SIXTH DIVISION
July 19, 2019

No. 1-15-3141

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. 09 CR 9146 (01)
	)	
REGINALD ROYAL,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

Held: We reverse defendant's convictions and remand for a new trial. The cumulative errors in his pretrial and trial proceedings cast doubt on the fairness of his trial.

¶ 1 Following a jury trial, defendant Reginald Royal was convicted of the first degree murder, with personal discharge of a firearm, of Raymond Washington and the aggravated battery with a firearm of Kenneth Fuqua. The court sentenced defendant to consecutive prison terms of 60 and 20 years, respectively.

¶ 2 Defendant raises several issues on appeal. He contends that the trial court erred when it (1) deferred ruling on the admissibility of *Lynch*[1] evidence of Washington's propensity for violence until after defendant testified, so he could not discuss *Lynch* evidence in his opening statement, and barred some *Lynch* evidence when it did rule, (2) denied disclosure of the identity of a confidential informant with knowledge of Washington's violent character, and (3) gave the jury the "provocateur" or initial aggressor instruction, and failed to include justification in every relevant instruction. He contends that the State made various improper remarks in closing arguments. He contends that trial counsel was ineffective for (1) failing to seek jury instructions on second degree murder based on serious provocation, (2) failing to seek the inclusion of self-defense in every relevant jury instruction, (3) shifting the burden of proof to the defense in closing arguments, and (4) not objecting to every improper closing argument by the State. He contends that the cumulative effect of the aforesaid errors deprived him of a fair trial.

¶ 3 Defendant also contends that the trial court forced him to waive counsel to raise *Krankel*[2] posttrial ineffective assistance claims, failed to comply with the requirements of Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) for waiver of counsel, and did not reappoint counsel or obtain a new waiver of counsel for posttrial proceedings following the *Krankel* proceedings. Defendant contends that the trial court did not conduct a proper *Krankel* inquiry. Lastly, he challenges his sentencing, contending that (1) the court misinterpreted mitigating factors and considered facts not in evidence, and (2) his 80-year aggregate sentence is excessive.

¶ 4 After reviewing the record in light of the relevant law, we agree with defendant that there were multiple errors in the proceedings below. We conclude that these errors cumulatively denied defendant a fair trial so that a new trial is required.

---

[1] *People v. Lynch*, 104 Ill. 2d 194 (1984).
[2] *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 5 I. JURISDICTION

¶ 6 On October 10, 2013, a jury found defendant guilty of first degree murder and aggravated battery with a firearm. On September 28, 2015, the court sentenced defendant to a total of 80 years' imprisonment. Defendant's notice of appeal was filed the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. July 1, 2017) governing appeals from a final judgment of conviction in a criminal case.

¶ 7 II. BACKGROUND

¶ 8 Defendant and codefendants Lonnial Roundtree and Terrance Hilson were charged with first degree murder in the shooting death of Washington, and the attempted first degree murder and aggravated battery with a firearm of Fuqua, on April 23, 2009. Defendant and Roundtree were alleged to have personally discharged a firearm while committing first degree murder.

¶ 9 A. Pretrial Motions

¶ 10 Defendant filed a discovery response indicating that he "may rely upon the affirmative defense of self defense." In addition to any witness disclosed by the State, he listed as possible witnesses Jeremie George, LaQunntos Jordan, Donnell Elkins, Seneca Moore, Antoine Sutton, Anthony Williams, David Cross, and Chicago Police Detective Luis Munoz.

¶ 11 Codefendant Roundtree filed, and defendant joined, a pretrial motion to disclose the identity of a confidential police informant who was a "high ranking" member of the Four Corner Hustlers gang, and to produce "consensual overhear" recordings and related documents. The motion alleged that Washington was a "high ranking leader of the Four Corner Hustlers gang," that defendants were alleged to be members of that gang, and that audio and video recordings had been made of conversations between the informant and other gang members including

discussions involving Washington and defendants. The motion claimed that one such discussion was between the informant and George in June 2009 concerning Washington's return to the drug trade, his supplying drugs to Jordan to sell despite Jordan being in a different gang, and Washington's recruitment of George and Jordan to kill defendants two days before Washington's death. The police also recorded a November 2009 conversation between the informant and Elkins in which Elkins acknowledged Washington's hit on Roundtree and defendant. The motion argued that the evidence being sought would be *Lynch* evidence, showing Washington's capacity for violence and specific instances of his violent conduct. While George, Jordan, and Elkins could be called as *Lynch* witnesses, they "would likely" invoke the privilege against self-incrimination or deny any connection to Washington's hit, so *Lynch* evidence could be presented only through the evidence sought in the motion.

¶ 12 The trial court conducted an *in camera* inspection of the recordings, then denied the motion. It found that the informant had no personal knowledge of the events at issue so his testimony "would just be rank hearsay." The court stated that it would consider a motion to admit the recordings into evidence if and when such a motion was filed.

¶ 13 Roundtree filed, and defendant joined, a motion *in limine* to admit *Lynch* evidence of Washington's reputation and specific instances of his prior violent conduct. The motion also sought reconsideration of the motion to disclose the informant and produce the recordings of his conversations with George and Elkins. The motion asserted that Roundtree and defendant would rely on the affirmative defense of self-defense, that Washington had put a hit on Roundtree and defendant, and that George tried to kill them on the morning of April 23, 2009. Defendants tried to meet with Washington later that day to resolve their issues, but when they encountered Washington, he attempted to shoot them first and they fired in self-defense. The motion sought

to present the recordings and the testimony of the undisclosed informant, Detective Munoz who prepared the report on the recorded conversations, Sutton, Moore, Williams, and Cross.

¶ 14 The State responded to the *Lynch* motion, asking the court to deny it because the recorded conversations with the informant were well after the date of Washington's shooting and thus "too remote to be relevant," and the proposed *Lynch* evidence was "too general, indefinite, and unreliable to be admissible."

¶ 15 Roundtree filed a reply in support of the *Lynch* motion, arguing that the post-shooting recordings concerned events before the shooting and thus were relevant to showing Washington's "motivations and actions at the time of the shooting." He also argued that the desired *Lynch* evidence was not too general, indefinite, or unreliable.

¶ 16 During arguments, the State made a proffer of its evidence: Washington and Fuqua were inspecting one of Washington's properties when defendants "ambushed" them, with defendant and Roundtree as the shooters and Hilson as the driver. The State could convict them based on Fuqua's eyewitness identification, officers who witnessed the shooting and saw defendants fleeing the scene, and two guns linking defendant and Roundtree to the scene.

¶ 17 Following arguments, the court denied reconsideration of the informant disclosure motion and declined to rule on the *Lynch* motion. In reserving its ruling, the court found "[b]ased upon the State's proffer" that the evidence would show that defendant and Roundtree shot Washington and Fuqua with "nothing coming into evidence about any kind of fight ahead of time." Noting that defendant could refuse to testify, the court found it "impossible to make that [*Lynch*] ruling at this juncture." The court also found that defendants could not discuss *Lynch* material in their opening statements because "you have to raise it to get into it."

¶ 18 Roundtree filed a proffer concerning how he, Sutton, Moore, Williams, and Cross would testify. Defendant and Roundtree moved for reconsideration of their *Lynch* evidence in light of the proffer. The court reiterated that defense opening statements could refer to self-defense but not *Lynch* evidence, which it would not rule upon until there was trial evidence of self-defense.

¶ 19 B. Trial

¶ 20 Simultaneously, two juries tried defendant and Roundtree and the court tried Hilson.

¶ 21 In defendant's opening statement, counsel referred to the attempts to kill defendant and Roundtree, to the arranged meeting with Washington, and to Washington reaching for his waistband before defendant fired his gun and fled with Roundtree. The State objected to these remarks, and the court ordered the jury to disregard them. In a sidebar, defense counsel argued that he referred strictly to evidence that defendant would testify to, rather than other *Lynch* witnesses. The court took no further action to either enforce or reconsider its rulings.

¶ 22 1. State's Case

¶ 23 Kenneth Fuqua testified that he was a building inspector. On April 23, 2009, he inspected a building at 3816 West Flournoy Street owned by Washington. The building was next to a north-south alley branching off Flournoy, an east-west street. Fuqua arrived about 1:00 p.m. and inspected the first floor, basement, and backyard while Washington followed. Fuqua did not see Washington with a gun, but he did not frisk him. Around 1:30 or 1:45 p.m. Fuqua and Washington went into the alley so Fuqua could check the foundation and outside structure.

¶ 24 Fuqua was standing near the fence next to the alley, looking up at the roof, when he heard multiple gunshots. Washington may have been about three or four feet from Fuqua, but Fuqua was "not exactly sure where he was." As a veteran, he was familiar with the sound of gunfire. He turned to his left, south towards Flournoy. There he saw defendant, who he identified at trial,

standing ten feet away holding a gun. Defendant then shot Fuqua, who fell down to play dead. Fuqua saw another "figure" with a gun about ten feet from defendant. Fuqua heard between twenty and thirty gunshots, including some after he fell to the ground. He then heard somebody yell "let's go" and heard a car drive away. Before the shooting, he did not hear anyone say anything, was not looking at Washington, and had not noticed a car approach.

¶ 25 After the shooting stopped and the car left, Fuqua noticed Washington lying motionless in the alley in a pool of blood. Fuqua called 911. While waiting for the police to arrive, he saw several people enter the alley. He did not notice them approach Washington or take anything from his body, but he was not focused on them as he had been shot in the groin.

¶ 26 Chicago police officers Alisha Knight and Grayland Watson testified that, at the time of the shooting, they were patrolling by car at Independence Boulevard and Harrison Street. They were traveling south on Independence, about to turn right onto Harrison, when they both heard gunshots to their right. Knight heard two sets of 8 to 10 shots separated by a few seconds. Watson did not remember a gap. When the officers looked through a vacant lot to their right, each saw a person on the ground in the alley and Knight also saw two men in the alley. The officers drove onto Flournoy, where they both saw the two men run to a Toyota Camry that had been parked on Flournoy just east of the alley. At trial, the officers identified the men they saw flee the alley and enter the Camry as defendant and codefendant Roundtree.

¶ 27 The officers followed the fleeing Camry and both saw two black objects being thrown from its passenger side when it turned onto Springfield Avenue. The Camry stopped briefly as defendant and Roundtree left the car. Knight chased and apprehended Roundtree, while other officers detained defendant. A short time later, the Camry crashed into a fence and Watson

apprehended codefendant Hilson, who had been driving the Camry. A fourth person fled the car and the scene, and was never arrested.

¶ 28 Sergeant Daniel Gallagher testified to being a lead detective on this case. At about 1:30 p.m. on April 23, 2009, he learned of a shooting and ongoing chase that started near 3816 W. Flournoy. When he arrived there, Washington was being placed into an ambulance and Fuqua was still in the alley. Gallagher interviewed Fuqua. He also tried to interview Washington, but he was unresponsive. After learning that the chase resulted in several arrests, Gallagher had defendant brought to the scene, where Fuqua identified him as the person who shot him.

¶ 29 Gallagher testified that Washington could have been tested for gunshot residue but was not. The alley in question continued south of Flournoy, but Gallagher did not direct anyone to look for fired bullets or other evidence there. A knit cap or ski mask found inside the front door of Washington's building was not tested for DNA, gunshot residue, hair, or the like because there was no indication that defendants entered the building. Two cellphones were discovered next to Washington's blood pool in the alley, but they were not tested for fingerprints or DNA, and police never established who owned them.

¶ 30 Pursuant to its pretrial ruling, the court did not allow cross-examination of Gallagher about his report indicating that Washington led the Four Corner Hustlers and the shooting was the result of a conflict within the gang. "I don't think it's relevant yet," the court found.

¶ 31 The medical examiner established that Washington had been shot or grazed more than 30 times, with some shots passing front to back and some back to front. Many of the shots had an "upward" or "slightly upward" trajectory. Multiple bullets and bullet fragments were removed from Washington's body.

¶ 32 Both defendant and Roundtree tested positive for gunshot residue. Police recovered two semi-automatic pistols on Springfield Avenue: a 9-millimeter Glock that could hold up to 19 bullets and a .40-caliber Springfield Arms that could hold 13 bullets. Both pistols were empty. Roundtree's fingerprint was on the magazine of the Springfield Arms pistol, and DNA on the Glock could not be excluded as defendant's DNA.

¶ 33 Police recovered 30 cartridge casings from the shooting scene: 13 matched the Springfield Arms pistol and 17 matched the Glock. The casings were found just inside the alley, at the mouth of the alley, and just outside the alley, with one found on top of a garbage bag at the back of the alley. Three bullets from Washington's body matched the Springfield Arms pistol, and seven bullets from Washington's body could not be matched or excluded as being fired by the Glock.

¶ 34 Marc Pomerance, the State's firearms expert, testified that the exact location of a shooter cannot be determined from the location of a shell casing due to multiple factors including how the gun was held and whether the shooter was moving. The police did not recover a firearm from Washington's body or at the scene, but Pomerance agreed that it was possible a third gun was fired during the shooting. Unlike semi-automatic pistols, revolvers do not eject cartridge casings.

¶ 35 2. Mid-Trial Rulings

¶ 36 After the State rested, defendants made motions for a directed verdict or judgment, which the trial court denied.

¶ 37 Defendant and Roundtree again asked the court to rule on *Lynch* evidence, arguing that each would testify that they merely approached Washington with their guns not drawn when Washington drew his gun, so that they were not the initial aggressors. Defendant filed a proffer of how he, George, Detective Munoz, Sutton, Moore, Cross, and Williams would testify.

¶ 38 Defendant would testify that he was not in the Four Corner Hustlers but another gang. He arrived at 3816 W. Flournoy at about 1:30 p.m. on April 23, 2009, in a car driven by codefendant Hilson. Defendant saw Washington, exited the car, and approached him. Washington reached for his right side near his waist, and pulled up his arm to "expose what [defendant] believed to be a handgun". Defendant was armed and acted out of imminent fear for his life.

¶ 39 Defendant's fear resulted not just from Washington's immediate actions but from knowing that he was a high-ranking member of the Four Corner Hustlers with a reputation for violence who defendant frequently saw carrying a gun. Defendant had seen Washington shoot Deandre Owens in 2005. Earlier on the day in question, two attempts were made to shoot defendant and Roundtree. In the first, a man who defendant knew to be a "close associate" of Washington tried to shoot them but they thwarted the attack and disarmed him before he could fire. In the second, George fired several shots at a car containing defendant and Roundtree. They then met with Hilson, who arranged a meeting with Washington to "broker peace."

¶ 40 George would testify that he was a Four Corner Hustler who knew of Washington's plan to kill Roundtree because Washington had ordered him to carry it out. Detective Munoz authored a report summarizing recorded conversations between George and an informant, was slated to be a witness in George's trial, was "familiar" with the gangs in this case and with Washington and George in particular, and was "uniquely qualified to address" Washington's reputation for violence. Sutton would testify that he was a Four Corner Hustler, that Washington was "ruthless," "known for ordering hits on anyone at any time," and "was always armed with a gun and would always be with a bodyguard." Sutton would testify that Washington wanted to kill Roundtree for not carrying out one of his orders and had tried to get Sutton to kill Roundtree.

¶ 41 Moore would testify that he was a Four Corner Hustler familiar with Washington's violent reputation, including that he "was known to have members of his own family killed." Moore would also testify to his "disagreements" with Washington and that he was shot in Washington's "failed hit" on him due to those disagreements. Cross would testify to being in a different gang, to Washington confronting him in 2006 for selling drugs in Four Corner Hustler "territory," and to Washington shooting him in the leg shortly after that confrontation. Williams would testify to being a Four Corner Hustler who worked with Washington selling drugs, that Washington ordered a hit on Williams for also working with Cross, that Williams stopped working with Washington after he verbally threatened Williams's life, and that Four Corner Hustlers shot Williams in August 2005.

¶ 42 The court again deferred its ruling until after defendant and Roundtree testified. Roundtree then testified before his jury.

¶ 43 3. Defendant's Case

¶ 44 Defendant testified that he lived on the west side of Chicago, in the Austin neighborhood, for almost two decades and knew Roundtree and Hilson since childhood. Defendant and Roundtree were in one gang. Hilson and Washington were in another, the Four Corner Hustlers, and defendant knew Washington to be the leader of that gang. Washington was "referred to as Big Four or Blood," the latter referring to Washington being "known to be very violent and vindictive" so that he left a trail of blood. Defendant had seen Washington with a gun "on numerous occasions." In the summer of 2005, he saw Washington shoot Deandre Owens and then shoot at defendant. Defendant did not report the incident to police for "[f]ear of retaliation." There had been attempts on defendant's life since 2006 or 2007, when defendant warned Washington's cousin Daniel Hilson that Washington wanted him killed.

¶ 45 On April 23, 2009, defendant went to 3816 W. Flournoy with Roundtree, codefendant Terrance Hilson, and Gregory Baddy in a car driven by Hilson. They were on their way to meet with Washington to discuss "[p]ossibly stopping the attempts on my life," in a meeting defendant arranged with Hilson. Defendant was "going there just to speak to Mr. Washington," not to harm him. Upon arriving, defendant got out of the car and saw Washington and a man unknown by defendant standing in the alley about four or five feet from Washington. When defendant was asked at trial to demonstrate the distance, it was about three feet. As defendant walked towards Washington, he turned towards defendant, smirked, took a step back, and reached into his waistband. Washington was holding a black object in his hand, and defendant believed it to be a gun though he could not tell what kind. Defendant took his own gun from his pocket and briefly hesitated, then fired at Washington when he heard a shot because he thought Washington was firing at him. Defendant focused on Washington with "tunnel vision" and did not pay attention to the man with Washington.

¶ 46 Defendant denied knowing that Roundtree had a gun as they traveled to the meeting. When asked about some of Washington's gunshot wounds being to his back, defendant could not "say for sure" whether he shot Washington in the back. Defendant admitted throwing the gun from the car as they left the scene, but testified that he did not notice the police following them because his ears were still ringing from the shooting. He attributed running from the car, after it stopped and he saw the police, to not thinking clearly at the time.

¶ 47 On the night before the shooting, defendant was entering a store with Roundtree and Baddy when Roundtree began struggling with Lawrence Logan, who had a gun in his hand. Defendant knew Logan to be a Four Corner Hustler. He had seen Logan take orders from Washington many times, including orders to "violate" or assault particular people. Defendant

joined Roundtree in trying to take Logan's gun from him. Defendant succeeded, pocketing the gun and then leaving the store. Defendant later used the loaded Glock pistol he took from Logan in the incident with Washington, and defendant denied ever firing a gun before that incident.

¶ 48 Around midday on the day of the shooting, defendant was driving his truck with Roundtree and Baddy when he heard gunshots from his left striking the truck. When defendant looked in the direction of the shots, he saw George shooting from a car. Immediately after this incident, defendant called Hilson, who then met with defendant. Defendant asked Hilson to "please talk to your cousin [Washington, to] try to settle the situation or let me speak my peace." Defendant heard Hilson use the telephone, and then they went to 3816 W. Flournoy.

¶ 49 After defendant testified, the State argued that defendants were the initial aggressors by the "escalation" of going to Washington. The court ruled that defendants could introduce *Lynch* evidence regarding matters they were not aware of at the time. The court found that "going over to a location with a weapon in your pocket [does not] make you *per se* the initial aggressor," so "who is the initial aggressor is at play for purposes of some of the *Lynch* material." The court found Detective Munoz's proposed testimony to be irrelevant because, while he could give evidence regarding gangs, "someone's opinion" of Washington's reputation was inadmissible. The court found the proposed testimony of Moore and Williams to be merely hearsay and conclusory. It ruled that George and Cross could testify, and Sutton could testify but not to his personal opinion of Washington or that Washington was always armed and had a bodyguard.

¶ 50 David Cross and Antoine Sutton each testified that he knew Washington as "Blood" and knew him to be a "chief" in the Four Corner Hustlers. Sutton was a Four Corner Hustler, while Cross was in another gang along with defendant and Roundtree. Cross testified that Washington shot him in 2005 for selling drugs in Four Corner Hustlers "territory." Sutton testified that

Washington told him in 2008 to kill Roundtree for not doing something Washington asked him to do. Sutton did not carry out Washington's order but instead told Roundtree about it. While he was not Roundtree's friend, they had mutual friends.

¶ 51 Before Jeremie George testified, defendant and Roundtree argued again for the admission of the consensual overhear recordings and Detective Munoz's testimony. They argued that they would need this evidence as George's prior statements against penal interest if he did not testify as they expected. The court decided to examine George without the juries present, after he consulted with counsel, to see how he would testify.

¶ 52 After that was done, George testified that he knew Washington to be a "chief" or high-ranking member in the Four Corner Hustlers, of which George was a member. Washington offered George and Jordan close to $20,000 to kill Roundtree and defendant because Washington "had problems with" Roundtree. George denied accepting the offer and denied shooting at Roundtree or defendant on April 23, 2009.

¶ 53 4. Instructions, Etc.

¶ 54 At the jury instruction conference, defendant and Roundtree objected to the initial aggressor instructions. The State argued that no gun was found at the shooting scene and the only evidence that Washington had a gun came from defendants. The court found that there was an issue of fact for the juries so they would receive the initial aggressor instructions.

¶ 55 Defendant's jury was instructed on first degree murder, second degree murder, self-defense, and aggravated battery with a firearm. It was also instructed on whether he personally discharged a firearm in committing first degree murder.

¶ 56 In closing arguments, the State argued that defendants went to Washington's building to kill him, and Fuqua was an innocent man who was shot and injured doing his job. The State

noted the sheer number of shots fired by defendant and Roundtree, that police pursued defendants from the scene and arrested them shortly after the shooting, and that multiple pieces of forensic evidence showed that defendant and Roundtree shot Washington and Fuqua. The State argued that defendants were responsible for each others' actions so that it did not need to prove whose shots killed Washington. The State argued that circumstantial evidence, including defendant and Roundtree being armed and firing so many shots, showed that defendants intended to kill Washington.

¶ 57 Defendant's counsel argued that defendant was afraid of Washington due to his reputation for ruthless violence and the prior attempts on defendant's life. He argued that defendant went to speak with Washington rather than kill him, and that defendant did not know who Fuqua was except that he was with Washington. He argued that Washington smirked and reached for an apparent weapon, and that he did not fire at Washington until after hearing a gunshot. He argued that various defense witnesses corroborated Washington's reputation for, and prior acts of, violence. Counsel argued that Fuqua's testimony did not contradict defendant's account, and that the forensic evidence was not fully developed to investigate alternative explanations of the incident. He argued that the jury should find defendant's actions to be justified, or in the alternative find him guilty of second degree murder.

¶ 58 In rebuttal, the State argued that defendant's testimony was not credible because no gun was recovered from Washington. It argued that defendant testified that Washington produced an object he believed to be a gun, and elicited Fuqua's testimony about people near Washington after the shooting, to account for the absence of a gun from Washington. The State argued that the defense evidence regarding Washington from a "parade of gangbangers and felons" may or may not have been credible but could support a conclusion that defendants wanted to "get him

before he gets us." It argued that defendants could have spoken with Washington by telephone if negotiation was their goal and they feared him. It argued that defendant had ample time "to rehearse a story" and that fleeing the police after the shooting was evidence of his guilt. The State argued that there was a discrepancy between defendant's testimony that Fuqua was only about three feet from Washington and Fuqua's testimony that he was about 15 feet from Washington. The State noted that some of Washington's wounds were to his back, which it argued was inconsistent with self-defense. Referring to defendant as "Mr. Innocent," "Mr. Truth," "Mr. Truthful," and "a stuttering fool," the State argued that he attributed gaps or potentially damaging points in his testimony to not recalling or to his mind "racing" during the incident while he remembered other more favorable points. It argued that the number and placement of shots fired by defendants should create "that repulsed feeling, that sick feeling in your stomach" consistent with "an execution" rather than self-defense or second degree murder.

¶ 59 Following deliberations, the juries found defendant and Roundtree guilty of first degree murder and aggravated battery with a firearm, finding that each personally discharged a firearm in the commission of first degree murder.[3]

¶ 60 C. Posttrial

¶ 61 Defendant told the court that he was consulting new counsel for posttrial motions, but substitution was postponed until trial counsel filed a posttrial motion. After several months without a posttrial motion, defendant reiterated that he wanted new counsel as "[t]here is no way possible [trial counsel] could preserve my issue" of ineffective assistance. The attorney consulted earlier having not taken his case, defendant chose to proceed *pro se*. After the court warned him of the dangers of doing so, defendant asked the court to appoint new counsel. The court told

[3] Codefendant Roundtree's appeal has proceeded separately. *People v. Roundtree*, 2019 IL App (1st) 160235-U (unpublished order under Supreme Court Rule 23).

defendant that he could file a *pro se Krankel* motion and the court may appoint new counsel after a *Krankel* inquiry. The court told defendant he would be representing himself only in the *Krankel* proceedings, and it would not admonish him pursuant to Supreme Court Rule 401(a) (eff. July 1, 1984) on waiver of counsel "since at this juncture we're just talking about a *Krankel* hearing."

¶ 62 At the following court sessions, the court discussed with defendant the offenses of which he was found guilty and the sentencing ranges for those offenses. However, it did not remind him of his rights to counsel and to have counsel appointed if he was indigent. See Ill. S. Ct. R. 401(a) (eff. July 1, 1984) (admonishments must include the nature of the charges, applicable sentencing, and the rights to counsel and appointed counsel).

¶ 63 Defendant filed a *pro se Krankel* motion. The court held a hearing in which it asked defendant multiple questions about his claims and questioned trial counsel at length. The court denied defendant's *Krankel* motion with detailed findings. It asked defendant if he wanted to be *pro se* or have appointed counsel for sentencing, and he replied that he had a posttrial motion.

¶ 64 Defendant filed a *pro se* motion for a new trial, which the court denied following a hearing. Defendant requested counsel for sentencing, and the court appointed counsel.

¶ 65 Following a sentencing hearing with extensive evidence in aggravation and mitigation, the court sentenced defendant to consecutive prison terms of 60 years for first degree murder, including a 20-year firearm enhancement, and 20 years for aggravated battery with a firearm. Defendant's postsentencing motion was denied, and defendant timely filed his notice of appeal.

¶ 66 III. ANALYSIS

¶ 67 A. *Lynch* Issues

¶ 68 Defendant first contends that the trial court committed several errors related to *Lynch* evidence. He contends that the court misapprehended *Lynch* and thus (1) refused to rule on the

admissibility of his proposed *Lynch* material until after he testified, (2) prohibited defense counsel from referencing *Lynch* evidence in his opening statement, and (3) excluded some of defendant's *Lynch* evidence. The State responds that the court properly exercised its discretion.

¶ 69 Evidentiary rulings, including whether to grant a motion *in limine*, are generally within the trial court's sound discretion and not reversed absent an abuse of discretion. *People v. Way*, 2017 IL 120023, ¶ 18. A court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Peterson*, 2017 IL 120331, ¶ 125. A court abuses its discretion when its ruling was based on an error of law. *People v. Porter-Boens*, 2013 IL App (1st) 111074, ¶ 10.

¶ 70 In *Lynch*, our supreme court held that "when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it." *Lynch*, 104 Ill. 2d at 200. A victim's aggressive and violent character can support a defendant's self-defense theory in two ways. *Id.* at 199-200. One is that "the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior." *Id.* at 200. The other is that "evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened." *Id.*

¶ 71 1. Refusal to Rule

¶ 72 Here, the trial court accepted the State's argument that the admission of *Lynch* evidence would be premature. However, *Lynch* addressed such a prematurity argument. The State argued in *Lynch* "that the evidence was inadmissible because [it was] offered without a proper foundation." *Id.* at 204. The *Lynch* court acknowledged that "a defendant may not introduce evidence of the victim's character until some evidence has been presented that the victim was, or

appeared to be, the assailant, and that the defendant therefore acted in self-defense." *Id.* "However, the reason for the rule is to ensure such character evidence is not admitted unless self-defense is at issue in the case." *Id.* The *Lynch* court noted that, in its case, "self-defense was going to be an issue. In fact, it was the only contested issue." *Id.* at 204-05. The court concluded that, "where the evidence will surely be admissible sooner or later, we do not think the State has the right to exclude it solely on the ground of prematurity." *Id.* at 205.

¶ 73 Here, as in *Lynch*, the matter of self-defense was the only contested issue confronting the trier of fact because defendant did not dispute that he shot Washington. We find that the trial court abused its discretion when it deferred its ruling on defendant's *Lynch* material. We do not share the court's view that it needed to wait for defendant's testimony introducing evidence of self-defense to rule upon the proposed *Lynch* material. A trial court abuses its discretion when it refuses to rule on a motion *in limine* regarding the admissibility of prior convictions despite having sufficient information to rule. *People v. Patrick*, 233 Ill. 2d 62, 73 (2009). We see no reason not to hold similarly for a *Lynch* motion *in limine*. Here, the State made it clear that its evidence would not raise the issue of self-defense, maintaining that its evidence would show that defendant and Roundtree were the aggressors and the shooting was an ambush of Washington. Eyewitness Fuqua testified that he was not looking at Washington at the relevant time, nor at defendant until after hearing gunshots, nor did he hear any exchange of words. Thus, the only evidence of self-defense would come from defendant.

¶ 74 We are mindful, as was the trial court, that defendant could have declined to testify. "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York*, 401 U.S. 222, 225 (1971); see also *Patrick*, 233 Ill. 2d at 69. However, a jury does not receive self-defense instructions unless there was *some* evidence introduced to

support them. *People v. McDonald*, 2016 IL 118882, ¶¶ 25, 29; *People v. Brown*, 2017 IL App (3d) 140921, ¶ 22. Where, as here, a defendant seeks to introduce *Lynch* evidence and his only means of raising self-defense is through his own testimony, he is essentially conceding that he will testify in his own defense. We are not concerned that a defendant could raise the issue in a proffer, discuss self-defense and *Lynch* evidence in his opening statement, introduce *Lynch* evidence, but refuse to testify. Doing so would be virtually fatal to the defense. The defendant would not be entitled to self-defense instructions because there would not be even slight evidence to support them. Also, many courts have recognized the ruinous effect of promising certain evidence – especially a defendant's testimony – in an opening statement and then failing to present it. See, e.g., *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004) (citing Illinois and federal cases). "[L]ittle is more harmful than the failure to present important evidence promised in an opening statement." *People v. Talbert*, 2018 IL App (1st) 160157, ¶ 54.

¶ 75 The proffers by the State and Roundtree provided the court all the necessary information to render a pretrial decision on *Lynch* evidence. In reaching this conclusion, we are not persuaded by *People v. Guyton*, 2014 IL App (1st) 110450, which the State relies upon heavily. *Guyton* is factually similar to the instant case, but there the appellate court ruled that it was not an abuse of discretion to limit defendant's ability to discuss the "specific facts" of the *Lynch* evidence in opening statements or examining State witnesses. *Id.* ¶¶ 50-52. The reasoning appears to be based on the logic that a pretrial ruling on *Lynch* evidence is generally premature when a defendant's testimony is the only evidence raising self-defense. *Id.* ¶ 52.

¶ 76 However, *Guyton* does not mention *Patrick*, much less acknowledge *Patrick*'s holding that a trial court abuses its discretion by deferring its ruling on a motion *in limine* when it has all the necessary information to make a proper ruling. *Patrick*, 233 Ill. 2d at 73. The *Patrick* court

noted that "early rulings permit defendants and defense counsel to make reasoned tactical decisions in planning the defense," including properly informing the jury in opening statements. *Id.* at 70. Notably, the trial court in *Guyton* allowed "limited reference to *Lynch* material during opening statements" (*Guyton*, 2014 IL App (1st) 110450, ¶ 50), while the trial court here allowed absolutely no reference to *Lynch* evidence in opening statements. We find *Guyton* distinguishable at best, and we are persuaded that *Patrick* calls for a different outcome here.

¶ 77 Here, the trial court had all the information it needed to make a pretrial ruling on *Lynch* evidence, and its decision to wait for defendant's testimony deprived him of the ability to discuss *Lynch* material in opening statements. We conclude that the court erred by refusing to rule on the pretrial *Lynch* motions and barring defense counsel from discussing *Lynch* evidence.

¶ 78 2. Rulings

¶ 79 In defendant's next *Lynch* issue, he contends that the court improperly excluded several of his witnesses whose testimony would have bolstered his claim that Washington was violent. After defendant raised the issue of self-defense, the court allowed him to present some *Lynch* evidence: defendant himself, Cross, Sutton, and George testified to Washington's proclivity for violence. However, defendant was not allowed to present the testimony of Moore, Williams, or Munoz, and Sutton was precluded from testifying that Washington was always armed with a gun and always had a bodyguard.

¶ 80 Like all evidence, the admission of testimony is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court absent an abuse of discretion. *People v. Reese*, 2017 IL 120011, ¶ 75. When a defendant raises the issue of self-defense, *Lynch* provides that a victim's aggressive and violent character may be shown by "appropriate evidence." *Lynch*, 104 Ill. 2d at 200. Where there was no conviction of the victim, a defendant

must present sufficient proof of the victim's violent crimes, and a prior altercation or arrest can be adequate proof of violent character if supported by firsthand testimony to the victim's behavior. *People v. Gibbs*, 2016 IL App (1st) 140785, ¶ 34. Reputation evidence may be presented as *Lynch* evidence, but a reputation witness must have adequate knowledge of the victim, and the reputation evidence must be based upon contact with the victim's neighbors and associates rather than the witness's personal opinion of the victim. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 40 (citing *People v. Moretti*, 6 Ill. 2d 494, 523-24 (1955)).

¶ 81 Here, the proffer for Detective Munoz stated that he could provide evidence regarding the methods and leadership structure of the Four Corner Hustlers and could address Washington's reputation for violence. Munoz also wrote the report summarizing the consensual overhears, which pertained to Washington's return to the drug trade, his recruitment of hitmen to kill Roundtree, and other gang activities. Based on defendant's proffer, we find that the court properly excluded Munoz's testimony. While he was described as having knowledge of Washington and the Four Corner Hustlers, he was not alleged to have firsthand knowledge of Washington's violent behavior. The record does not establish that he had sufficient knowledge to testify to Washington's reputation in the community, as nothing in the proffer demonstrates that his knowledge of Washington came from Washington's neighbors or associates. Any knowledge Munoz gained from the consensual overhears would be hearsay (see *People v. Simon*, 2011 IL App (1st) 091197, ¶¶ 71-74, excluding proposed *Lynch* evidence as hearsay) and allegations of Washington's general criminal activity are not *Lynch* evidence. *Lynch*, 104 Ill. 2d at 199-200 (evidence must be of the victim's aggressive and violent character).

¶ 82 Defendant contends that Moore as a Four Corner Hustler would have been familiar with Washington's associates and could give reputation evidence as to Washington's violent character

including having family members killed, as well as testifying that Moore himself was shot in a "failed hit" by Washington. However, defendant's proffer does not describe how it "was known" to Moore that Washington had family members killed. Moreover, the proffer clearly indicates that Moore's girlfriend told him after his shooting that she overheard Washington discussing having ordered Moore's shooting. Thus, Moore's knowledge that Washington ordered the hit was hearsay. *Simon*, 2011 IL App (1st) 091197, ¶¶ 71-74. We shall not conclude on this record that the trial court abused its discretion in excluding Moore's testimony.

¶ 83 Defendant contends that Williams, another Four Corner Hustler, knew Washington's associates and reputation for violence. Williams would have testified that Washington threatened him for allowing Cross to sell drugs in Four Corner Hustler territory. A short time later, Williams was shot by several of Washington's men. The court denied admission of Williams's testimony because it found it to be conclusory. However, we find that the court should have allowed Williams to testify. Not only did he have knowledge of how Washington was perceived in the community, he had firsthand experience with Washington's threats of violence. Shortly after Washington's threats, men Williams knew to work for Washington tried to kill him. These actions were similar to defendant's experience with Washington and could have bolstered the reliability of defendant's testimony.

¶ 84 Defendant argues that Sutton should have been allowed to testify to Washington's reputation for being a ruthless person who always carried a gun and had a bodyguard. The court excluded this evidence on the grounds that Sutton could not testify to his personal opinion and Washington's reputation for being armed was not relevant under *Lynch*. We disagree with the trial court's view of Sutton's testimony and conclude that he should have been allowed to testify to the aforesaid matters. Sutton as a Four Corner Hustler would have been familiar with

Washington and his associates, allowing him to testify to Washington's reputation. Also, testimony that Sutton knew Washington always carried a gun would support defendant's self-defense theory by corroborating defendant's testimony that he knew Washington regularly carried a gun. *Lynch*, 104 Ill. 2d at 199-200; *People v. Allen*, 378 Ill. 164, 168 (1941) ("proof of going about habitually armed with a deadly weapon, if known to the defendant, is proper evidence"); *People v. Cervantes*, 2014 IL App (3d) 120745, ¶ 34 (defense witnesses testified that the victim was known to carry a screwdriver or knife). We find that Sutton's proposed testimony was admissible and relevant under *Lynch* and the ruling to the contrary was erroneous.

¶ 85 We conclude that the trial court abused its discretion when it held that Williams could not testify and Sutton could not testify in full.

¶ 86 B. Informant Nondisclosure

¶ 87 Defendant contends that the trial court erred when it refused to reveal the identity of the informant from the consensual overhear recordings.

¶ 88 Illinois Supreme Court Rule 412(j)(ii) (eff. Mar. 1, 2001) provides that "[d]isclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused." Thus, the State may refuse to disclose an informant's identity if nondisclosure will not deny the defendant his constitutional rights. *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 31. A defendant does not have an absolute right to learn the identity of a confidential source. *Id.* ¶ 33.

¶ 89 The determination of whether disclosure is required is made on a case-by-case basis by balancing the public interest in protecting the flow of information from informants against a defendant's right to prepare a defense. *Id.* ¶ 31. Courts consider several factors in applying this balancing test, including whether (1) the disclosure request relates to the fundamental issue of

guilt or innocence rather than issues of probable cause, (2) the informant played an active role in the offenses by participating in and/or witnessing them, (3) the informant assisted in setting up the commission of the offenses rather than being a mere tipster, and (4) it has been shown that the informant's life or safety would likely be jeopardized by disclosure. *Id.*

¶ 90 A defendant seeking disclosure of an informant's identity bears the burden of showing that disclosure is necessary for his defense. *Id.* A request to disclose an informant's identity is addressed to the trial court's discretion and will be reversed only for an abuse of discretion. *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 32, but see *People v. Clark*, 2013 IL App (2d) 120034, ¶¶ 20-27 (discussing whether informant disclosure rulings are reviewed *de novo* or as matters of discretion).

¶ 91 We find that the trial court did not abuse its discretion in denying the disclosure request. A confidential informant is not a crucial witness, and his identity can be withheld, when he was neither a participant in nor a material witness to the elements of the offense. *Hannah*, 2013 IL App (1st) 111660, ¶ 37. Defendant does not claim that the informant participated in or witnessed the shooting of Washington and Fuqua or the surrounding events at the scene, asserting only that he "was aware of the hit Washington had ordered on [defendant] and Roundtree" and has knowledge of Washington's violent reputation.

¶ 92 While the informant was a Four Corner Hustler who could provide *Lynch* information, defendant presented *Lynch* evidence at trial. *Id.* ("However, information that supported the defense theory *** was already brought forth *** at trial"). Notably, defendant argued that he needed the informant's identity and the recordings lest he be unable to present *Lynch* evidence from George, but George testified at trial and provided *Lynch* evidence. Defendant argues that the informant had intimate knowledge about gang operations and was recorded discussing

several criminal enterprises. However, to the extent the informant would testify to Washington's illegal but non-violent actions, such testimony is not *Lynch* evidence. We conclude that defendant failed to meet his burden of showing that disclosure of the informant's identity was necessary for his defense, and the court's denial of the disclosure request was not erroneous.

¶ 93 C. Jury Instructions

¶ 94 Defendant contends that the trial court made various errors in the jury instructions that prejudiced his defense, by giving an inappropriate "provocateur" or initial aggressor instruction and omitting aspects of justification from some instructions.

¶ 95 1. "Provocateur" Instruction

¶ 96 Defendant contends that the court erred by giving the jury the "provocateur" or initial aggressor instruction because it was unsupported by evidence.

¶ 97 Both the State and defense are entitled to have the jury given instructions regarding their respective theories of the case, and an instruction shall be given when only slight evidence supports it. *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 37. This court reviews for an abuse of discretion a trial court's decision as to whether the evidence supported giving a particular jury instruction. *McDonald*, 2016 IL 118882, ¶¶ 38, 42; *Salcedo*, 2011 IL App (1st) 083148, ¶ 35.

¶ 98 Defendant's jury was instructed on his theories that he acted in justified self-defense (720 ILCS 5/7-1 (West 2016)) and that he had an unreasonable belief that self-defense was justified warranting a conviction for second degree murder (720 ILCS 5/9-2(a)(2) (West 2016)). The State requested, and over defendant's objection the court gave, the initial aggressor instruction:

> "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 danger other than the use of force which is likely to cause death or great bodily harm to the other person." See Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 (4th ed. 2000).

¶ 99 Whether a defendant acted in self-defense, and whether he was the initial aggressor, are issues of fact for the jury. *People v. Johnson*, 247 Ill. App. 3d 578, 585 (1993). The initial aggressor instruction is properly given when the State presents evidence showing the defendant to be the aggressor, or there is a question of whether the defendant was the aggressor. *Salcedo*, 2011 IL App (1st) 083148, ¶ 37. When an initial aggressor instruction is given alongside justifiable use of force instructions, the court is not assuming that the defendant was the initial aggressor but allowing the jury to resolve the evidence pursuant to either hypothesis. *Id.*

¶ 100 Under the State's theory of the case, upon arriving at the scene defendant and Roundtree exited their car and immediately shot at Washington and Fuqua. The State denied Washington had a gun. Fuqua testified that no one said anything prior to the shooting. He did not see Washington just before the gunshots, nor did he see anyone other than Washington until after hearing gunshots. Under defendant's theory, he and Roundtree went to meet Washington in hope that he would revoke his hit on them. When they reached Washington, he noted them exiting their car, and he reacted by reaching for an object defendant believed to be a gun. Defendant only then drew his gun, and he shot Washington only after hearing a gunshot. Thus, under either the State or defense theory of the case, defendant took no action to provoke Washington into drawing his firearm. *People v. Williams*, 168 Ill. App. 3d 896, 902-03 (1988) (trial court erred in giving the instruction where no evidence was presented that the defendant provoked the rival gang into using force against him).

¶ 101 In *People v. Brown*, 406 Ill. App. 3d 1068, 1080 (2011), the initial aggressor instruction was properly given when "the State had argued defendant became the aggressor when he shot three of the victims after they had abandoned the initial confrontation." In *People v. De Oca*, 238 Ill. App. 3d 362, 368 (1992), the evidence supported giving the instruction because "the testimony *** indicates that the fistfight had ended and then the situation transformed into a different encounter when defendant displayed a loaded shotgun and shouted at the crowd." In *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 39, the evidence supported giving the instruction because, after an initial encounter, the defendant could have become the aggressor by displaying a weapon and chased the victim. Here, by contrast, the State presented no evidence of an initial encounter or predicate action taken by defendant that provoked Washington. The State presented no evidence that Washington knew defendant was armed, nor that defendant exited the car with his gun drawn, nor that any words were exchanged prior to the shooting.

¶ 102 The State contends that defendant and Roundtree were the initial aggressors by seeking to meet Washington while they were armed. However, despite its ultimate ruling, the trial court recognized that merely arriving at Washington's location armed but not visibly so did not make defendant or Roundtree the initial aggressors. We agree and find that no evidence was introduced to show that defendant provoked Washington into drawing a weapon. We therefore conclude that the trial court abused its discretion in giving the initial aggressor instruction.

¶ 103 We cannot find that inclusion of the initial aggressor instruction constituted harmless error. For a jury instruction error to be found harmless, the State must prove beyond a reasonable doubt that the verdict would have been the same absent the error. *People v. Catchings*, 2018 IL App (3d) 160186, ¶ 46. However, defendant's testimony was not generally contradicted by Fuqua's testimony, and the initial aggressor instruction effectively required defendant and

Roundtree to retreat before using force – which they did not do – if they were the initial aggressors. We find that the State cannot demonstrate under such circumstances that the jury would have reached the same verdicts absent that instruction.

¶ 104 2. Other Instructions

¶ 105 Defendant also contends that several other jury instructions failed to properly convey the law. While the issue instruction for first degree murder contained a justification provision, the definitional instruction for first degree murder did not. Neither the definitional nor issue instructions for aggravated battery with a firearm referred to justification, and the jury was not instructed on transferred intent whereby defendant's self-defense justification for shooting Washington would apply to shooting Fuqua.

¶ 106 Defendant admits that this issue was not properly preserved as he did not raise it in the trial court. However, Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013) provides that substantial defects in jury instructions are not waived by a failure to make a timely objection if the interests of justice require. The Rule incorporates the plain-error doctrine, under which we consider forfeited errors when they are clear or obvious and either (1) the evidence was so closely balanced that the error by itself threatened to tip the scales of justice against the defendant, or (2) the error was so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process. *People v. Mitchell*, 2018 IL App (1st) 153355, ¶¶ 39-40. In determining whether jury instructions accurately stated the law by fairly, fully, and comprehensively advising the jury of the relevant legal principles, we consider the jury instructions as a whole and our review is *de novo*. *Id.* ¶ 41.

¶ 107 The pattern instructions defining first degree murder (Illinois Pattern Jury Instructions, Criminal, No. 7.01 (4th ed. 2000)) and aggravated battery with a firearm (Illinois Pattern Jury

Instructions, Criminal, No. 11.23 (4th ed. 2000)) provide that the phrase "without lawful justification" is included when an affirmative defense has been presented. Thus, the absence of such language from those instructions here was erroneous.

¶ 108 The pattern issues instruction for aggravated battery with a firearm (Illinois Pattern Jury Instructions, Criminal, No. 11.24 (4th ed. 2000)) does not provide for justification (more precisely, whether the defendant lacked justification) as one of the issues. However, this court found in *People v. Getter*, 2015 IL App (1st) 121307, ¶¶ 36, 40, that where self-defense instructions are appropriate under the doctrine of transferred intent – the specific intent to kill a person in self-defense may transfer to other persons affected by the acts of self-defense – then "beyond giving a general definition of self-defense and a general instruction on the State's burden of proof, the trial court should include an issues instruction for each applicable offense that the State bears the burden of proving, beyond a reasonable doubt, that defendant lacked justification in using the force he used." Thus, the court here erred when it failed to include the absence of justification as an issue in the issues instruction for aggravated battery with a firearm.

¶ 109 We need not resolve whether these errors constitute plain error because we are remanding this case for a new trial, where we expect the court to instruct the jury properly.

¶ 110 D. Closing Arguments

¶ 111 Defendant next argues that the State made various inappropriate arguments during its rebuttal closing argument.

¶ 112 The State responds that this issue has been forfeited because defendant did not object to some of the allegedly inappropriate arguments, and none of the arguments at issue were both objected to contemporaneously and challenged in the posttrial motion. However, as defendant

argues and we stated above, unpreserved error may be considered by this court under the plain-error doctrine. Also, defendant correctly notes that our supreme court has stated that:

> "the simple fact that defendant did not properly object to a statement does not render that statement as if it never existed. Indeed, all statements must be considered as part of the entirety of a prosecutor's closing argument, and even statements not properly objected to may add to the context of a remark properly objected to." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 113 Prosecutors are afforded wide latitude in closing argument and may properly comment on the evidence presented or reasonable inferences drawn from that evidence, may respond to comments by defense counsel that invite response, and may comment on the credibility of witnesses. *People v. Olla*, 2018 IL App (2d) 160118, ¶¶ 40-41. However, a prosecutor is not allowed to misstate the evidence or argue facts not in evidence, nor to attempt to shift the burden of proof to the defense. *Id.* ¶ 41; *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 47. It is improper for a prosecutor to make remarks with their only effect being to inflame the jury's passions or develop its prejudices without casting any light on the issues. *People v. Darr*, 2018 IL App (3d) 150562, ¶ 71. In other words, commentary that inflames the jury's passions is not improper if the commentary also serves a proper purpose. *Id*. While a prosecutor may not claim that defense counsel has deliberately lied to the jury or fabricated a defense, a prosecutor may challenge a defendant's credibility and the credibility and persuasiveness of his defense theory, even to the point of calling it ridiculous, preposterous, or the like. *People v. Herring*, 2018 IL App (1st) 152067, ¶ 89; *People v. Robinson*, 391 Ill. App. 3d 822, 840-41 (2009).

¶ 114 Our review considers closing arguments in their entirety and considers remarks in context, and improper remarks do not merit reversal unless they cause substantial prejudice to

the defendant. *Olla*, 2018 IL App (2d) 160118, ¶ 40. Substantial prejudice exists when the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the conviction. *Marzonie*, 2018 IL App (4th) 160107, ¶ 48. The strength of the evidence against the defendant is often a decisive factor in this determination. *Id.* A prosecutor's misstatements in rebuttal are especially prejudicial because the defendant cannot respond with further argument. *People v. Davilla*, 236 Ill. App. 3d 367, 383 (1991).

¶ 115 Here, we do not find it improper for the State to refer to defendant as "Mr. Innocent," "Mr. Truthful," a "stuttering fool," and the like as part of its argument that defendant attributed gaps or potentially damaging points in his testimony to his mind "racing" during the incident, or to not recalling, while his recollection or explanation of more favorable points was more firm. The State was making an argument about defendant's credibility, based on reasonable inferences from the evidence, when it made the rhetorical flourishes at issue.

¶ 116 Similarly, when the State asked the jury if it had "that repulsed feeling, that sick feeling in your stomach when you saw the shell casings," the State did so as part of an argument that the number and placement of the shots fired by defendant and Roundtree, as shown by the shell casings, tended to belie the defense argument that they acted in self-defense so that defendant should be acquitted or convicted of second-degree murder. Contrary to defendant's contention that "[t]hese arguments did not ask the jury to infer any rational fact about the case based on the ammunition," the State did exactly that alongside its emotional appeal to the jury.

¶ 117 Defendant contends that the State made an improper argument when it referred to the defense witnesses as a "parade of gangbangers and felons." The State notes that the witnesses testified to being gang members and admitted to felony convictions, so that the argument was

properly addressed to their credibility. Defendant contends that the impropriety lies in the fact that he would have presented a non-gang-affiliated, non-felon witness if he had been allowed to call Detective Munoz. However, the trial court did not allow defendant to call Munoz, a decision we have found to not be erroneous. Under such circumstances, we cannot find that the State made an improper argument by addressing the credibility of the actual trial witnesses.

¶ 118 That said, we find that some of defendant's contentions of improper argument have merit. We find it improper for the State to argue to the jury a significant discrepancy between witnesses that did not exist. Defendant and Fuqua both testified that Fuqua was about three or four feet from Washington before the shooting. However, to cast doubt on defendant's credibility, the State argued that there was a significant discrepancy between their accounts on this point. We note that this drew an objection from defense counsel that the trial court overruled.

¶ 119 We also find it improper for the State to argue significant inconsistencies or evasions in defendant's testimony that were not actually there. Defendant did not deny that he threw his gun from the car as he and codefendants left the scene, but the State argued that he gave a preposterous account that the gun "just bounced out." Similarly, defendant was consistent in his testimony that he believed, but was not certain, that the object Washington drew was a gun. However, the State characterized his testimony on the point as wavering between certain identification of a gun and uncertainty. We note that this characterization drew an objection from defense counsel that the trial court overruled.

¶ 120 While the jury was duly instructed that closing arguments are not evidence, we cannot conclude that mischaracterizing trial evidence regarding defendant's credibility in rebuttal closing argument would have no effect on the jury in a case where defendant's credibility was key. That said, because we are remanding this case for a new trial as stated above and explained

below, we need not determine whether these improper arguments were either harmless error where preserved or constituted plain error where they were not preserved.

¶ 121 E. Cumulative Error

¶ 122 We conclude that, while one or two of the errors above could have had an insignificant effect on defendant's trial, their cumulative effect denied defendant a fair trial. The test of whether a defendant was denied a fair trial by cumulative error is whether a substantial right has been affected to such a degree that we cannot confidently state that the defendant's trial was fundamentally fair. *People v. Blue*, 189 Ill. 2d 99, 138 (2000). Here, errors occurred at various stages in defendant's trial. In a case where the credibility of defendant and his self-defense argument were key, we cannot confidently state that his trial was fair when the jury did not hear about his *Lynch* evidence in his opening statement, *and* did not hear Williams testify or Sutton testify in full, *and* was improperly instructed, *and* heard mischaracterizations of certain trial evidence in the State's rebuttal closing argument.

¶ 123 In reversing and remanding, we decline to reach defendant's ineffective assistance claims or his contentions regarding the posttrial and sentencing proceedings.

¶ 124 IV. CONCLUSION

¶ 125 We reverse defendant's convictions for first degree murder and aggravated battery with a firearm and remand for a new trial consistent with this order.

¶ 126 Reversed and remanded for a new trial.