2018 IL App (2d) 151113-U
No. 2-15-1113
Order filed May 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BLAYNE F. HIGGINS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 15-CF-1445 Honorable John R. Truitt, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State presented sufficient evidence upon which the jury reasonably could have concluded that defendant did not act in self-defense when he shot the victim. The trial court did not abuse its discretion in refusing defendant's non-Illinois Pattern Jury Instruction that a defendant may be justified in the use of deadly force against an unarmed aggressor. Defendant waived his argument that he was denied an impartial jury by acquiescing in the trial court's remedial questioning of the jury about a purported safety concern relayed by an excused juror. Regardless, the trial court did not abuse its discretion in determining the jury's impartiality, and defendant failed to establish that his trial counsel was ineffective for failing to seek further questioning or a mistrial or that he was prejudiced as a result.

¶ 2 Defendant, Blayne F. Higgins, appeals his conviction of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)) following a jury trial in the circuit court of

Winnebago County. He argues (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the trial court erroneously refused his proposed non-Illinois Pattern Jury Instruction (IPI) regarding the use of force in self-defense, and (3) he was denied a fair trial because of a contaminated jury. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Shooting

¶ 5 On the evening of June 22, 2015, defendant shot Randall Dalgard in the abdomen. They were not strangers. They were involved in a love triangle with Karen Jenkins. The testimony established that Randall and Karen were romantically involved for approximately seven years, lived together, and had two children together. However, in the summer of 2014, Karen had an affair with defendant. On December 25, 2014, she and the two children moved in with defendant and defendant's wife with whom defendant had an "open relationship." Karen moved back in with Randall early in June 2015, although Karen and defendant had sexual relations after that time.

¶ 6 Randall testified that on the night of the shooting, he brought the children to Gene's Place, a bar and grill where Karen worked, to say goodnight. However, when he telephoned Karen from the parking lot, she did not answer so they returned home. While in the parking lot though, Randall saw defendant's car parked next to Karen's van. Karen subsequently telephoned Randall and acknowledged that defendant was at the bar, "it was fine," and "there was nothing going on." Randall described a strained relationship with Karen and "trust issues."

¶ 7 Randall returned to Gene's Place alone in a borrowed car "to see where everything stood," *i.e.*, whether Karen and defendant remained romantically involved or whether defendant was just bothering her. He parked in a parking lot across from Gene's Place, about 50 meters

from the entrance to the bar and about 30 meters from Karen's van and defendant's car. He waited there for approximately 30 minutes. Randall was not armed.

¶ 8 Defendant testified that he went to Gene's Place that evening around 8:30 p.m., had dinner, played the slot machines, and talked with Karen. At about 10 p.m., defendant left the bar alone. He waited in his car because he wanted to continue to talk to Karen. Karen testified that she remained in the bar after her shift ended at 10 p.m. to avoid further conversation with defendant.

¶ 9 There were different versions of what happened next although a non-auditory surveillance video of the Gene's Place parking lot captured a portion of the ensuing actions.

¶ 10 Karen testified that at about 10:30 p.m., when she walked outside to the Gene's Place parking lot, she saw defendant in his car. She did not expect defendant to be there. Karen initially went into the driver's seat of her van but emerged and asked defendant if she could hug him. After hugging him, Karen returned to the driver's seat of her van. Defendant exited his car, approached Karen, and asked if she "was really going home." Karen responded, "[Y]es, I have to" and "You have to let me go." Defendant said, "You want me to let you go?" Karen replied, "Yes you have to let me go." Defendant asked "if it would make a difference if we made love one more time, if [she] was still going to go home, and [she] said no." Both Karen and defendant testified that the encounter was emotional, but not contentious.

¶ 11 Randall testified that he heard Karen say to defendant, "I want to leave. Let me go," and defendant yelled, "You want me to let you go?" At that point, Randall got out of his car and walked toward defendant with the intention of telling defendant to go home and to "let it go" because it was "not worth it." Karen, still sitting in the driver's seat of the van, spotted Randall and told defendant, "There's Randy." Karen testified that she was frightened of what was going

to happen, that Randall's physical demeanor suggested that he intended to strike defendant, and that she "knew they were going to get into a fight" because Randall's fists were clenched and he was "walking sternly."

¶ 12 Randall, however, testified that as he approached defendant, he held his hands up and said, "Hey man, I ain't here to fight," but defendant immediately punched him. Randall ducked and turned, but defendant continued to strike him repeatedly. Defendant admitted that he "threw the first punch" but testified that as Randall approached, Randall yelled, "I warned you, motherfucker." According to defendant, Randall's balled fists and raised arms suggested that Randall was going to punch him so defendant punched him first. Both Randall and defendant are six feet tall and weighed approximately 250 pounds at the time of the altercation.

¶ 13 The surveillance video shows that as defendant and Randall met, defendant struck Randall and continued to strike him as Randall turned his back. The view on the surveillance video becomes obstructed as the fight progresses and defendant and Randall land between defendant's car and Karen's van.

¶ 14 Randall testified that he tried to cover his head and "stay low." He repeatedly stated, "I'm not here to fight" and "quit hitting me" and told Karen to call 9-1-1. Randall took a step backwards "got him in between his vehicle" and "threw an elbow," but defendant continued to hit him. Randall stuck his thumb in defendant's eye. Defendant stuck his fingers inside Randall's mouth and pulled on Randall's jaw. Randall bit defendant's finger. Randall released defendant's finger from his mouth but still had his thumb in defendant's eye as he turned around to put distance between them and face defendant. According to Randall, at that point, defendant said, "I hope you like how this feels, bitch," and "rushed me with his pistol and shot me." Defendant

asked Randall if he "wanted another one," and Randall said, "No, I'm good. She's yours. I'm done."

¶ 15 Karen testified that she saw defendant hit Randall multiple times and that Randall told her to call 9-1-1 as Randall was "against my window." Karen heard a gunshot as she was exiting the van through the passenger door. She saw Randall on the ground and ran inside the bar to call 9-1-1. The altercation lasted "a couple minutes." A few moments later, Randall walked into the bar, holding his stomach.

¶ 16 The testimony established that defendant had a concealed carry permit and carried a nine-millimeter handgun in a holster inside his pants at the waist. The handle protruded from the holster, but his shirt covered it. Defendant testified that Randall grabbed the gun out of the holster during the fight, but defendant pushed the gun back down into the holster. As defendant was pinned against the van, Randall repeatedly elbowed him in the face, stuck his thumb in defendant's eye, bit defendant's finger, and "went for the gun again." Defendant grabbed the gun at this point and fired a shot. He thought that if he did not fire his gun, he would die or be hurt "real bad," and "just wanted it to be over." Defendant testified that he was disoriented and said, "You had to do this" after he shot the gun. As defendant walked away, he felt the blood rushing through his face and bent over as "blood spilled out onto the ground." At that point, Randall lunged and tried to grab him, saying, "I hate you, motherfucker." Defendant testified that he shot only once because he did not want to hurt Randall.

¶ 17 The surveillance video showed that after the shooting, defendant paced in the parking lot, returned to his car and sat inside, exited his car, paced again, returned to his car, drove in a circle and returned to his parking spot, sat in his car, and then drove out of the parking lot. When he

returned home, he telephoned the police to report the shooting. Defendant was treated at the hospital for a swollen face, a bloody and torn finger, and a bloody nose.

¶ 18 Randall testified that he did not grab defendant's gun during the altercation. According to Randall, he did not know that defendant possessed a gun until defendant shot him with it. An ambulance brought Randall to the hospital where he had surgery to repair his intestines and install a colostomy bag.

¶ 19 Evidence regarding two prior face-to-face interactions between defendant and Randall was introduced. Defendant testified that in February 2015, when Karen was living with defendant and his wife, defendant and Randall physically fought at a gas station during an exchange of Randall's and Karen's children. Karen was inside the gas station when Randall arrived. According to defendant, he told Randall to wait to take the children until Karen returned, and he blocked the door to Karen's van with his body. Randall put his finger in defendant's face, and when defendant pushed it away, Randall "swung a punch" at him. Defendant "then swung a punch at [Randall]," and they wrestled. Randall tackled defendant and beat defendant in the face.

¶ 20 Randall, however, testified that defendant shut the van door on his arm and hit him in the face. The gas station attendant broke up the fight. Randall left, but he returned to compensate the gas station attendant whose car mirror had been damaged in the fight. According to Randall, he reported the incident to the police. A police officer was present at the gas station when Randall returned, but the gas station attendant testified that the police officer's presence was happenstance.

¶ 21 The second incident occurred in May 2015. Defendant testified that when he and Karen picked up the children at Karen's sister's house, Randall was in the driveway. According to defendant, Randall said, "I'm gonna get you motherfucker" and tried to get defendant out of the

van to fight him. Defendant told Randall that he would not fight him. Both defendant and Karen testified that Randall followed them, and when they stopped at a red light, Randall exited his car, approached Karen's van, and again unsuccessfully tried to coax defendant out of the van to fight him. Defendant testified that Randall flicked his cigarette at defendant's face and spit in his direction. When the light turned green, Karen drove away. Defendant reported the incident to the police. Randall disputed that he flicked the cigarette at defendant and testified that he followed them because it was his route home.

¶ 22 Defendant also testified about a prior interaction with Randall over the telephone. Randall telephoned Karen at Gene's Place. Defendant was there at the time, and Karen gave defendant the telephone to answer. Randall was "belligerent" and told defendant to "stay away" from Karen so defendant hung up. Randall testified that defendant said "distasteful things" during the conversation.

¶ 23 In addition to the testimony regarding the prior encounters between Randall and defendant, Randall's ex-wife testified that during her marriage to Randall, he kicked her during an argument, causing a bruise. Randall's prior convictions for burglary and theft also were admitted.

¶ 24 B. The Excused Juror

¶ 25 Following initial closing arguments but before the State's rebuttal, pursuant to the bailiff's report that a juror had information to convey, the trial court met with the parties and the juror in chambers. The juror relayed that before court that morning, he went to a restaurant for breakfast. As he exited his car in the parking lot, "two guys on motorcycles pulled in." The restaurant was "pretty well empty and they sat down right across from me, probably about two feet," but there was no conversation. The juror previously had never seen the men. The same two

men were in the courtroom that day. The juror informed the trial court that he had communicated the information to the jury and subsequently to the bailiff outside the jury room. Upon inquiry by the trial court, the juror stated that he remained impartial, would decide the case based only upon the evidence, and that "[n]obody's going to scare me out of what I need to do."

¶ 26 Defense counsel requested that the juror be excused on grounds that the juror "perceived that there might be some sort of safety threat" and that the juror violated the instruction prohibiting discussion of outside incidents in the jury room. He further suggested that the trial court instruct the jury that "there has been apparently some incidental contact with that juror and some people who may or may not be affiliated with the case, but that the—as a result of that contact it is appropriate to—maybe say—probably not affiliated with the case—we've got to try to have some damage control with the suggestion made in the jury room that this could be some sort of nefarious thing going on." The following colloquy ensued:

> "THE COURT: So you don't think it's all or nothing what he said, he told everyone. Why is it him versus just a complete mistrial and we throw the whole thing out the window if I buy that argument?
>
> MR. TAYLOR [(DEFENSE COUNSEL)]: Well, I suppose, you know that Your Honor—Your Honor could inquire of all the other folks whether any of them had safety concerns. But his reaction to this was to immediately equate it with a safety, a personal safety issue and so he's demonstrated uniquely a personal fear."
>
> And he even said, I'm not going to let anybody intimidate me from doing the job I'm here to do. That's a personal issue.
>
> THE COURT: So your request is he be removed and the first alternate seated?
>
> MR. TAYLOR: Yes.

* * *

THE COURT: I'm incline[d] to agree. I'm incline[d] to remove him, seat the first alternate, and then generally ask the entire remaining 13 whether anything that was communicated to them by one of the other jurors in any way, shape, or form affects their ability to remain fair and impartial. Is that something everybody can live with?

MS. DAILEY [(ASSISTANT STATE'S ATTORNEY)]: Yes, that's fine.

MR. TAYLOR: I can live with that.

THE COURT: Okay. Then I'm erring on the side of caution. Once he says a safety concern, well, why would you view it as a safety concern. I think the inference—even though he said he doesn't know who, if anyone, they're affiliated with or whether it was just pure happenstance, I think the inference when you're talking about a safety concern prejudices the defense enough that if that's your request I'm going to grant it.

MR. TAYLOR: Thank you."

¶ 27 The trial court excused the juror outside the presence of the jury. In open court, the trial court seated an alternate juror and informed the jury that a juror had been excused. Addressing the jury as a group, the trial court continued:

"Was anything communicated to you this morning by [the excused juror] that would affect your ability to continue to be fair and impartial in this case, having listened to the evidence, follow the law to the evidence and in that way decide the case? If anyone believes their ability to be fair and impartial has been compromised, would you raise your hand and let me know?

The record should reflect none of the 13 jurors or 12 jurors and our alternate juror, no one has raised their hand indicating that they could not remain fair and impartial.

And again the evidence that you are to consider in reaching your verdict is the evidence which you receive in this courtroom together. Anything that you may have read, heard, or seen outside the courtroom, and that includes in the jury room, is not to be considered by you in any way, shape, or form in reaching your verdict. Is that clear to everyone?

If it is not clear to anyone, raise your hand. Again no jurors have raised their hand."

¶ 28 The State proceeded with its rebuttal closing argument.

¶ 29 C. Jury Instructions

¶ 30 Following closing arguments, the trial court gave the jury the following two IPI instructions regarding self-defense. First, the trial court instructed the jury:

"A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force. However, 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." Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. Supp. 2009) ("Use of Force in Defense of a Person") (hereinafter IPI Criminal 4th No. 24-25.06).

¶ 31 Second, the trial court instructed the jury:

"A person who initially provokes the use of force against himself is justified in the use of force only if the force used against him is so great that he reasonably believes

he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person, or in good faith, he withdraws from physical contact with the other person and indicates clearly to the other person that he desires to withdraw and terminate the use of force, but the other person continues or resumes the use of force." Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 (4th ed. Supp. 2009) ("Initial Aggressor's Use of Force") (hereinafter IPI Criminal 4th No. 24-25.09).

¶ 32 The trial court also instructed the jury that the State had a duty to disprove self-defense:

"In this case the State must prove beyond a reasonable doubt the proposition that the defendant was not justified in using the force which he used. You have heard testimony of Randall Dalgard's prior acts of violence. It is for you to determine whether Randall Dalgard committed those acts. If you determine that Randall Dalgard committed those acts you may consider that evidence in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in using the force which he used." Illinois Pattern Jury Instructions, Criminal, No. 3.12X (approved Oct. 17, 2014) ("Proof of Prior Conviction/Prior Violent Act/Reputation—Victim—Self-Defense").

¶ 33 Defense counsel, however, also requested the following non-IPI instruction: "The aggressor need not be armed for the defendant to use deadly force and for such force to be justified." Defense counsel argued that the instruction was meant to address the State's emphasis on the fact that defendant was armed, and Randall was not armed. The trial court denied the request, stating that the IPI instructions thoroughly and adequately explained the affirmative defense of self-defense.

¶ 34 The jury found defendant guilty of aggravated battery with a firearm.

¶ 35 D. Post-Trial Motion

¶ 36 Defendant filed a post-trial motion, arguing, *inter alia*, that the trial court erred in refusing the non-IPI jury instruction and that he was denied a fair trial because of a contaminated jury. Regarding the latter, defense counsel acknowledged that the trial court excused the juror and questioned the panel—the remedy he requested—but that further research indicated that defendant was entitled to a new trial. He argued that questioning the jury was insufficient to remedy the contamination caused by the excused juror's suggestion that he had been followed by the two men at the restaurant. Indeed, defense counsel relayed, a sheriff's deputy approached an individual outside the courtroom after the trial to search his phone for pictures because a juror believed that the individual photographed the jury. As it turned out, the individual merely was texting. Nevertheless, defendant argued, the incident demonstrated that his jury was "influenced by fear" and he was entitled to a new trial.

¶ 37 The trial court denied the motion, stating that the IPI instructions adequately covered the issue of self-defense. In rejecting defendant's jury-contamination argument, the trial court reasoned that its action was the precise remedy requested by defense counsel and that it erred on the side of caution in excusing the juror even though the juror stated that he remained impartial. The trial court further reasoned that there was "no evidence that fear played any role in the jurors' deliberations." The trial court stated that a juror's concern regarding anonymity is a routine concern after trial.

¶ 38 The trial court sentenced defendant to nine years in prison. Defendant timely appealed.

¶ 39 II. ANALYSIS

¶ 40 A. Sufficiency of the Evidence

¶ 41 Defendant initially challenges the sufficiency of the evidence against him. He contends that the State failed to disprove that he acted in self-defense when he shot Randall. According to defendant, Randall was the initial aggressor, and defendant was justified in discharging his gun when faced with the reasonable belief that he would die or be severely injured.

¶ 42 The State has the burden of proving beyond a reasonable doubt each element of an offense. *People v. Gray*, 2017 IL 120958, ¶ 35. A reviewing court faced with a challenge to the sufficiency of the evidence must view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* The reviewing court will not retry the defendant. *Id.* Rather, it is the trier of fact's responsibility to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id.* Thus, a reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *Id.* A criminal conviction will not be reversed unless the evidence is so unreasonable, improbable, or unsatisfactory that it leaves reasonable doubt of the defendant's guilt. *Id.*

¶ 43 Once a defendant properly raises a self-defense claim, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense in addition to proving the elements of the charged offense. *Id.*, ¶ 50. A person acts in self-defense when (1) unlawful force was threatened against him, (2) he was not the aggressor, (3) the danger of harm was imminent, (4) the use of force was necessary, (5) he actually and subjectively believed a danger existed that required use of the force applied, and (6) his beliefs were objectively reasonable. 720 ILCS 5/7-1

(West 2014); *Gray*, 2017 IL 120958, ¶ 50. If the State negates any one element, the self-defense claim necessarily fails. *Gray*, 2017 IL 120958, ¶ 50.

¶ 44 Defendant argues that Randall was the initial aggressor. He argues that the evidence was undisputed that Randall was angry with defendant, previously threatened defendant, and "ambushed" defendant on the night of the shooting. According to defendant, as Randall emerged and marched toward him with clenched fists, yelling "I warned you, motherfucker," it was clear that "violence against him was imminent."

¶ 45 Randall, however, testified that as he approached defendant, he "held his hands up" and told defendant that he was not there to fight. According to Randall, while still in the car, he heard Karen telling defendant to leave and let her go and defendant yelling, "You want me to let you go?" Randall's intention was to tell defendant to leave.

¶ 46 Defendant counters that Randall's testimony was not credible because of Randall's criminal history. Moreover, contrary to Randall's version of the encounter between defendant and Karen, both defendant and Karen testified that their exchange was emotional, but not combative. Defendant also relies upon the surveillance video displaying Randall's "aggressive manner" as he walked toward defendant as well as Karen's testimony that she was frightened when Randall emerged, that Randall's physical demeanor suggested that he intended to strike defendant, and that she "knew they were going to get into a fight." According to defendant, the only reasonable conclusion from the evidence was that Randall was the initial aggressor.

¶ 47 The jury heard and saw the witnesses and was thus in the best position to consider their credibility, resolve any inconsistencies, and determine the weight to be afforded their testimony. We may not substitute our judgment for that of the jury's on questions involving witness credibility. See *Gray*, 2017 IL 120958, ¶ 35. Moreover, the surveillance video demonstrated that

defendant preempted Randall's allegedly anticipated use of force by pummeling Randall as they confronted each other. Indeed, defendant does not dispute that he threw the first punch. The jury reasonably could have concluded based upon the evidence presented that defendant was the initial aggressor.

¶ 48 Defendant nevertheless contends that as the "non-initial aggressor," he was justified in shooting Randall because he reasonably believed that he could die or be severely injured. A defendant claiming self-defense is only justified in using force to the extent that he reasonably believes that such conduct is necessary to defend himself. *People v. Holman*, 2014 IL App (3d) 120905, ¶ 58. A self-defense claim, therefore, fails where the defendant responds with an amount of force that was unnecessary and excessive under the circumstances. *Id.*; *People v. Belpedio*, 212 Ill. App. 3d 155, 163 (1991).

¶ 49 In *Belpedio*, for instance, the defendant and the victim were on opposing teams in a contentious touch-football game. *Id.* at 157-58. During one play, the victim allegedly elbowed the defendant; the force, the contact, and the intentionality were disputed. *Id.* at 158-59. The defendant testified that he grabbed the victim by the shirt after the play saying, "Was that necessary?" *Id.* at 160. The victim then "threw his right elbow" against the side of the defendant's head. *Id.* The defendant was "scared" and believed the victim was going to hit him. *Id.* According to the defendant, the victim then pushed him and "threw a left punch," which missed the defendant. *Id.* In response, the defendant punched the victim, but believed the punch missed, and punched the victim again. *Id.* The victim, in contrast, testified that after the initial contact, the defendant grabbed the victim's shirt with both hands and pushed against his throat, using foul language. *Id.* at 158. As the defendant pushed the victim, the victim pushed the defendant's shoulders so that the players became separated. *Id.* There was testimony that the

defendant then struck the victim in the face and knocked him to the ground. *Id.* The victim lost consciousness and suffered a broken nose and received stitches to his lip, nose, and eye. *Id.* Other witnesses, including teammates and referees, offered varying accounts of the contact, timing, and sequence of the altercation. *Id.* at 158-60.

¶ 50 The *Belpedio* court affirmed the defendant's conviction for aggravated battery, holding that the defendant's self-defense claim failed because the trial court reasonably could have concluded based upon the evidence presented that the defendant was the initial aggressor. *Id.* at 162-63. The court further held that, even if the victim initiated the physical contact by elbowing or pushing the defendant, the evidence established that the defendant responded with an unnecessary and excessive amount of force under the circumstances, which belied the defendant's self-defense claim. *Id.* at 163. Namely, the court reasoned, punching the victim in the face, causing a split lip, broken nose, and unconsciousness, "does not describe the actions of a person defending himself from an elbowing or shove. Rather, these are actions of a person seeking revenge or retaliation." *Id.*

¶ 51 Likewise, here, the jury reasonably could have concluded that defendant's use of force—shooting Randall in the abdomen—was excessive under the circumstances. Defendant's account was that Randall reached for his gun during the altercation but defendant managed to return the gun to its holster. According to defendant, Randall reached for the gun a second time and grabbed it as he was elbowing defendant in the face and biting defendant's finger. Thus, defendant argues, his use of force was justified because he was severely injured and reasonably believed that he could die. Defendant cites the prior altercations with Randall as support for his objectively reasonable belief that Randall would harm him.

¶ 52 Randall's account was that he bit defendant's finger because defendant stuck his fingers inside Randall's mouth and pulled on Randall's jaw. According to Randall, he repeatedly asked defendant to stop hitting him and asked Karen to call 9-1-1. Karen's testimony corroborated Randall's request to call 9-1-1. Randall testified that he never reached for the gun and was not aware that defendant was carrying a gun until defendant shot him with it. Given the location of the handgun inside defendant's pants in the concealed carry holster, it was not unreasonable for the jury to credit Randall's testimony that he was unaware of the gun and never reached for it. Thus, even if the jury found that defendant was not the initial aggressor, the jury reasonably could have concluded that the amount of force used—shooting Randall in the abdomen—was an excessive response to being elbowed in the face and having his finger bitten.

¶ 53 Moreover, even if the jury found that Randall reached for the gun during the struggle, defendant's testimony was that he initially gained control of the gun and managed to return it to its holster. Yet when Randall purportedly reached for the gun a second time, defendant shot the gun, hitting Randall in the abdomen. The disproportionality of the response contradicts defendant's self-defense claim. Viewing all of the evidence in the light most favorable to the prosecution, we determine that a rational trier of fact could have found defendant guilty beyond a reasonable doubt.

¶ 54 B. Jury Instructions

¶ 55 Defendant next argues that the trial court erred in refusing to give the jury his proposed non-IPI instruction that a defendant may be justified in the use of deadly force against an unarmed aggressor. According to defendant, the instruction addressed the potential that the jury improperly would find defendant's actions unjustified merely because he was armed, and Randall was not.

¶ 56 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence so the jury may reach a proper conclusion based on the appropriate law and the evidence presented. *People v. Hoffman*, 2012 IL App (2d) 110462, ¶ 8. The applicable IPI criminal instruction shall be used unless the trial court determines that it does not accurately state the law. Ill. S. Ct. R. 451(a) (eff. April 8, 2013); *Hoffman*, 2012 IL App (2d) 110462, ¶ 9. A non-IPI instruction may be given when no IPI criminal instruction is available on a subject about which the trial court determines that the jury should be instructed. Ill. S. Ct. R. 451(a); *Hoffman*, 2012 IL App (2d) 110462, ¶¶ 9-10. A non-IPI instruction "should be simple, brief, impartial, and free from argument." Ill. S. Ct. R. 451(a).

¶ 57 The decision to give or refuse a non-IPI instruction is subject to the trial court's sound discretion and will not be reversed absent an abuse of that discretion. *People v. Simms*, 192 Ill. 2d 348, 412 (2000). The refusal of a non-IPI instruction is an abuse of discretion "where there is no IPI instruction applicable to the subject and the jury was left to deliberate without proper instructions." *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 69.

¶ 58 Here, the trial court instructed the jury that the State had a duty to disprove self-defense and gave the jury two IPI criminal instructions regarding the use of force in self-defense. The "Use-of-Force-in-Defense-of-a-Person" instruction provided that justifiable use of force requires a reasonable belief that such conduct is necessary to defend against imminent use of unlawful force, but that deadly force is only justified by a reasonable belief that the force is needed to prevent imminent death or great bodily harm to himself. IPI Criminal 4th No. 24-25.06. The "Initial-Aggressor's-Use-of-Force" instruction outlined the parameters around the initial aggressor's justifiable use of force. The instruction stated that the initial aggressor is justified in using force only if he reasonably believes he is in imminent danger of death or great bodily harm

and has exhausted every reasonable means to escape the danger other than using deadly force or in good faith withdraws from physical contact, indicates clearly his desire to withdraw and terminate the use of force, but the other person continues or resumes the use of force. IPI Criminal 4th No. 24-25.09.

¶ 59 Defendant acknowledges that the IPI instructions adequately address the law regarding justifiable use of deadly force and duties of the initial aggressor. He contends, however, that it was necessary to instruct the jury that a defendant may be justified in the use of deadly force against an unarmed aggressor to "bring balance" to the case as the jury may improperly have found that it was not justifiable for the armed defendant to shoot the unarmed Randall.

¶ 60 The court in *People v. Santiago*, 161 Ill. App. 3d 634, 638-41 (1987), affirmed the trial court's rejection of an analogous proposed non-IPI instruction. There, the defendant testified that while he was in hostile gang territory, he saw a rival gang member, heard a bottle crash, saw a group running toward him and shouting gang slogans, and then saw another bottle thrown at him. *Id.* at 637. Surprised and scared (as members from the rival gang previously chased him, trapped him in a store, and shot at him and his family), the defendant opened fire without aiming, shot his gun six times, and killed a rival gang member. *Id.*

¶ 61 The trial court in *Santiago* refused the defendant's proposed non-IPI instructions, including the following: "It is not necessary for the deceased to have actually possessed or used a deadly weapon to justify a killing in self-defense. If a defendant is confronted with such means or force as to lead to a reasonable belief that he is in danger of loss of life or of suffering great bodily harm, that is all the law requires to justify a killing in self-defense." *Id.* at 638-39. The appellate court affirmed, holding that the proposed instruction was argumentative as well as

misleading because it failed to mention that the defendant must not be the aggressor to establish self-defense on such terms. *Id.* at 640.

¶ 62 Here, defendant's proposed non-IPI instruction that "[t]he aggressor need not be armed for the defendant to use deadly force and for such force to be justified" is even more specious and argumentative. The instruction not only omits the legal principle that the defendant must not be the aggressor to establish self-defense, it also presumes that Randall was the aggressor with its language "[t]he aggressor need not be armed." This was an issue for the jury to decide.

¶ 63 The trial court properly instructed the jury with applicable IPI instructions explaining the justifiable use of deadly force and the duties of the initial aggressor. The instructions provided the jury with the appropriate law in its deliberations. Defendant provides no basis upon which to hold that the trial court abused its discretion in refusing the proposed non-IPI instruction.

¶ 64 C. Jury Impartiality

¶ 65 Defendant further argues that he was denied a fair trial because the jury was "contaminated with outside information that raised safety concerns and the remedial measures taken to assure the jurors could remain fair were inadequate." According to defendant, the jury was contaminated when the ultimately excused juror improperly informed the other jurors of the incident involving the two men who sat near him at a restaurant prior to court, only to later appear in the courtroom.

¶ 66 The trial court questioned the juror and "erred on the side of caution" by excusing him after the juror acknowledged his possible perception of the incident as a safety threat. This was the precise remedy requested by defense counsel. Following agreement of both parties as to the appropriate remedy regarding the remaining jurors, the trial court questioned the jury as a group in open court about whether the information that the excused juror relayed to them affected their

ability to remain fair and impartial and whether it was clear to them that they were prohibited from considering any information learned outside the courtroom in reaching the verdict. No jurors raised their hands to indicate that the information would affect their ability to remain fair and impartial or that they did not understand the prohibition on considering outside information.

¶ 67 Defendant argues that the questioning was insufficient to "root out the safety concerns" and that the trial court should have taken additional measures to ensure the jury's impartiality. According to defendant, the "unfettered imagination" of the jurors "was left to run wild" immediately prior to deliberations in a case that involved evidence of aggressive behavior.

¶ 68 Initially, as the State argues, this issue is waived because defendant acquiesced in the trial court's method of questioning the jury. Where, as here, a defendant agrees with a procedure at trial, he may not contend on appeal that the course of action was erroneous. *People v. Carter*, 208 Ill. 2d 309, 318 (2004). Defendant nevertheless argues that we should review the issue under the plain-error doctrine and that his counsel was ineffective for failing to demand more extensive questioning of the jury or request a mistrial.

¶ 69 We note that defendant's affirmative acquiescence in the questioning of the jury renders a plain-error analysis unavailable. See *People v. Dunlop*, 2013 IL App (4th) 110892, ¶ 12 (the plain-error analysis applies to cases involving procedural default, *i.e.*, forfeiture, not to cases involving affirmative acquiescence). Even if the plain-error doctrine were applicable here, where defendant acquiesced in the very conduct about which he now complains, defendant fails to establish the initial consideration in the analysis—that an error occurred. See *People v. Lewis*, 234 Ill. 2d 32, 43 (2009) ("[t]he first step of plain-error review is to determine whether any error occurred").

¶ 70 "The standard for jury impartiality is whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." *People v. Runge*, 234 Ill. 2d 68, 103 (2009). Due process requires "'a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.'" *Id.*, quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The trial court's determination of whether the jury has been affected to an extent that it could not be fair and impartial will not be reversed absent an abuse of discretion. *Id.* at 104-05.

¶ 71 Defendant argues that the trial court's questioning of the jury should have been individual, more extensive, and outside the courtroom. He cites *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 21, for the proposition that the trial court's inquiry into juror bias should discover as much information as possible. However, not all allegations of juror bias require an individualized *voir dire*. *Runge*, 234 Ill. 2d at 103-04. Rather, the trial court must assess the particular circumstances to determine whether questioning the jurors might compound the problem by drawing unnecessary attention to it. *Id.*; *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 67. "'Sometimes less is more'" when it comes to judicial investigation of alleged juror misconduct. *Runge*, 234 Ill. 2d at 104; *Sharp*, 2015 IL App (1st) 130438, ¶ 67.

¶ 72 In *Sharp*, for example, several jurors in the defendant's murder and aggravated battery trial received telephone calls from an unknown number on the evening before the scheduled closing arguments and deliberations. 2015 IL App (1st) 130438, ¶¶ 19-27. The caller falsely informed the jurors that the court time had been delayed by two hours. *Id.* The trial court questioned the jurors regarding the content of the telephone calls and ultimately excused one juror who received the telephone call at his home telephone number rather than his cell phone

(the number listed on his juror card). *Id.* ¶¶ 26-27. On appeal from the defendant's convictions, the court held that the trial court properly exercised its discretion in determining that further questioning or admonishments were unnecessary. *Id.* ¶ 69. "Nothing linked either party to the making of the improper phone calls" and "[n]one of the affected jurors stated anything to the judge that indicated that he or she could not be impartial." *Id.*

¶ 73 Likewise, here, defendant provides no evidence that the jurors were concerned about the information or viewed the incident as a threat to their safety. The excused juror relayed to the other jurors that two men who sat near him that morning at breakfast were in the courtroom. According to the excused juror, there was no interaction between the juror and the two men, and the juror did not know whether the men were affiliated with either party. Nonetheless, in an abundance of caution the trial court replaced the juror because the juror's recitation suggested that he viewed the incident as a safety concern. The trial court questioned the remaining jurors and confirmed their ability to be fair and impartial and to consider only the information presented in the courtroom. Defendant presents no basis upon which to hold that the trial court failed to conduct an adequate inquiry or to second-guess the trial court's determination of the jury's impartiality. The trial court did not abuse its discretion in determining the jury's impartiality and proceeding with trial. Defendant, therefore, fails to establish plain error.

¶ 74 Defendant's ineffective-assistance-of-counsel-claim likewise lacks merit. Claims of ineffective assistance of counsel are resolved under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced, *i.e.*, a reasonable probability that the result of the proceeding would have been different but for counsel's deficient representation. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). Regarding the first prong, a

defendant must overcome the presumption that counsel's actions were the result of trial strategy. *Id.* As for the second prong, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

¶ 75 Defendant fails to establish either prong. Under the circumstances, defense counsel's decision regarding the nature and extent of remedial questioning was a matter of trial strategy. Counsel reasonably could have determined that further questioning of the jury may have drawn unnecessary attention to the incident. See *Runge*, 234 Ill. 2d at 103-04; *Sharp*, 2015 IL App (1st) 130438, ¶ 67. Additionally, counsel may have been satisfied with the composition of the existing jury and preferred not to impanel a new one. Moreover, defendant does not establish prejudice from defense counsel's failure to request further questioning or a mistrial. There is nothing in the record to support that the jury was affected by the information relayed by the excused juror. As discussed above, the trial court did not abuse its discretion in determining the jury's impartiality and proceeding with trial.

¶ 76 III. CONCLUSION

¶ 77 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 78 Affirmed.