's right hand showing his right ring finger wrapped in gauze and a bandage on his "little finger." Abuzanat acknowledged that it looked like defendant injured two fingers. During Abuzanat's testimony, defense counsel presented a stipulation between the parties that the knife recovered from underneath the couch was eight inches long and had a four-inch blade.

¶ 17 The State entered a stipulation between the parties that a forensic scientist would testify that her examination of the recovered folding knife revealed no latent impressions suitable for comparison. The State entered a stipulation between the parties that an evidence technician would identify People's Exhibit Nos. 56 through 67 as photographs that he took of Ochoa-Deleon's body at the hospital. He would testify that the photographs truly and accurately depicted Ochoa-Deleon's body as it appeared at the hospital on March 18, 2013.

[4] As pointed out by defendant, Defense Exhibits No. 4-7 are not contained in the record on appeal, but Abuzanat described the photographs at trial.

¶ 18 The State entered a stipulation between the parties that Tonya Townsend, the assistant medical examiner who performed the postmortem examination of Ochoa-Deleon, would testify consistently with People's Exhibit No. 68, which was a true and accurate certified copy of the protocol that she prepared for Ochoa-Deleon's postmortem examination. She would testify that Ochoa-Deleon was 65 inches tall and weighed 166 pounds. She would also testify about the evidence of Ochoa-Deleon's injuries and the findings of her external examination. Her examination of Ochoa-Deleon's head and neck revealed a five-sixteenths of an inch horizontal incision on the left side of his head behind his ear that was one-sixteenth of an inch deep. There was a 2.75 inch by 0.75 inch "red region of abrasion on the right chin" and a 2.5 inch horizontal abrasion on his "right neck." Ochoa-Deleon had a three-eighths of an inch vertical-diagonal stab wound below his lower lip that was 2.0 inches deep and "associated with a 0.75 by .05 inch left-sided intraoral tear." Seven inches below the crown of Ochoa-Deleon's head, there was a 1.75 inch horizontal incision wound that was 0.25 inches deep and had "a 0.25-inch red abrasion at the left interior margin of the wound."

¶ 19 An examination of Ochoa-Deleon's chest revealed a 0.75 inch vertical stab wound that was 5.0 inches deep. Townsend would testify that this wound "perforated the skin and soft tissue, perforated the intercostal space between left ribs 4 and 5 and penetrated the anterior wall of the left ventricle, 1.0 cm above the apex of the heart, leaving a 1.6 cm incision on the heart wall and was associated with 200 milliliters of hemothorax." An examination of Ochoa-Deleon's left upper back showed a seven-sixteenths of an inch horizontal stab wound on his left upper shoulder that was 1.25 inches deep as well as a five-eighths of an inch oblique stab wound on the left scapular region that was "1-5/16 inches deep." An examination of Ochoa-Deleon's left hand

showed a one-sixteenth of an inch by one-sixteenth of an inch "superficial abrasion without hemorrhage or bruising on the dorsum *** near the third finger." Townsend would further testify that an examination of Ochoa-Deleon's body revealed that, "[t]he heart was significant for a 1.6 centimeter vertical stab wound and the anterior free wall of the left ventricle, 1.0 cm above the apex of the heart. The stab would [*sic*] was through and through into the left ventricle." Townsend would testify that the toxicology analysis showed that he was positive for ethanol.

¶ 20 Townsend would testify that People's Exhibit No. 69 was a CD containing 45 photographs of Ochoa-Deleon that were taken during the postmortem examination and the photographs accurately depicted his injuries as they appeared on his body on March 19, 2013. Townsend would testify that it was her opinion within a reasonable degree of medical and scientific certainty that Ochoa-Deleon's cause of death was multiple stab and incised wounds and the manner of death was homicide.

¶ 21 In closing argument, defense counsel argued that defendant acted in self-defense and requested the court find him not guilty. Defense counsel also requested the court to convict defendant of a lesser offense if it believed defendant's actions "were unreasonable but that he was defending himself."

¶ 22 Following argument, the trial court found defendant guilty of second degree murder. In doing so, it stated:

> "The dispute was verbal and came in some ways physical. [Defendant] in response to the dispute took a knife, whether he was mistaken believing that he had a right to deadly force and felt that he been provoked by the actions of the deceased. In any

> event, what he did was, he brought a knife, a deadly weapon, into a scenario where deadly force may not have been required.
>
> This is an attack that was answered with a knife and indeed the deceased is now deceased because of that. Looking at all in its totality, there are some factors in this case from the evidence presented that mitigate the matter from as [*sic*] a homicide to the offense of first degree to second degree."

The court denied defendant's motion for a new trial and subsequently sentenced defendant to 10 years in prison. This appeal followed.

¶ 23 Defendant first contends that we should reverse his conviction for second degree murder because the State did not prove beyond a reasonable doubt that defendant's actions were not justified as self-defense. He asserts that Ochoa-Deleon was larger than defendant and that Ordonez testified that Ochoa-Deleon was on top of defendant in a hugging position, demonstrating that Ochoa-Deleon had launched himself from the chair at defendant. He claims the evidence that Ochoa-Deleon did not have defensive wounds, Ochoa-Deleon's injuries were consistent with having been inflicted in a hugging position, and two knives were found at the scene support that defendant was not the only one who was armed.

¶ 24 Defendant was charged with first degree murder but the court found him guilty of second degree murder. For second degree murder, the State must prove first degree murder and the defendant must then prove by a preponderance of the evidence one of two mitigating factors: (1) "at the time of the killing" he was "acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed;" or (2) "at the time

of the killing," he "believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." 720 ILCS 5/9-2(a), (c) (West 2012). If the defendant proves a mitigating factor by the preponderance of the evidence, the burden of proof remains on the State to prove each of the elements of first degree murder beyond a reasonable doubt. 720 ILCS 5/9-2(c) (West 2012).

¶ 25 To prove first degree murder, the State must prove beyond a reasonable doubt that the defendant killed another individual without lawful justification and, in performing the acts which caused the death, the defendant, as charged here, (1) intended "to kill or do great bodily harm to that individual or another," or knew "that such acts will cause death to that individual or another;" or (2) knew "that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1(a)(1), (2) (West 2012). However, the affirmative defense of self-defense is a recognized justification to first degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). If, as here, a defendant asserts self-defense as an affirmative defense to murder, the State must prove "that the murder was not carried out in self-defense, and that the defendant's use of force was not legally justified." *Jeffries*, 164 Ill. 2d at 127.

¶ 26 Self-defense as an affirmative defense is set forth in section 7-1 of the Criminal Code of 2012. 720 ILCS 5/7-1(a) (West 2012). Section 7-1 provides, in relevant part, that a person "is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2012). To raise self-defense as an affirmative defense, a defendant must set forth "some evidence" of each of the following elements:

> "(1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable." *Jeffries*, 164 Ill. 2d at 127-28.

¶ 27 "If the State negates beyond a reasonable doubt any one of the above-mentioned elements, it has met its burden and the defense must be rejected." *People v. Huddleston*, 243 Ill. App. 3d 1012, 1018 (1993). If a defendant's self-defense claim fails, the fact finder must determine whether the defendant is guilty of first or second degree murder. *Jeffries*, 164 Ill. 2d at 128. But, "[i]f the State fails to prove that the defendant was *not justified* in using the force that he used," then the fact finder must find the defendant not guilty of first degree murder (*Jeffries*, 164 Ill. 2d at 128 (1995) (Emphasis in original.)), and necessarily cannot find him guilty of second degree murder. Thus, if a defendant acted under a reasonable belief that his use of force was justified, then self-defense may apply; but if his use of force was unreasonable, second degree murder may apply. *People v. Rodriguez*, 336 Ill. App. 3d 1, 17 (2002).

¶ 28 Here, the fact finder rejected defendant's self-defense claim. Thus, on review, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that the defendant was not justified in using the force that he did. *People v. Newbern*, 219 Ill. App. 3d 333, 342 (1991). "Whether an act was justified under the law of self-defense is for the trier of fact and depends on all of the surrounding facts and circumstances." *People v. Cook*, 262 Ill. App. 3d 1005, 1016 (1994). It is the trial court's responsibility to determine witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence. *People v. Spiller*, 2016 IL App (1st)

133389, ¶ 28. "A decision as to whether a defendant acted in self-defense will not be disturbed on review unless it is so improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Graca*, 220 Ill. App. 3d 214, 218 (1991).

¶ 29 The evidence here was sufficient to support the conclusion that defendant did not act in a reasonable belief of self-defense. A rational trier of fact could conclude from the evidence that defendant's use of force was not reasonably necessary to prevent his imminent death or great bodily harm and, therefore, defendant was not justified in using the force he used to stab and kill Ochoa-Deleon. Although Ordonez did not see how the physical altercation started, it is undisputed that Ochoa-Deleon died of multiple stab and incised wounds. The photographic evidence and postmortem examination report showed that Ochoa-Deleon's injuries were extensive. Defendant's injures, however, were minor, as he only had "band aids on his arms," "something on his right hand" "some marks" and "redness" on the chest area, "red on the eye," a band aid on his "little finger," and a ring finger wrapped in gauze. Thus, the evidence established that the altercation was "one-sided" even though, as defendant points out, Ochoa-Deleon was larger than defendant. This evidence was sufficient for a rational trier of fact to conclude that defendant did not act in a reasonable belief of self-defense. See *Cook*, 262 Ill. App. 3d at 1016-17 (finding that the "one-sided nature of the struggle" supported that the defendant did not act in self defense, noting "[a] review of the medical and photographic evidence reveals that the injuries to the deceased were both extensive and gruesome. In contrast defendant was practically unscathed").

¶ 30 Further, Ordonez testified that, after Wosbely separated defendant and Ochoa-Deleon, Wosbely and Lopez-Hernandez had to prevent defendant from fleeing the apartment, from which

the court could have inferred defendant's consciousness of guilt. His flight does not support an inference that he had stabbed Ochoa-Deleon under a reasonable belief that force was necessary to prevent imminent death or great bodily harm. See *People v. Assenato*, 224 Ill. App. 3d 96, 102 (1991) ("evidence of flight is admissible as a fact from which the jury may infer consciousness of guilt").

¶ 31 In addition, Wosbely, who ran to defendant and Ochoa-Deleon and separated the two men, kept telling Officer Moreno that defendant "did it." Also Moreno testified that defendant told him, "I stabbed him. He came at me." And, after the incident, defendant was angry and screaming and told Wosbely, "shut up, you're next." The court reasonably could infer from defendant's statement that he had just attacked Ochoa-Deleon, as he was threatening to attack Wosbely "next." From this the court could conclude that defendant had not stabbed Ochoa-Deleon in the belief it was necessary to prevent imminent death or great bodily harm to himself.

¶ 32 Viewing the evidence in the light most favorable to the State, we conclude the trial court's finding that defendant did not act in a reasonable belief in self-defense so as to justify stabbing and killing Ochoa-Deleon was not "so improbable or unsatisfactory" as to raise a reasonable doubt of defendant's guilt. Accordingly, given that the trial court could have reasonably concluded defendant did not act in self-defense, its second degree murder finding was not against the manifest weight of the evidence.[5]

¶ 33 Defendant's second contention is that his due process rights were violated because the trial court used information outside the trial record when it found him guilty of second degree

[5] Defendant makes his challenge to the sufficiency of the evidence supporting his convictions solely in the context of self-defense. He thus challenges only the evidence regarding the "without lawful justification" element of first degree murder (720 ILCS 5/9-1(a) (West 2012)), which is required to prove second degree murder (720 ILCS 5/9-2(c) (West 2012)).

murder. He argues that the court's findings were based not on the evidence but on the State's remarks and argument made at the hearing on the pretrial motion and on its opening statement. Specifically, defendant asserts that the court improperly relied on the State's assertions that defendant and Ochoa-Deleon engaged in a verbal dispute regarding defendant's failure to support his family, which led to a physical altercation, and that defendant was the one who brought the folding knife into the altercation, none of which was supported by the evidence. Defendant acknowledges that he did not preserve his challenge to the trial court's findings by objecting at trial or raising the issue in a posttrial motion, but he asserts we should review the issue under the plain error doctrine. See *People v. Anaya*, 2017 IL App (1st) 150074, ¶ 50 (to preserve an alleged error for review, a defendant must object at trial and raise the issue in a posttrial motion).

¶ 34 Under the plain error doctrine, we may review unpreserved error in two situations: (1) "the evidence is so closely balanced that error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the "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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, we must first determine whether any error occurred at all. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005).

¶ 35 In a bench trial, the trial court, as the trier of fact, is limited to the record before it and "it is a denial of due process of law to consider matters outside the record." *People v. Collins*, 21 Ill. App. 3d 800, 805 (1974). However, "a trial judge is presumed to know the law and only consider competent and admissible evidence." *People v. Williams*, 246 Ill. App. 3d 1025 (1993). "This

presumption may only be rebutted where the record affirmatively establishes that the trial judge in fact considered inadmissible evidence." *Williams*, 246 Ill. App. 3d at 1033. We conclude that the record does not affirmatively establish that the trial court considered matters outside the record or inadmissible evidence when it found defendant guilty of second degree murder.

¶ 36 Defendant takes issue with the trial court's statements that "[t]he dispute was verbal and came in some ways physical," defendant was "mistaken believing that he had a right to use deadly force," and he "brought a knife, a deadly weapon, into a scenario where deadly force may not have been required." Defendant claims these findings are not supported by the evidence. We disagree and find the evidence was sufficient to support the court's findings.

¶ 37 The evidence at trial established that, before defendant stabbed Ochoa-Deleon to death, he and Ochoa-Deleon were talking in the living room. Ordonez did not hear the subject of their conversation or an argument. However, given that the conversation quickly led to a physical altercation wherein Ochoa-Deleon was stabbed to death, the court could reasonably infer that defendant and Ochoa-Deleon had engaged in some kind of verbal dispute when they were talking by the couch.

¶ 38 The evidence was also sufficient to support the trial court's findings that defendant had "brought a knife" into an altercation that did not warrant use of deadly force. Ochoa-Deleon died from multiple stab wounds and, as previously discussed, the photographic evidence and postmortem examination showed his injuries were extensive. In contrast, defendant's injuries consisted of only redness and marks on his chest, redness in his eyes, and injuries to his right ring finger and "little finger." Given that Ochoa-Deleon suffered multiple stab wounds and defendant had minor injuries and no stab wounds, the trial court could reasonably infer from the

evidence that it was defendant who "brought a knife" into the altercation. Further, after the stabbing, defendant admitted to Moreno, "I stabbed him. He came at me." But there is no evidence that he told the police or anyone else in the apartment after the stabbing that Ochoa-Deleon came at him with knife. Instead, defendant was screaming and threatened Wosbely by telling him "you're next." In addition, as previously determined, given the evidence of the grievous nature of Ochoa-Deleon's numerous knife wounds versus defendant's minor injuries, the altercation was one-sided in defendant's favor, and thus supporting the court's determination that defendant's use of force was unwarranted.

¶ 39 Accordingly, the evidence was sufficient for the trial court to reasonably infer that the physical altercation that led to Ochoa-Deleon's stabbing death resulted from some kind of verbal dispute and that defendant brought a knife into the altercation where deadly force was not required. Because the evidence sufficiently supported the trial court's findings, defendant has failed to demonstrate the trial court committed error by improperly considering matters outside of the record. The plain error doctrine therefore does not apply and defendant's claim remains forfeited.

¶ 40 Defendant lastly contends that he was deprived of a fair trial because the prosecutor presented "a narrative of events filled with facts" in the opening statement that was not presented as evidence at trial. Defendant argues the prosecutor's comments were highly prejudicial because the trial court considered the allegations when it found him guilty. Defendant acknowledges he did not preserve his challenge by objecting at trial or raising the issue in a posttrial motion. He argues, however, that we should review his challenge under the plain error doctrine. As

previously discussed, under the plain error doctrine, we must first determine whether any error occurred at all. See *Nicholas*, 218 Ill. 2d at 121.

¶ 41 Remarks or arguments made in opening statements are not evidence. See *People v. Flax*, 255 Ill. App. 3d 103, 109 (1993). Rather, "[t]he purpose of an opening statement is to advise the trier of fact what the evidence will show." *People v. Richmond*, 341 Ill. App. 3d 39, 47 (2003). In an opening statement, the prosecutor "may include a discussion of the expected evidence and reasonable inferences from the evidence." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). The prosecutor "is allowed great latitude in making the opening statement." *People v. Richmond*, 341 Ill. App. 3d 39, 47 (2003). "Reversible error occurs only where the prosecutor's opening comments are attributable to deliberate misconduct of the prosecutor and result in substantial prejudice to the defendant." *Kliner*, 185 Ill. 2d at 127.

¶ 42 Defendant claims the prosecutor's statement that Ochoa-Deleon and defendant had initially engaged in a verbal argument because Ochoa-Deleon believed that defendant was not sending sufficient money to his family members in Guatemala was not established as evidence at trial. Defendant also asserts there was no evidence to support the prosecutor's statements that, "[d]uring the physical altercation, the defendant removed a folding knife and used that folding knife to stab [Ochoa-Deleon] multiple times" and that Wosbely "actually was injured because he was trying to get the folding knife that the defendant was using."

¶ 43 Defendant is correct that there was no admissible evidence regarding what the argument was about, or any evidence that defendant used the folding knife found at the scene to stab Ochoa-Deleon. Nevertheless, we conclude that the prosecutor's comments in the opening statement did not substantially prejudice defendant. In a bench trial, "a trial court is presumed to

recognize and disregard improper arguments presented to it and consider only competent evidence in ruling on the merits." *People v. Kelley*, 304 Ill. App. 3d 628, 639 (1999). Further, the court is presumed to know the law (*People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001)), including that unsupported remarks in an opening statement are not evidence. This presumption may only be rebutted when the record affirmatively shows otherwise. *Id.*

¶ 44 The record here does not affirmatively show that, in finding defendant guilty, the court improperly considered comments from the State's opening statement that were not ultimately supported by the evidence. The court did not specifically refer to the challenged remarks. Further, as we previously determined, the trial court's factual findings were supported by the evidence. Lastly, defendant admitted he stabbed and killed Ochoa-Deleon, and we found the evidence was sufficient for the trial court to reasonably conclude that any belief in self-defense was not justified. Thus, defendant was not substantially prejudiced by the prosecutor's comments made in the opening statement. Accordingly, there was no reversible error in the remarks and we will not review defendant's challenge under the plain error doctrine.

¶ 45 For the reasons explained above, we affirm defendant's conviction.

¶ 46 Affirmed.