2019 IL App (1st) 16-1076-U

SECOND DIVISION
September 3, 2019

No. 1-16-1076

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 12 CR 18112
DENNIS JOYNER,	)	
	)	The Honorable
Defendant-Appellant.	)	Frank Zelezinski,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Presiding Justice Ellis and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision to bar testimony regarding the victim's prior acts of violence pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984) was harmless error in light of the overwhelming and uncontroverted video surveillance evidence of the defendant's guilt presented at trial.

¶ 2 Following a jury trial in the circuit court of Cook county, the defendant, Dennis Joyner, was found guilty of first degree murder and sentenced to 48 years' imprisonment. On appeal, the defendant contends that the trial court erred when it barred him from introducing two pieces of probative evidence pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984) that he claims, *inter alia*,

would have established that the victim had previously made threatening remarks to him about owning a gun, thereby supporting his theory of self-defense. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The defendant was charged with eight counts of first degree murder (720 ILCS 5/9-1(a) (1), (2) (West 2012)) and two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2012)) for shooting the victim, Robert Fortson, at a gas station on September 11, 2012.

¶ 5 Prior to trial, the defendant filed a motion pursuant to *Lynch*, 104 Ill. 2d 94 (1984), seeking the admission of four prior instances of violent acts committed by the victim against himself and others that would support his theory that the victim was the aggressor and that in shooting him, the defendant acted in self-defense. In his motion, the defendant alleged that the altercation between him and the victim began as a landlord-tenant dispute and that on September 11, 2012, while the defendant was purchasing gasoline and lottery tickets at his local gas station, he saw the victim reaching for a potential weapon and, fearing for his life, defended himself by shooting the victim.

¶ 6 In his *Lynch* motion, the defendant therefore sought the introduction of the following evidence:

(1) The victim, his wife and stepson all lived in a residence that they rented from the defendant. On May 2, 2011, when the defendant informed the victim that he wanted to terminate the victim's lease and that he wanted his family to move out, the victim told the defendant that he was "going to f*** him up" and would damage his property, and that the

defendant was "messing with the wrong person." This incident (No. 11-0958) was documented in a police report, which was attached to the motion.

(2) On August 16, 2011, as they were approaching the end of the lease term, the defendant sought to enter the residence to photograph it and make sure that there were no changes or damage to the property. The victim threatened to harm the defendant if he came onto the premises, and the defendant was forced to use a police escort to access the residence. This incident (No. 11-10205) was also documented in a police report attached to the motion.

(3) On September 4, 2011, the defendant contacted the police because even though the victim had left the residence, he had "made good on his threats to destroy the property." The defendant noted damage to the heating and cooling system, as well as that the cables for the television services had been cut, and that the screens had been taken off the windows. This incident (No. 11-11141) was documented in a police report attached to the motion.

(4) In September 2011, the defendant learned from his best friend, John Daniel, that the victim's nickname was "Goon."

¶ 7 On February 22, 2016, the trial court held a hearing on the defendant's motion. At that hearing, the defendant made an oral request for the admission of a fifth piece of *Lynch* evidence regarding the victim's prior violent background, namely that sometime in 2010, after the victim's stepson was arrested in a narcotics case, the defendant advised the victim that he would not have people engaged in the drug trade living at his residence, to which the victim responded that no m*****f***** is going to tell [him] what to do since [he] got a 9," referring to a 9 mm handgun.

¶ 8 At the hearing, the State opposed the introduction of all of the proffered *Lynch* material. The State first asserted that *Lynch* applied only if the defendant could establish self-defense, which the State submitted the defendant would not be able to do. In addition, the State, *inter alia*,

argued that none of the incidents involving the police that the defendant wanted introduced ended with the victim being arrested or charged, let alone convicted. With respect to the victim's nickname as "Goon," the State argued that this evidence was irrelevant. Finally, with respect to the testimony regarding the victim's possession of a 9mm handgun, the State argued that this incident was not even reported to the police and that even defense counsel acknowledged that only the victim and the defendant were present at the time these statements were made.

¶ 9 After hearing arguments by both counsels, the trial court held that it would admit only the first, second and fourth *Lynch* materials, but not the third and fifth, since those were "too remote." With respect to the third allegation, regarding the victim's destruction of the property, the court held that there was "no direct evidence as to who did this, whether [the victim] or somebody" else and that there was no one who saw the victim "doing it purposely." With respect to fifth allegation, regarding the victim's threats to the defendant including the statement that he owned a 9mm gun, the trial court held that this incident was never documented in any police report and was "just sort of a he said/she said situation." The court further explained that its ruling was prospective and that all three admitted pieces of *Lynch* material would be allowed at trial, only if the defendant was able to establish self-defense.

¶ 10 The defendant's jury trial commenced in February 2016, and the following relevant evidence was adduced.

¶ 11 The victim's wife, Dishon Fortson Brignac, first testified that in August 2009, she and the victim began renting a house in Park Forest from the defendant, who they met through her brother-in-law, Macari Fortson. Brignac averred that upon moving in, she and the victim made upgrades to the property, including installing a new carpet, painting the walls, and staining the hardwood floors.

¶ 12 Brignac testified that on May 2, 2011, the defendant came to the property and told them that they had to leave the premises because his daughter was coming back to town and needed a place to live. Brignac stated that she and the victim were angry because the defendant was offering them no notice, and wanted them to move out that very day, and because they had had already spent about $4,000-$5,000 on improving the property. According to Brignac, the conversation escalated to a verbal altercation during which the victim and the defendant "threw insults and threats at each other" until the police were called. The argument never got physical and once the police arrived, it ended.

¶ 13 Brignac stated that on August 29, 2011, she and the victim moved out of the defendant's property, and she telephoned the defendant to ask him if he wanted to do a walk-through and pick up the keys. The defendant told her to put the keys in the mailbox and after that she had no contact with him. Brignac averred that to her knowledge the victim also had no contact whatsoever with the defendant after they moved out of the residence. Brignac and the victim moved first to Indiana (where they lived for about nine months) and then to Chicago Heights.

¶ 14 Brignac next testified that over a year later, on September 11, 2012, the victim had been running errands, including taking care of Mr. Ted, an elderly gentleman whom he was responsible for, when he telephoned to tell her that he needed to stop at a gas station before returning home. Brignac never heard from the victim again. Instead, she received a telephone call informing her that the victim had been shot. Once at the hospital, she was eventually told that her husband had died.

¶ 15 The State next presented the testimony of four eyewitnesses. First, Regina Mayfield testified that at about 11 a.m. on September 11, 2012, she parked her car at one of the pumps at the Mobil gas station located at 431 West 14th Street in Chicago Heights (hereinafter the Mobil

gas station). Mayfield exited her car and entered the gas station. She noticed that a young man wearing a red shirt walked in right behind her. According to Mayfield, there were already two people inside the store, the store clerk and a customer, whom she described as a male in his late 50s, about 6' 3" tall, weighing a little over 200 lbs and wearing a black suit with a black beret. The store clerk was behind the counter and the customer was near the front of the store. Mayfield testified that the customer appeared to be "a little agitated" and "angry."

¶ 16 When Mayfield moved to the counter to pay for her gas, the customer in the black suit just "snapped" and started screaming at the man in the red shirt, "You better get out of here, m*****f*****, before I kill you." Mayfield heard him scream the threat at least three times. According to Mayfield, the man in the red shirt said nothing throughout the whole incident, but just turned around and started walking out of the store. Mayfield stated that the customer in the black suit also turned around and followed the man in the red shirt outside.

¶ 17 At that point, Mayfield proceeded to pay for her gas. She was still inside the gas station when she heard about six or seven gunshots coming from outside. Mayfield moved to the back of the store, and the clerk let her behind the counter. According to Mayfield, the customer in the black suit came back inside and placed the gun that was in his hand on the counter. Subsequently, the police arrived and placed him under arrest. Mayfield denied that the customer in the black suit ever appeared scared.

¶ 18 On cross-examination, Mayfield admitted that because the individual in the red shirt was behind her when she walked into the gas station, she could not see whether he mouthed anything to the customer in the black suit. She also admitted that she never saw what happened outside of the gas station, and that she only heard gunshots.

¶ 19 Next, Janeth Velazquez-Perez, who was six months pregnant and working as a clerk at the

Mobil gas station on September 11, 2012, testified that at approximately 11 a.m., the defendant came into the gas station to buy lottery tickets, gas and a car wash. He was wearing a black suit and appeared to be in a "regular" mood. Perez was familiar with the defendant because he would come into the gas station at least once a week and she considered him a "nice" customer.

¶ 20 A few minutes later an older woman entered the gas station. She was followed by the victim, who was wearing a red shirt. According to Perez, as soon as the victim walked into the gas station, the defendant's mood immediately changed. He looked like he had snapped and suddenly became angry. Perez heard the defendant shout at the victim, at least twice: "Get outta the store, I'm gonna f****n' kill you." Perez testified that the victim did not say anything to the defendant before that. Instead the victim put his hands up to the side of his body and said, "Okay, okay" and started walking to the door. The defendant followed the victim outside of the store. As the victim was walking away, Perez saw the defendant grab his gun. According to Perez, the victim did not notice that the defendant had a gun because he was in front of the defendant and was just trying to walk away. Once the men were outside, Perez was curious as to what would happen. She then heard the first shot, but did not see it. At that point, she looked out and saw the victim on the ground, and the defendant walking around him shouting. Perez then heard at least five or six more shots.

¶ 21 At that moment, Perez walked over to the older female customer, who had begun screaming, and brought her back behind the counter. She closed the window, locked the door, and hid with the customer because she saw the defendant returning to the gas station and did not know what he was going to do. Perez heard the defendant enter the gas station and place the gun on the countertop before the police arrived.

¶ 22 On cross-examination, Perez admitted that the lottery machine, which she was using when

the defendant spoke to the victim inside the gas station, does make noise, but denied that any such noise made it impossible for her to hear what was going on.

¶ 23 Francisco Villagomez next testified that at about 11 a.m. on September 11, 2012, he went to the Dunkin Donuts, which was attached and opened onto to the Mobil gas station, to buy coffee and lunch. As Villagomez was looking at the menu, he heard gunshots, and turned to see where they were coming from. The shots had come from outside, so Villagomez went to the glass door to see what was happening. Through that glass door, Villagomez saw a man in a red sweater falling to the ground, face down. According to Villagomez, the shooter, who was wearing a black suit and a beret, came over to the victim. The victim tried to get away, and put his right hand up, saying "Stop, don't shoot," but the shooter continued to shoot at him. According to Villagomez, the victim screamed, "ah, ah" every time he was shot. Villagomez estimated that the shooter shot at the prostrate victim about a total of eight or nine times. At that point, the shooter backed away from the body and walked back into the gas station. Once the shooter was inside, standing inside the Dunkin Donuts and looking towards the gas station side of the building, Villagomez saw the shooter walk to the cashier's counter and place the handgun on it, and then straighten his suit before looking directly at Villagomez. The two made eye contact and the shooter made a gesture to Villagomez, so Villagomez pretended to turn around and buy his coffee. The police eventually arrived.

¶ 24 On cross-examination, Villagomez acknowledged that he did not see the shooter inside the gas station prior to the shooting nor did he hear anyone screaming or saying profanities. He also did not see the victim come into the gas station. Accordingly, he had no idea what had precipitated the shooting.

¶ 25 Finally, Scotty Edwards testified that at about 9 a.m. on September 11, 2012, he was at his

friend and neighbor, Mr. Ted's house, when the victim arrived to check in on Mr. Ted. After about 15 or 20 minutes, the victim and Edwards left to go to the liquor store. Edwards stated that they first pulled up at the Mobil gas station and he went inside to pay for the gas. After that, Edwards crossed the street to go to the liquor store, while the victim filled the car with gas.

¶ 26 Edwards averred that about five to ten minutes later, as he was returning to the gas station from the liquor store, he saw the victim exit the gas station with a man following right behind. Edwards was about 25 to 30 feet away. He never saw or heard the victim say anything to the man behind him. Instead, according to Edwards, the man just pulled out a pistol and shot the victim in the back. Edwards immediately fell to the ground, and continued to watch as the man walked around and continued to shoot at the victim. Edwards believed that the victim was shot about seven times. After the shooting, Edwards returned to Mr. Ted's house, and then together with friends returned to the scene to see what had happened to the victim.

¶ 27 On cross-examination, Edwards admitted that while he was in the liquor store he did not see anything that was happening inside the gas station and therefore did not know what had brought on the shooting.

¶ 28 Murad Husain, the owner of the Mobil gas station, next testified that he had a video surveillance system installed at the gas station in 2009. The system had 55 cameras located on the property and was operated by a computer. Husain checked the system daily to make sure it was operable and stated that the cameras were working on September 11, 2012.

¶ 29 Husain averred that after receiving a telephone call on September 11, 2012, at about 12 or 1 p.m., he proceeded to the gas station where he was met with police. Husain directed the police to the surveillance system and ultimately turned over a thumb drive of the surveillance footage from three different video cameras to them. Husain identified a compact disc with clips from

these three video cameras and stated that they depicted true and accurate recordings of what those cameras captured at the time of the shooting.

¶ 30 On cross-examination, Husain admitted that the time stamp on the videos was incorrect explaining that, as a result of his own "laziness" he had not fixed the time. However, Husain claimed that on the date in question he knew what the "real time" was compared to what was shown on the videotapes and that the difference was approximately an hour to an hour and a half.

¶ 31 Chicago Heights Police Sergeant Mikel Elamin next testified that in response to a radio call at about 10:45 a.m. on September 11, 2012, he proceeded to the Mobil gas station. Once there he observed a black male victim, who appeared to have been shot, lying face down on the ground. Sergeant Elamin remained with the victim and attempted to speak with him to determine who had shot him, but the victim was unresponsive. Subsequently, he entered the gas station and together with the gas station owner, Husain, watched the video surveillance footage from "over 40 cameras" to determine which ones had captured the shooting. According to Sergeant Elamin, only three cameras captured the incident, and he asked Husain to put those on a flash drive for him. The flash drive was later recorded onto a compact disc that was then published to the jury.

¶ 32 That compact disc contains footage from the three video cameras at the gas station, which captured the shooting from: (1) the interior of the doorway and entrance to the gas station; (2) the outside pump area; and (3) the area behind the clerk's counter directed towards customers and the Dunkin Donuts shop behind it. This footage was used by the four eyewitnesses in their testimony to explain where they were located and what they could see during the time of the shooting.

¶ 33 Collectively, they show the defendant standing in front of the gas station counter as the

victim enters the gas station following Mayfield. They further show the defendant noticing the victim and then speaking to him aggressively. The two move to the right and are out of sight of the cameras for two seconds before the camera shows the victim walking away and heading to the door to exit the gas station, with the defendant right on his heels. The surveillance clips further show the defendant pulling out his gun as he follows the victim outside of the gas station. The video clips of the outside of the station then show the defendant shooting the victim in the back. After the victim falls to the ground, the defendant continues to circle him and shoot at him as he is lying on the floor, attempting to raise himself up with his hands to protect himself. The video clips eventually show the defendant reentering the gas station and placing his handgun on the counter.

¶ 34 Chicago Heights Police Officer Thomas J. Somer next testified that at about 11 a.m. on September 11, 2012, he responded to a call of a shooting at the Mobil gas station. The description of the shooter was that of an African-American male wearing a suit. Upon arrival, Officer Somer observed the victim, who appeared to have been shot, prostrate and unresponsive on the ground between the gas pumps and the front door of the gas station. The officer also observed numerous shell casings scattered around the victim's body.

¶ 35 Officer Somer looked into the gas station and observed an individual, whom he identified as the defendant in open court, matching the shooter's description. Officer Somer entered the gas station and placed the defendant under arrest. He also retrieved a handgun from the clerk's counter in the vicinity of the defendant. Officer Somer identified the handgun as a black .45 caliber Smith and Wesson.

¶ 36 On cross-examination, Officer Somer acknowledged that after being instructed to do so more

than once, the defendant ultimately knelt to the ground and put his hands in the air. He admitted that the defendant did so of his own accord. He also admitted that the handgun had been left in the so-called "slide" position, which permitted the officer to see whether the gun was loaded.

¶ 37 Illinois State Police crime scene investigator Sergeant Cary Morin next testified that on the afternoon of September 11, 2012, he processed the scene of the shooting at the Mobil gas station. Among other things, he photographed the inside and outside areas of the gas station, and recovered and inventoried eight fired .45mm shell casings, one fired bullet, and the handgun that had been retrieved by police officers from the defendant. In addition, later that same day, Sergeant Morin proceeded to St. James Hospital, where he recovered and inventoried several fired bullets and bullet jackets from the victim's body.

¶ 38 Illinois State Police forensic scientist, and firearms expert, Nicole Fundell, next testified that on September 3, 2014, she received eight fired cartridge cases, three fired bullets, two fired bullet jackets and the .45mm handgun retrieved from the defendant, from the Chicago Heights police department. After testing, Fundell opined to a reasonable degree of scientific certainty that the eight fired cartridge cases found at the scene were fired by the defendant's handgun. In addition, she determined that the fired bullet and fired bullet jacket recovered from the victim's body came from that same handgun.

¶ 39 Cook County Chief Medical Examiner and expert pathologist, Dr. Stephen Cina, next testified that he reviewed the autopsy of the victim performed by Dr. Ariel Goldschmidt on September 12, 2012. According to that autopsy report, the victim suffered the following external gunshot wounds: (1) to the upper right back side of his neck that exited his cheek; (2) to his right upper arm; (3) near his right armpit; (4) a grazing wound to his right elbow; (5) two wounds to his right forearm; and (6) and a graze wound to his left wrist. The last two bullet wounds were

significant because the bullets also went through the victim's liver and right lung, fracturing his vertebrae, and his stomach and lateral chest area before exiting the body, causing massive internal bleeding. The victim also suffered a gunshot wound to the back, which was on the right side, back of the neck. According to Dr. Cina, the victim died as a result of multiple gunshot wounds and the manner of death was homicide.

¶ 40 On cross-examination, Dr. Cina acknowledged that he could not discern the order of the gunshots. He also could not tell what the victim was doing at the time the gunshots entered his body, but did think it was fair to say that the wounds to his right forearm were compatible with defensive-type wounds, such as putting one's hands up.

¶ 41 After the State rested its case-in-chief, the defendant testified on his own behalf. At the time of trial, he was 63 years old. The defendant stated that he worked for the Illinois State Police for 21 years, first as a trooper and then as part of the executive protection detail for two Illinois governors. The defendant retired from the Illinois State police in 2006, after which he began working as a security officer with the City Colleges of Chicago. The defendant was licensed and permitted to carry a sidearm.

¶ 42 The defendant testified that on September 11, 2012, he was scheduled to begin his shift at the City Colleges at 3 p.m. He was therefore wearing his uniform, which consisted of a blue blazer, blue slacks, and a white shirt. On his way to work, the defendant stopped at the Mobile gas station, which he frequented weekly, to get gas, wash his car and buy lottery tickets.

¶ 43 After parking his vehicle at the gas station, the defendant went inside, scanned the newspaper and then approached the clerk at the counter to buy lottery tickets. As the defendant was waiting for the clerk to print his lottery tickets, he saw the victim enter the gas station. The defendant explained that he immediately recognized the victim because the victim had been his tenant

between 2009 and 2011. The defendant had not seen the victim for over a year prior to that date. According to the defendant, the victim then told the defendant, "I'm gonna take care of you." The defendant followed the victim to where he was standing and told him, "You don't belong here. Get outta here." The defendant denied ever using any profanities or threatening to kill the victim. The victim responded by repeating to the defendant "I'm gonna get you. I'm gonna take care of you." He did so in an "evil" and threatening voice. Using the surveillance video footage, the defendant testified that the victim made these threats when the two of them were out of the view of the video cameras for a few seconds.

¶ 44 The defendant testified that he followed the victim out of the gas station because he feared for his safety. As he followed the victim, he told him several times "I'm tired of you threatening me." Once outside, the defendant saw the victim make a furtive movement towards his waist, and then start to swing around towards the defendant. The defendant admitted that the victim's back was towards him when he made this furtive movement, and that he could therefore not see the victim's hands. He explained, however, that at that moment, he feared for his safety because he did not know "what [the victim] had and what he was going to do to [him]." In fear for his life, the defendant then fired his handgun at the victim' s chest. When asked to view the video surveillance footage showing him shooting at the victim's back, the defendant initially stated that it must be "wrong," because he fired at the victim's chest when the victim "swung around." Ultimately, however, the defendant stated that he did not remember what happened once he began shooting and that he just kept shooting until his gun locked. He explained that because the gun is a semi-automatic, with eight bullets, once all the bullets are fired, the gun locks in place. The defendant stated that in the moment he did not realize how many shots he had fired.

¶ 45 The defendant averred that he then went into the gas station and placed the handgun on the

gas station clerk's counter because he was afraid that the police might shoot him if they saw him with a weapon. After the police arrived, he complied with their demands and went down on his knees with his hands in the air. The defendant informed the officers that he was a retired state trooper and that he had feared for his life because the victim had threatened to kill him.

¶ 46 After a sidebar, the defendant was permitted to testify about the previous threatening incidents he had had with the victim pursuant to *Lynch*. The defendant explained that beginning in August 2009, he had rented a home at 108 Westwood in Park Forest to the victim. He explained that he did this as favor to the victim's brother, Macari Fortson, who was a friend he knew from work. According to the defendant, on August 2, 2011, together with his girlfriend, Jackie, he went to the rental property to take photographs of it. The defendant stated that he had informed the victim that he would be coming to take photographs, but that, when he appeared at the door, the victim became upset, and threatened to blow up the defendant's house. He also told the defendant, "I know where you live at and I will take care of you." He also called Jackie, "b****" several times. The police were at the end of the driveway, and the defendant asked them to document what had happened.

¶ 47 The defendant further testified that after the victim left the house in September 2011, he learned from a friend that the victim's nickname was "Goon." The defendant stated that on September 22, 2012, he was surprised to see the victim at his gas station, in Chicago Heights, and that these prior incidents of threats were in his mind when he observed the victim make a furtive movement towards his waist. The defendant believed he was in imminent danger, and only wanted to protect himself so that he could go home to his family.

¶ 48 On cross-examination, the defendant was asked why, if he feared for his life, he did not just

walk to his car after following the victim out of the gas station. The defendant responded that he did not want to leave his change, lottery tickets and car wash receipt at the clerk's counter.

¶ 49 On cross-examination, the defendant was also asked why he never approached the victim's brother Macari, to help him out during the tenant-landlord dispute, and the defendant stated that he tried asking Macari for help several times but that Macari responded that he "could do nothing."

¶ 50 In rebuttal, the State called, Macari, who averred that the defendant never told him about any threats that the victim had made against the defendant. Macari also testified that the defendant never told him that he had been afraid of the victim.

¶ 51 In rebuttal, the State also called Eric Ruskey, the paramedic who treated the victim immediately after the shooting. Ruskey testified that while in the ambulance he cut off the victim's clothes to tend to his wounds and found that the victim did not have a gun anywhere on his person.

¶ 52 After the close of evidence, the court allowed defense counsel's request that the jury be instructed on both second degree murder and the affirmative defense of self-defense. Among other things, the jury was instructed in the following manner: "You have heard testimony of [the victim's] prior acts of violence *** 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."

¶ 53 During deliberations the jury made two requests. First, they asked to see the surveillance videos again, which defense counsel did not object to and the trial court permitted. Subsequently, the jury sent the following note:

> "We received a document stating, 'Heard testimony of [the victim's] acts of violence.' It also states 'You may consider that evidence.' We don't recall this referenced in court. Please explain or inform or confirm if this document should be disregarded."

The court responded, "Jurors: You have all the appropriate jury instructions and have heard all of the evidence. Please continue your deliberations. Do not disregard any instructions."

¶ 54 After deliberations, the jury found the defendant guilty of first degree murder. In addition, the jury found that during the commission of this offense the defendant had personally discharged the firearm that proximately caused the victim's death.

¶ 55 The defendant filed a posttrial motion, *inter alia*, challenging the partial denial of his *Lynch* motion. After the trial court denied that motion the parties proceeded with sentencing. After hearing arguments in mitigation and aggravation, the court sentenced the defendant to a total of 48 years' imprisonment, which included the mandatory 25-year firearm enchantment. The defendant now appeals.

¶ 56 II. ANALYSIS

¶ 57 On appeal, the defendant contends that the trial court erred in excluding two pieces of *Lynch* material, including evidence of: (1) the victim's threats that "no m*****f***** [wa]s going to tell [him] what to do" because he owned a 9mm handgun; and (2) the victim's making good on his prior threats to destroy the defendant's property. The defendant contends that both pieces of evidence were highly probative to his theory of self-defense and prejudiced the outcome of his trial warranting reversal of his conviction. For the reasons that follow, we hold that while it was error to exclude this testimony, in light of the overwhelming evidence of the defendant's guilt presented at trial, that error was harmless.

¶ 58 We first proceed by addressing the trial court's error. The admission of evidence is within

the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 314 (2010). A court abuses its discretion when its decision is arbitrary, fanciful or unreasonable. *Id*.

¶ 59 In *People v. Lynch*, 104 Ill. 2d 194, 199-200 (1984), the Illinois Supreme Court held that when the theory of self-defense is raised, evidence of the victim's violent and aggressive character is admissible for two distinct purposes. First, it may be offered to show that the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior, and thereby establish the reasonableness of the defendant's state of mind in acting in self-defense. *Id*. Second, it may be offered to support the defendant's version of the facts when there are conflicting accounts as to the identity of the aggressor. *Id*.; see also *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 49; see also *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005). If the testimony is offered to show the defendant's state of mind, the defendant must have known the information about the victim when the alleged self-defense occurred; if the testimony is offered as evidence of the victim's violent character to establish that the victim was the aggressor, the defendant is not required to possess knowledge of the victim's reputation. *Guyton*, 2014 IL App (1st) 110450, ¶ 49; see also *People v. Ware*, 180 Ill. Ap. 3d 921, 927 (1998).

¶ 60 In the present case, the defendant proceeds under the first prong of *Lynch*, contending that the evidence excluded by the trial court directly impacted his defense because it went to the heart of his mental state and the reason why he responded to the victim in the manner that he did.

¶ 61 The defendant first contends that the trial court should have permitted him to testify that the the victim had previously made a threat to him that referenced gun ownership. Specifically, the defendant sought to introduce his own testimony that upon discovering that the victim's stepson had been involved in a narcotics arrest, he informed the victim that he could not have people

engaged in the drug trade living at his rental residence, at which the victim threatened him that "no m*****f***** is going to tell me what to do since I got a 9 [mm handgun]." The defendant contends that this evidence was crucial in explaining why he was justified in believing that the victim was armed and dangerous when he threatened to "take care" of him inside the gas station, and why when he saw the victim make a furtive movement towards his waist he feared for his life.

¶ 62 The State contends that the trial court properly excluded this evidence because without a police report it was too speculative and because ownership of a weapon alone is insufficient to establish a violent tendency. In support, the State cites to *People v. Cruzado*, 299 Ill. App. 3d 131 (1998). We disagree and find that case inapposite.

¶ 63 It is axiomatic that a defendant commits first degree murder when "without lawful justification" he kills another while intending to cause death or great bodily harm. 720 ILCS 5/9-1(a) (West 2012). One of the recognized justifications to first degree murder is the affirmative defense of self-defense. Section 7-1(a) of the Criminal Code of 2012 (Criminal Code) provides in pertinent part:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2012).

Once the affirmative defense of self-defense is raised, "the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving

the elements of the charged offense." *People v. Lee*, 213 Ill. 2d 218, 224 (2004); see also *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995)).

¶ 64 Thus, in order to raise the affirmative defense of self-defense at trial, the defendant must present some evidence of each of the following elements: (1) that unlawful force was threatened against the defendant; (2) that the defendant was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the defendant actually and subjectively believed a danger existed that required the use of the force applied; and (6) that the defendant's belief was objectively reasonable. *Lee*, 213 Ill. 2d at 225; see also *People v. Spiller*, 2016 IL App (1st) 1333389, ¶ 22; 720 ILCS 5/7-1(a) (West 2012). " 'If the State negates any one of the self-defense elements, the defendant's claim of self-defense must fail.' " *Spiller*, 2016 IL App (1st) 133389, ¶ 29 (quoting *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995)).

¶ 65 Likewise, second degree murder requires proof of the same elements as first degree murder, with the only difference being that second degree murder requires the additional proof of a mitigating factor, in this instance, that "at the time of the killing" the defendant "believe[d] the circumstances to be such that, if they existed, would justify or exonerate the killing" under principles of self-defense but that this "belief [wa]s unreasonable. 720 ILCS 5/9(a)(2) (West 2012). Accordingly, where, as here, evidence of both first and second degree murder is presented, the State again bears the burden of proving beyond a reasonable doubt not only the elements of first degree murder but also that the defendant was not justified in using the force that he used to defend himself. *Id*. However, to reduce the offense of first degree murder to second degree murder, the defendant must show by a preponderance of the evidence that at the time of the killing he believed the circumstances to be such that they justified the use of deadly

force, but that his belief that such circumstances existed was unreasonable. *Jeffries*, 164 Ill. 2d at 127-28; see also 720 ILCS 5/9-2(a)(2) (West 2012).

¶ 66 As such, in the present case, for purposes of both the affirmative defense of self-defense and the second degree murder instruction, it was vital for the defendant to provide the jury with at least some evidence that would have justified his subjective belief, reasonable or not, that the use of deadly force against the victim was necessary to prevent his own imminent demise or great bodily harm. Contrary to the trial court's ruling, "[p]erception of danger is always material and relevant to defendant's belief that the use of deadly force is justified." *People v. Whiters*, 146 Ill. 2d 437, 444 (1992). In this vein, our courts have repeatedly held that a defendant is entitled to testify about his basis for believing that the decedent was armed. See *e.g.*, *People v. Allen*, 378 Ill. 164, 168 (1941) (it is proper for the defense to offer proof of the decedent "going about habitually armed with a deadly weapon, if known to the defendant"); *People v. Graves*, 61 Ill. App. 3d 732, 740 (1978) (evidence "that defendant knew [the victim] carried a knife and gun, was relevant and material to the jury's assessment of defendant's belief that his use of force was justified"); *People v. Kline*, 90 Ill. App. 3d 1008, 1012 (1980) ("It was relevant that defendant reasonably thought decedents were armed and dangerous, not whether they in fact were armed and dangerous."). Accordingly, testimony that the defendant knew that the victim possessed a weapon, and that he had threatened the defendant with it on a previous occasion, regardless of how remote, was both relevant and necessary to the defendant's perception of danger at the time of the shooting, and the trial court's decision to bar such evidence was unreasonable, and therefore constituted an abuse of discretion.

¶ 67 In coming to this decision, we have considered the decision in *Cruzado*, 299 Ill. App. 3d 131,

cited to by the State and find it inapposite. In that case, under the second *Lynch* prong, the defendant sought to admit evidence that during a prior arrest, of which the defendant had no personal knowledge, after a pat-down search, the police found the victim to have unlawfully possessed a weapon. *Id*. at 136. The trial court excluded the evidence and the appellate court agreed, finding that a charge of unlawful possession of a firearm itself was not probative of a violent nature. *Id*. at 137. Unlike *Cruzado*, the defendant here proceeded under the first *Lynch* prong and did not seek to introduce evidence of the victim's random possession of a handgun to show his propensity for violence or that he was the aggressor. Rather, the defendant sought to show that he personally knew that the victim owned a handgun and that the victim had already threatened to use that handgun against him, so as to justify his belief that the victim was armed and dangerous and posed a direct and imminent threat to him at the time of the shooting. As such, *Cruzado*, has no bearing on this case.

¶ 68 The defendant next contends that the trial court further erred in barring the introduction of evidence that the victim had fulfilled his promise to destroy the defendant's property. The State once more contends that this evidence was properly excluded because it was too speculative and therefore of very little probative value. Again, we must disagree.

¶ 69 The defendant sought to testify that a few weeks after the victim threatened to destroy his rental property, upon the victim's departure from that property, he discovered that the heating and cooling system, television cable line and window screens had been damaged, and that there were no signs of a forced entry. The defendant therefore concluded that the victim had made good on his recent threats to destroy his property and reported this incident to the police. As already stated above, the defendant's "[p]erception of danger is always material and relevant to defendant's belief that the use of deadly force is justified." *Whiters*, 146 Ill. 2d at 444. When

considered in light of the aforementioned evidence of the victim's prior threats to the defendant about owning a handgun, we fail to see how evidence that the victim had previously promised to destroy the defendant's property and then made good on those promises, could be anything but probative of the defendant's perception of what the victim was capable of doing. The defendant's apprehension when encountering the victim would necessarily have been determined by the victim's making good on his prior threats. Accordingly, we find that it was an abuse of discretion not to permit the defendant to testify as to this event.

¶ 70 However, "[n]ot all errors in the admission of evidence require reversal." *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 16. Rather, to determine whether such an error was harmless, " 'we must ask whether the verdict would have been different if the evidence had not been admitted.' " *Id.* (quoting *People v. McWhite*, 399 Ill. App. 3d 637, 643 (2010)).

¶ 71 In the present case, although we find error in the exclusion of both pieces of *Lynch* evidence, for the reasons that follow, we find that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt presented at trial.

¶ 72 The defendant is plagued by the grim surveillance videos of the shooting that were published to the jury. Together with the testimony of the four eyewitnesses, those videos uncontrovertibly establish that the victim never threatened the defendant and that the defendant was never in any imminent danger from the victim, let alone one that would have justified his belief, be it objectively reasonable or not, that deadly force was necessary to defend himself against the victim. The two eyewitnesses inside the gas station agreed that without any provocation, word or action, from the victim, the defendant "just snapped," repeatedly yelling at the victim to "get out of here ***, before I kill you." The two witnesses agreed that the victim did not speak a single word to the defendant before he was accosted, but instead tried to get away from the

defendant by walking out of the gas station. These two eyewitnesses also agreed, and the surveillance videos show, that the defendant proceeded to stalk the victim, almost on his heels, out of the gas station.

¶ 73 The surveillance videos further indisputably and gruesomely show that after the defendant exited the gas station immediately behind the victim, he pulled out a gun and shot the victim in the back. Consistent with these videos, Perez, Villagomez, and Edwards, who all had different vantage points of the crime scene, all testified that after that first shot, the defendant menacingly circled around the wounded victim, who had fallen face down on the ground and was begging for the defendant to stop, and then shot him at least another seven times. All of the forensic evidence, including the autopsy report, supports this eyewitness testimony. Under this record we fail to see how even if the jury had been presented with evidence of the defendant's knowledge of the victim previously threatening him with a gun and making good on promises to destroy his property, the defendant would have been acquitted of first degree murder. See *e.g.*, *People v. Figueroa*, 381 Ill. App. 3d 828, 847 (2008) (applying harmless error analysis to *Lynch* and finding harmless error where the evidence of the defendant's guilt was overwhelming); *People v. Collins*, 366 Ill. App. 3d 885, 893-94 (2006); *People v. Armstrong*, 273 Ill. App. 3d 531, 536 (1995); see also *People v. Crum*, 183 Ill. App. 3d 473, 485 (1989) (any error made by the trial court was harmless because there was sufficient evidence to convict the defendant beyond a reasonable doubt).

¶ 74 In this respect, we reject the defendant's contention that the error cannot be harmless because the jury sent a note during deliberations stating that even though they had received a jury instruction noting the victim's acts of violence, they did not remember any such evidence referenced at trial. Even if the jury had been presented with evidence that the defendant had

believed that the victim possessed a gun and had made good on prior threats to harm him, so as to justify his apprehension and his first shot, the uncontroverted evidence of the defendant's actions after that first shot are irreparably damaging to his cause. The surveillance videos and the testimony of three eyewitnesses established that instead of walking away, the defendant continued to yell and to shoot at the clearly immobilized victim, until he emptied his eight-bullet weapon. Under this record, the exclusion of evidence did not impact the finding of guilt, and any error was harmless beyond a reasonable doubt.

¶ 75 I. CONCLUSION

¶ 76 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 77 Affirmed.