2019 IL App (2d) 170243-U
No. 2-17-0243-U
Order filed May 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-CF-141
	)	
GRANT VAN MUREN,	)	Honorable
	)	Brian F. Telander,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Birkett and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to disprove defendant's claim of self-defense; State had no duty to preserve evidence that was not in its possession; defendant did not make a clear request to represent himself; evidence was sufficient to support defendant's convictions for residential arson and aggravated arson; and trial court did not abuse its discretion in considering movie clip, and, if it did, any error was harmless.

¶ 2 I. INTRODUCTION

¶ 3 Following a bench trial in the circuit court of Du Page County, defendant, Grant Van Muren, was convicted of second degree murder, residential arson, and aggravated arson (the latter two counts merged). Additionally, defendant was acquitted of robbery and concealing a

homicidal death. Defendant now appeals, arguing that the State failed to disprove his self-defense claim beyond a reasonable doubt; that a due process violation occurred when an alleged misrepresentation by a police officer caused the loss of potentially exculpatory evidence; that the trial court ignored his request to represent himself; that he was not proven guilty of either arson charge beyond a reasonable doubt; and that the trial court erred by allowing the admission of evidence concerning a popular movie (one of the Bourne movies) as it pertained to defendant's mental state. We affirm.

¶ 4 II. BACKGROUND

¶ 5 Charles V. Clark (the victim or the decedent) was found dead in his Naperville home on January 22, 2014. The following evidence was adduced at trial. The State first called Sergeant Anthony Mannino, of the Naperville Police Department. On January 22, 2014, he was dispatched to 1148 Vail Court to assist the fire department with a gas leak. He arrived at about 10:35 a.m. There were three individuals in the area. At this address was a residence that was part of a town-house complex. It had two stories and an attached garage. When he arrived he was advised that there was an unconscious individual—possibly deceased—inside. Mannino entered the garage and noted the odor of natural gas. As he approached the door to the townhouse, the odor grew stronger. Mannino proceeded upstairs. At the top of the stairs was a loft and an open door led to a bedroom. In the bedroom, he observed "a male subject lying facedown or on his belly." Mannino checked for a pulse and found none. While waiting for other personnel to arrive, Mannino noted a gold chain on a sofa in the loft area and a "folded sandwich table type of TV tray sort of thing on the couch also." There was a computer area in the loft. Mannino also saw an "ashtray upside down" and "a folding knife under a chair." A

closet door had been pushed off its track. Some items near the base of the door "appeared to have red stains." There was blood around the male subject.

¶ 6 Mannino testified that he went downstairs to the kitchen. There, he observed that the oven door was open and there were papers inside the oven. On a counter to the right of the oven was a toaster. It appeared that someone had burnt something—possibly paper or paper towels—in the toaster. The cabinetry above the toaster was burnt as well.

¶ 7 On cross-examination, Mannino testified that despite the smell of gas when he arrived, the fire department did not tell him to evacuate the premises. The deceased was not wearing a shirt, shoes, or socks. He was wearing shorts, which were pulled down in the back, and blue underwear. A television in the loft was on when Mannino arrived.

¶ 8 Steven Barr testified that he and his girlfriend shared an apartment with defendant in 2013. After living together about 30 days, on June 6, 2013, Barr returned from work one night to encounter defendant at the front door of the apartment. Defendant was "fairly intoxicated." He was "touchy feely" and wanted to put his arm around Barr. He was trying to be "buddy buddy" with Barr. Barr "wanted to just decompress" from work and retreated to his office. Defendant attempted to follow. Defendant attempted to engage Barr in a conversation about Barr's relationship with his girlfriend. Barr told defendant to leave his office. Defendant reentered the office several times. Defendant then tried to force the door open and grab Barr and was eventually successful. Barr's girlfriend came out of her room. The altercation continued and started to get loud. Defendant tried to call 911, saying that Barr assaulted him. The police came, told everyone to stay in their own rooms, and left. Before the police got back to their car, defendant was out of his room, "trying to harass" Barr and his girlfriend again. Barr went outside and got the police. They returned, and defendant got combative with them. The police

took defendant away. Defendant returned later that night, and Barr permitted him to go into his room. The next morning, defendant left and Barr changed the locks. He also obtained an order of protection against defendant. Defendant returned that evening with the police to remove his belongings from the apartment.

¶ 9 Irene Clark testified that she was married to the victim in 1992. They separated initially in 2001 and finally in 2004. She described the victim as "friendly," "free hearted," and "very giving." The victim was "peaceful" when he was with her.

¶ 10 Krystal Parks testified that she was tending bar on the night of January 21, 2014. Parks identified defendant and stated that he came into the bar where she was working that evening. Defendant asked for an energy drink. Parks noted "marks" on defendant's face. Defendant paid with a twenty-dollar bill that had wet blood on it. Parks asked defendant if he had other money to pay with, and he said no. Defendant sat at a table and was soon joined by a "younger guy." They came to the bar, and defendant ordered another energy drink while his companion requested a Bloody Mary. Defendant attempted to pay with another bloody twenty-dollar bill. Parks again asked defendant if he had a different way to pay. Defendant opened his wallet and looked through it. He then said that he did not. Parks observed that there was blood on the wallet and on bills inside it. She added that it was a "nice stack" of money. Defendant and his companion left between midnight and 1 a.m., after asking if there were any other open bars in the area.

¶ 11 On cross-examination, Parks testified that the bar was "[n]ot too crowded" that night. She acknowledged that when initially questioned by the police, she said that she did not recall defendant being in her bar. She explained that she "was not sure who [the officer] was talking about." After she learned defendant's name, she searched for it on the Internet. She

"immediately recognized" defendant's picture and called the officer back. While defendant was at the bar, he did not appear intoxicated, was not disruptive, and never consumed alcohol. Defendant's eye was swollen, which appeared to be a fresh wound. The Naperville Police never attempted to collect the bloody money. On cross-examination, she clarified that her initial interaction with the police was by telephone and she was given a description of defendant that she did not recognize. She did not recall defendant until she saw his picture and then remembered him because of the bloody money.

¶ 12 Lieutenant William Kostelny of the Naperville Fire Department next testified for the State. Kostelny testified that he had responded to calls involving gas leaks hundreds of times. He was dispatched to 1148 Vail Court in Naperville, arriving at about 10:30 a.m. on January 22, 2014. The call was for a possible gas leak. On the way to the location, they calibrated gas detection devices. When they arrived, they encountered three individuals in the driveway. One said that gas had been coming from the stove, as a valve had been left open, but it was now closed. Kostelny went in to confirm that the valve was closed. He noted a strong odor of natural gas. He was aware that a police officer was already inside and sent one of his crew, Scott Bostrom, to check the gas level. The residence was a two-story unit that was attached to other units on either side. A gas meter indicated that the gas level on the first floor was 1.7 percent, which was below an explosive range. No carbon monoxide was detected. Bostrom checked upstairs and found the level to be 6.1 percent, which was in the explosive range. Any ignition source could ignite it, including a fire in a toaster. Kostelny noted that the oven in the kitchen was open and there were papers inside of it. There were also papers in a toaster that appeared to have been burned. The oven was on, set at 235 degrees. The cabinet above the toaster was "disfigured" and "the lacquer that was on it was burned through." Kostelny opined that heat

from the toaster would have partially ignited the cabinet. The damage he observed was not caused by smoke alone. The firefighters opened windows on the second floor and used a fan to blow fresh air in though the front door in order to ventilate the residence and allow work to continue inside of it. Bostrom placed four heart monitor leads on the individual lying face down in the bedroom. They indicated that the person "was flatlined."

¶ 13 On cross-examination, Kostelny testified that he never directed the police officer present in the residence to leave due to the level of gas inside. He clarified that it was the oven, rather than the stove, that was on—that is, "[t]he lower part of the unit." On redirect-examination, he stated that he did inform the police officer of the level of gas present and advised that "it was a dangerous situation." The officer stated that it was a crime scene and he wanted to remain inside to ensure that everything was done properly.

¶ 14 The State then called Steven Prosser of the United States Marshals Service. He is "a chief inspector with their technical operations group." In this capacity, he is "both the program and operations manager of all electronic surveillance conducted" in this region. In 2002, he was assigned to the investigative division, where he had been asked on hundreds of occasions to determine the location of a cell phone. The court recognized Prosser as "an expert in the field of cellular site analysis." Prosser reviewed telephone company records pertaining to a cell phone registered to Danita Muren. From 6:46 a.m. to 3:45 p.m. on January 20, 2014, Prosser opined, the phone was in the St. Charles-Geneva-Elburn area. From 4:47 p.m. on January 20, 2014, to 3:59 a.m. on January 21, 2014, the phone was in the Naperville area. The location was consistent with the phone being at 1148 Vail Court. At 5:47 a.m. on January 21, 2014, the phone communicated with a cell tower in the Lockport area, which was no longer consistent with the phone being at 1148 Vail Court. It remained at that location until 10:22 p.m. the same day. This

was consistent with it being at 5 South Elgin Avenue in Romeoville. Between 10:33 p.m. on January 21, 2014, and 1:23 a.m. on January 22, 2014, the phone was in Joliet. At 2:10 a.m., the phone communicated with a tower in the Naperville area. After that, there were several incoming calls, but the phone had either been turned off or had left the covered area. At 4:49 a.m., the phone again communicated with the Lockport tower.

¶ 15 On cross-examination, Prosser agreed that he could not tell if the owner was with a phone. He acknowledged that the sectors that a phone could be in was "relatively large," that is, "miles." He could not say that "this particular phone came out of 1148 Vail [Court] at a particular time." It was not unusual for a cell tower to range "out to about 2 miles," and, in fact, a tower the phone at issue communicated with on January 22 was 3 miles away.

¶ 16 Anthony Cimilluca, a Naperville police officer, next testified for the State. He is assigned as "a detective in Special Operations." On January 23, 2014, at about 10:53 p.m., he assisted other officers in processing defendant at the Naperville Police Department detention area. Cimilluca identified defendant. He brought defendant to the detention center and removed his jacket. It was a black, heavy winter coat. He removed a note and a wallet from the coat, but placed the note back in the jacket. Defendant was then placed in a temporary holding cell. His jacket "went with him." The wallet was given to Officer Reitmeyer. The wallet was admitted into evidence.

¶ 17 Chad Reitmeyer next testified. He is a detention officer with the Naperville Police Department. On January 23, 2014, at approximately 10:40 p.m., he assisted in processing defendant. He took into possession a billfold from Cimilluca. He inventoried the contents of the wallet. There was currency in the wallet that had a red stain on it. He gave the wallet and its contents to E.T. Griffith.

¶ 18 The State's next witness was Michael Caruso, a detective with the Naperville Police Department. He was the lead detective on this case. On January 22, 2014, a 911 call was received from Janice Linear, a neighbor of the decedent. She knocked on the decedent's door and noted an odor of gas coming from the dwelling. Caruso spoke with evidence technicians processing the scene. A notepad had been found with the names of defendant and his mother on it. There were also phone numbers on the notepad. His partner, Detective Arsenault, ran the numbers through some law enforcement databases. One of the numbers was related to defendant. Detective Deuschler attempted to get phone records for that number. She was successful. The records were reviewed by Detective Bissegger.

¶ 19 Caruso next went to a residence in Romeoville. A red Chevrolet Blazer registered to defendant was outside. He "established surveillance" of the residence. At one point, he observed an individual matching defendant's description emerge from the residence. Caruso "broke[] off surveillance" and returned to the Naperville Police Department; other officers continued surveillance however. At about 2:30 p.m., defendant was brought to the police station.

¶ 20 Detectives Arsenault, Prosek, and Sheehan were also present. Defendant was escorted in by Detective Kowal. Kowal gave Caruso defendant's cell phone. Defendant gave consent to search the cell phone. Caruso noted that defendant was wearing blue jeans that appeared to have blood stains on them. He smelled of body odor and walked with a limp. Caruso also noted some minor cuts and bruises. Defendant took off his shirt and showed Caruso what appeared to be multiple bite marks on his back. There were some on both shoulders and some on his lower back. Caruso read defendant his *Miranda* rights. Defendant's interrogation was recorded (both audio and video).

¶ 21 Defendant told Caruso that he first met the victim through a website called easyroommate.com. The victim responded to an ad defendant had placed. On Monday, January 20, 2014, at about 5 p.m., defendant went to 1148 Vail Court to see the room that was available. He and the victim took care of the paperwork concerning the lease. Defendant gave the victim $950. Defendant's initial impression was that the victim was a "really nice guy." The two moved defendant's belongings into the residence. They then went to Sam's Club, and the victim bought some brandy. They also bought some food. Defendant told Caruso that they then returned to the residence and drank the brandy. Defendant stated that he became "wasted" and was "stumbling" and "very drunk."

¶ 22 A recorded portion of the interview was then played for the trial court. Defendant stated that the victim became emotional and started sobbing. The victim told defendant to leave and, when defendant refused, attacked him. In what Caruso characterized as the "first version," defendant stated that he had in no way touched the victim, and the victim attacked defendant. The victim attempted to choke defendant and gouge his eyes. Defendant showed Caruso a bite mark on his arm as well as an eye injury and "some red broken blood vessels." Defendant stated that "he choked the victim out." He did not intend to kill the victim, he stated, but was simply trying to get the victim to stop choking him. Defendant stated that he thought he had bit off the victim's finger. A few minutes later, however, he stated that he did not believe the victim was even bleeding. Defendant took his belongings and left. Defendant intitially claimed that the fight started and ended in the master bedroom. Caruso did not believe defendant's story was consistent with the coroner's report.

¶ 23 Caruso noted that despite defendant claiming that the fight was confined to the master bedroom, there were indications that a struggle occurred in the adjacent loft as well. There was

blood in the loft, and a closet door was off its hinge. Accordingly, Caruso continued to question defendant about the details of the fight. As there was a TV table that appeared to have blood on it lying on the couch and because the autopsy report indicated that blunt force trauma was one of the causes of the victim's death, Caruso asked defendant if he had struck the victim with anything. Defendant initially denied striking the victim with an object, but stated that he kicked the victim in the side and in the head. According to defendant, the fight took about 20 minutes. Defendant was about 5' 11" tall and weighed 150 pounds; the victim was between 6'3" and 6'4" tall and weighed 320 or 330 pounds. After the victim passed out from being strangled, defendant called a friend named Kim (who resided at the residence in Romeoville where defendant subsequently went). He also called his father and another person; however, he never called the police.

¶ 24 Caruso and Arsenault did not believe defendant had not used the table as a weapon, and told this to defendant. The autopsy indicated the victim had been struck on the head, on the "[l]eft top, right about the scalp line." Caruso agreed that he had confronted defendant "for hours and hours and hours and hours," telling him that it did not make sense that the table had not been used as a weapon. Eventually, defendant stated that the victim was sitting in a chair and he struck him with the table. Defendant did not make this admission until the second day of the interrogation. Subsequently, the table was sent to a laboratory and it was determined that there was no blood on it.

¶ 25 Defendant stated that, before leaving, he took $140 of the money he had paid the victim to live there. However, none of the $950 he claimed to have paid the victim was found in the residence. Defendant later admitted to taking more than $140.

¶ 26 Defendant and the detectives discussed the evidence found in the kitchen. Arsenault was aware of a scene in one of the Bourne movies where the protagonist places paperwork in a toaster, turned the gas on, and then started the toaster in order to blow up a building. Caruso asked defendant whether he had seen that movie, and defendant indicated that he had. However, defendant initially denied placing anything in the toaster at the victim's residence. When asked about the papers that were found in the oven, defendant claimed that the victim had put some Clorox Wipes there as "some sort of demonstration of a Myth Busters episode." Later, when told the wipes had a reddish stain on them, defendant stated that he had used them to clean himself and put them in the oven. Caruso testified that defendant stated he wanted to burn the wipes "[t]o cover his, and he basically said, T.R. and did not finish the word." He also admitted placing papers with his mother's credit information in the toaster as well as some papers that had his or his mother's name on them. Defendant also admitted to turning on the gas valves on the stove.

¶ 27 Caruso asked defendant if anything sexual had transpired between him and the victim. Defendant "vehemently denied it for a good portion of the interview." He claimed not to know the origin of the bite marks on his back. Subsequently, defendant related that he and the victim had engaged in "some kind of flirty horseplay." This included the victim touching him. Defendant described sitting next to the victim playing a video game. The victim placed his hand on defendant's leg, and defendant placed his hand on the victim's leg. Further, Caruso stated, "[t]here is some admission to kissing, cuddling, so-to-speak."

¶ 28 Defendant then fell asleep. When he woke up a short time later, the victim had his shirt off and was leaning on defendant. Defendant's pants had been pulled down slightly. Arsenault asked defendant if he wanted to have a rape kit performed. Further, while initially denying that

any sexual penetration occurred, defendant later said that something may have happened while he was asleep.

¶ 29 After the interrogation paused on the first day, Officer Richards took defendant to Edward Hospital in Naperville. The detectives sent defendant to the hospital because they had observed him limping. Defendant agreed to go. Arsenault recommended to defendant that he have a rape kit performed while there, and defendant agreed to this as well. When the interrogation resumed the next day, defendant explained that he had refused the rape kit because he thought it would be pointless, as he had taken a few showers in the interim. The detectives had observed that defendant smelled of body odor. His hair "appeared very greasy and unwashed." Defendant told Caruso that in addition to the papers he burnt in the toaster, he also burned some papers in the attached garage.

¶ 30 Defendant also told Caruso that the victim had "digitally penetrated him via his anus." He stated that they were on the couch in the loft. Defendant became drowsy. The victim leaned over defendant, "stuck his fingers down his pants and digitally penetrated him." Defendant stated that the victim used two fingers. The victim was kissing defendant's back at the same time, though defendant did not think the victim was biting him hard enough to leave any marks. Defendant stated that the victim put his knee in defendant's back while penetrating him.

¶ 31 Subsequently, the detectives again asked defendant whether he had struck the victim with the TV table. Defendant admitted to doing so. Defendant stated that he grabbed the table and hit the victim in the head while the victim was sitting in a chair.

¶ 32 Defendant explained that after the victim penetrated him, the victim went to his bedroom for a while. Defendant was not sure if the victim took a shower, but when he came back out, he had a towel and was wearing shorts. The victim was sitting on his bed, and he called defendant

into the room. The victim was sobbing, and defendant did not know why. The victim kept apologizing. Defendant stated that "[t]hey were kind of consoling each other, had their heads against each other." At some point, the victim became angry at defendant and told him to leave. Defendant refused, saying that he had paid his rent. The victim "got physical" with defendant, but then let him go and went into the loft area. The victim sat in a chair at a computer station. Defendant went to the loft and sat on the couch, which was behind the victim. After about five minutes, defendant related, he "got some balls up" and "wasn't going to take this and took the table and hit [the victim] in the head." Defendant stated that his intent was to "beat the crap out of" the victim. Further, the purpose of starting the fires was to make sure the victim was dead. Defendant got the idea to burn papers in the toaster from a Bourne movie. When confronted with phone records indicating that he returned to Naperville from Romeoville some time after the incident, defendant acknowledged doing so, explaining that he wanted to beat up the victim.

¶ 33 On cross-examination, Caruso stated that he did not recall anyone telling him that a large pair of underwear was found in the residence that appeared to have bloodstains on them. He never asked that such a piece of evidence be tested by the laboratory, though he had the authority to do so. At the time defendant was brought into the police station, Caruso had not yet visited the crime scene. During the interrogation, Caruso told defendant that the victim was a "big drinker," which Caruso was aware of this because the Naperville police had had "numerous contacts" with him that were alcohol related. Caruso spoke with Janice Linear, the victim's girlfriend, on January 23, 2014. She told Caruso that the victim had "problems related to drinking."

¶ 34 Caruso recalled defendant saying that he was drunk during the incident and was "missing some details." They asked defendant whether he was gay. Based on defendant's injuries, they

"thought there was some sort of consensual or forceable [*sic*] encounter." Caruso acknowledged that he lied to defendant during the interview about the victim having had problems "with white males," including "big fights." He also implied to defendant that he or another officer had spoken with the victim despite the fact that the victim was dead. Caruso lied "to see if [he] could get certain information." Defendant told Caruso that he did not call the police because he was scared, as the victim "just tried to *** fucking murder him." Defendant stated that any money he took was his money. Defendant stated that after he had passed out for a short while, his pants were pulled "a little bit down past the butt crack area." When Caruso first asked defendant whether he thought he had been assaulted, defendant answered negatively. Later, when defendant was relating what Caruso termed the second or third version of events, he stated that he might have been assaulted. Caruso asked defendant if he was angry because the victim "didn't show [defendant] none of his slow romance-type thing," and defendant called Caruso a "dick." Defendant stated that he did not get angry with the victim until the victim tried to choke him and gouge his eyes out. Defendant first stated nothing sexual had occurred and later stated that the sexual contact was not consensual. The police took defendant on a walkthrough of the residence.

¶ 35 Despite defendant claiming that he started a fire in the garage, the police could find no evidence of it. Caruso stated that he and Arsenault discussed defendant's body odor and greasy hair at the time of the interrogation, but they did not document it in the police report.

¶ 36 On redirect-examination, Caruso testified that either party could have requested that an item of evidence be tested by the crime laboratory. During the interrogation, defendant stated that he had been choked so hard that he lost his vision. However, in a picture of defendant taken at approximately the time Caruso conducted the interrogation, no bruises could be seen on

defendant's neck. Caruso explained that they pressed defendant on certain points when his earlier statements were not consistent with the evidence found at the crime scene. For example, defendant was insistent that the fight took place only in the master bedroom despite evidence that it also occurred in the loft area (such as the closet door being off its hinges and the presence of blood). On several occasions, defendant admitted to having lied earlier in the interrogation.

¶ 37 The police took defendant to the crime scene for a walk-through, which was videotaped. The recording was played for the trial court. Defendant explained that he and the victim first met in the garage. They took care of the rental paperwork and then went grocery shopping. The victim bought a large bottle of brandy, which defendant described as "bigger-almost juggish." When they returned, they went upstairs and started to drink. At one point, the victim asked if defendant wanted something to eat. They each had a shot and then went downstairs to make chicken.

¶ 38 Defendant identified some marks on a cabinet that were "from the toaster burning." Defendant did not think he had left the stove open when he left. He first turned the knobs for the stovetop on, but realized it was electric, so he turned the broiler on before he left.[1]

¶ 39 Defendant stated that he was eating chicken in the kitchen. He stepped away to make a phone call. When he returned, the victim had a shot prepared for him. They went back upstairs.

¶ 40 Defendant stated that he had placed rental paperwork and Clorox wipes in the stove. He had used the wipes on his face and body. He had not tried to wipe away any fingerprints. Defendant placed some paperwork in the toaster, turned it on, and then sat at the kitchen table for

[1] The conversation seems to move from topic to topic and is not necessarily based on the chronology of events on the night of the incident. We reproduce it here as it occurred during the walkthrough.

10 minutes until the toaster was done burning. Defendant acknowledged that there were some burns on the cabinetry caused by the fire.

¶ 41 After they went back upstairs, defendant was playing a videogame. Defendant got "drowsy, like really tired, really fast." Defendant stated that the victim sat down next to him. It was about 10:30 or 11 p.m. When defendant awoke, the victim's shirt was off and he had changed from sweat pants to "swim shorts kind of." They watched an episode of "It's Always Sunny in Philadelphia." The victim "was kind of like touchy feely a little bit and [defendant] wasn't saying no to it." The victim placed defendant's hand on his thigh, but defendant "didn't do anything with it." Defendant started dozing off again. The victim pulled defendant over and placed his knee on defendant's back. Defendant tried to "wiggle free" but could not, as the victim was "a lot heavier" than defendant.

¶ 42 Defendant then provided the following narration of what occurred next:

> "Um after stopping the fight and saying I couldn't breathe-well eventually I stopped yelling and said I couldn't breathe, lay off. He laid off and told me to put my hands under my stomach. And then from there, he started to kind of lift up my shirt and feel my back and um he kissed-he actually kissed me once on the neck, kind of lifted up, lifted up my shirt. You know, just started feeling it and as he did that, he went under, kind of like where my underwear or hands were around my stomach. He pulled the belt open to loosen up my jeans, pulled my pants down, and started to kind of, started to kind of finger my, my uh ass hole. Um it wasn't like too hard at first but um after he did that enough, he proceeded to kind of bite my back. Like he kneeled down and held my arm, like with the shirt he held up, the arm, he was holding down my neck and biting my neck and um after about 3 minutes, he stopped and um he said he'll, he said he's going to be

> right back after that though. Well after that, he was done. He said he like it feels lose enough. He got up um and like did a massage on my neck. And then walked over to the um, walked over and I guess he um took a shower. He just um pulled up my pants. He sat up, and I was um I don't know. I was kind of dazed. I just kind of zoned out, considering I had just talked to you about-I guess it was a lot of feelings. Yeah hold on a second. With this-."

One of the officers then asked defendant if he needed to take a break and catch his breath. Defendant answered affirmatively.

¶ 43 Defendant continued: "[W]ell after I was just sitting there, zoning out. Really, all a mix of um, I was a little bit afraid. A little bit angry." The victim asked defendant to come into the master bedroom and grabbed defendant's arm, tugging him down. The victim then started crying. The victim told defendant to leave. Defendant stated that he had already paid his rent. The victim grabbed defendant by the throat and pushed defendant's head against something. He let defendant go.

¶ 44 Defendant was sitting on a futon; the victim sat on the chair by the computer. Defendant was "pretty sure he was masturbating over there." The victim was looking at the computer with his back to defendant. After a "couple of minutes," defendant decided that he "wasn't going to do this." Defendant added, "[I]t's a fight or flight moment," and "I chose to fight." Defendant picked up the "wooden stand up table." Defendant walked over to the victim and said something. The victim "kind of looked," and defendant hit him with the table. Defendant stated he was "pretty sure" he hit the victim in the back of the head. However, he added: "I was really drunk. I was kind of dozing off, and it was kind of all in the moment." He only struck the victim once. The victim fell backward. The victim tried to tackle defendant, and defendant hit him in the area of the face. The victim tried to strangle defendant and gouge his eyes. Defendant tried to bite the victim's fingers. The victim

alternated between attacking defendant's eyes and throat. Defendant tried to block the victim and also tried to strangle the victim with his left hand. Defendant was eventually able to "squirm away." He managed to place the victim in a choke hold. Defendant maintained the hold until the victim stopped struggling. Defendant thought the victim had been "knocked out." Defendant sat down for 20 seconds. He kicked the victim a few times. Defendant found the money he had paid for rent and took it. It was bloody. Defendant took his personal belongings to his car.

¶ 45 Dr. Michael Joseph Hartmann also testified for the State.[2] Hartmann works in the emergency room at Edward Hospital. On January 24, 2014, at about 1:44 a.m., Hartmann was on duty. At that time, he first saw defendant, who was in police custody. Defendant reported that he was experiencing knee pain. Defendant stated that he was injured in an altercation on Monday evening. Defendant also told Hartmann that he believed he had been drugged and raped. Defendant stated that he had woken up with his pants partly off. Furthermore, it hurt to have a bowel movement. He first experienced this pain on Monday evening. Hartmann asked defendant how many times he had showered since the altercation, and defendant replied, three. Hartmann offered to perform a rape kit. Initially, defendant was agreeable "and was requesting the rape kit in my initial contact with him." Hartmann testified that it was defendant who first requested the rape kit. Hartmann then explained what the rape kit would entail and what sort of evidence would be collected. Subsequently, defendant declined to undergo the rape kit. He told Hartmann that he thought it would be "pointless." Hartmann offered "to perform a complete examination including a rectal examination." Defendant declined this examination as well.

[2] Hartmann actually testified out-of-order, in the middle of Caruso's testimony. For the sake of continuity, we recount this testimony here.

Defendant did not tell Hartmann how the rape occurred, and he only complained of his knee injury. Hartman characterized defendant's demeanor as awake, alert, but reserved.

¶ 46 On cross-examination, Hartmann stated that he "believed" that defendant also told a nurse that he had been drugged and raped. During the visit, defendant remained handcuffed and a police officer was present. Hartmann did not see defendant without his shirt on. He did not conduct a full-body examination. Hartmann did not recall having any conversations with the police officer who brought defendant to the emergency room. Prior to the examination, Hartmann had been made aware that defendant was "brought in on suspicion of homicide."

¶ 47 On redirect-examination, Hartmann stated that he explained "all that happens as far as how to proceed with a rape kit." He also specifically explained "what kind of evidence collection would be done." Hartman testified that a rape kit entails the collection of potential DNA evidence and physical evidence on the patient, including hair, semen, blood, saliva, and urine from the mouth, anus, and urethra. On recross-examination, Hartmann stated that he told defendant that it would entail conducting "a full examination of his rectal area," including swabs.

¶ 48 Dr. Hilary S. McElligott also testified for the State. She is the chief forensic pathologist for Du Page County. The trial court recognized McElligott as an expert in the field of forensic pathology. She performed an autopsy on the victim. McElligott noted signs that the victim had been strangled. She observed hemorrhages in the whites of his eyes and in the mucosal surfaces. There was deep purple bruising across the victim's neck as well as "linear and semicircular abrasions." Further, there were subcutaneous hemorrhages in the neck muscles. The hyoid bone was fractured, and there was bleeding into areas proximal to the neck.

¶ 49 McElligott testified that she also observed abrasions across the front of the victim's head, at the hairline. There were scratches on his forehead and the side of his head. She noted that

some of the injuries formed a straight line, indicating that "some sort of object that had a straight edge or line to it may have impacted that part of the head." There was a hematoma underneath these injuries. She found multiple areas of bleeding underneath the scalp. There was bruising and swelling around the victim's eyes. His lower lip was swollen and bruised. She also observed injuries to the victim's left ear, chest, back, knees, hands (including bites), and tongue (also a bite mark, probably self-inflicted). There were two deep tearing injuries on the victim's right thumb, and abrasions and a tear on his right pinky. These were consistent with human bite marks. There were similar injuries to the victim's left hand and thumb. The left index finger's nail was gone. There were biting injuries to the fingers.

¶ 50 McElligott opined that the cause of the victim's death was strangulation. The injuries around the victim's neck indicated that sustained force had been applied. Further, she opined that "[m]ultiple blunt force trauma" was a contributing cause. She believed the significant blunt force injuries he had suffered made him more susceptible to strangulation. Further, the injuries to the victim's head were consistent with being hit with a hard object. McElligott opined that the force necessary to produce such injuries was "significant." Moreover, there were several "points of trauma" indicating "several impact points." McElligott identified a number of autopsy photographs.

¶ 51 On cross-examination, McElligott testified that the victim weighed 291 pounds and was six feet and four-and-a-half inches tall. The condition of the body indicated that the victim had been "in some sort of struggle or fight." The injuries she observed around the victim's neck could have been caused by hands or by a "choke hold." McElligott stated that the victim's blood-alcohol-content was .167. She did not recall finding any evidence that the victim had consumed other drugs. She observed a fatty liver, which is consistent with alcoholism and heavy

drinking. There was no evidence that the victim had been strangled with a ligature. None of the victim's fingers were missing. The tip of one thumb was missing, and this would cause a lot of bleeding. She did not find any injuries to the back of the victim's head. Some of the head injuries were consistent with being struck by a fist. There was no bleeding into the brain or swelling of the brain. She examined the table found at the residence and estimated it weight 12 to 15 pounds.

¶ 52 On redirect-examination, McElligott testified that the table could have caused the injuries she found on the victim's head.

¶ 53 The State also called Steve Baker, a detective with the Naperville Police Department. He is assigned to the "high tech crimes unit as a digital forensic examiner." The trial court recognized him as an expert in the field of digital forensic analysis. On January 23, 2014, he was sent to 1148 Vail Court "to evaluate that scene for any potential digital evidence." His partner, Detective Dan Ragusa, was also present. They examined the computers in the loft area. When they brought the computer out of sleep mode, a YouTube web page was displayed. There was a search result for "a Hannibal related term, 'vie cor meun hannijbalb.' " Baker also examined a Dell laptop computer. An email program on the computer used an address of grantmuren@aol.com. Other accounts used defendant's name or initials. The last time the computer had been accessed was January 13, 2014. Other files contained documents, such as defendant's resume and a letter of recommendation for defendant. There were also banking documents with defendant's name on them. Baker "located searches related to Hannibal and Hannibal-related type searches" in February and March of 2013. One search was for "vie cor meum Hannibal."

¶ 54 Baker identified the computer at 1148 Vail Court as belonging to the victim. The misspelled search for "vie cor meun hannijbalb" was performed on January 20, 2014, at 11:47 p.m. Baker examined other electronic media belonging to the victim and could find no Hannibal related material.

¶ 55 Baker also examined an LG cell phone belonging to defendant. The parties stipulated that the phone contained phone listings for Charles Clark (listed as "Charles Xavier" on defendant's phone), Danita Muren (listed as "Mom"), Al Muren (listed as "Papa Al"), James Muren (listed as "Dad"), and Kim Abdelmalak. Baker documented several incoming and outgoing calls. On January 21, 2014, at 1:49 a.m., defendant called "a contact named Kim." At 2:06 a.m. that day, he called "a contact labeled as F.R." At 3:39 a.m. on January 21, 2014, he received a call from "Dad." Twenty minutes later, defendant called "Dad," and he did so again at 4:07. At 4:07 a.m., he called "Papa Al," and at 5:47 a.m., there is an incoming call from "Dad." "Mom" called defendant at 8:02 a.m. on January 21, 2014. "Dad" called a 2:47 p.m. that day. At 3:23 p.m., defendant texted Mom, "I am fine, nothing happened." Defendant called "Charles Xavier" (the victim) at 3:37 p.m. on January 21, 2014. Defendant called the "Charles Xavier" listing six more times that day. At 7:11 p.m. on the same day, defendant texted "Papa Al" and stated, "Call me. I need your help and I am willing to pay for it." "Mom" texted defendant at 8:48 p.m. on January 21, "Glad everything is okay. Try to call you tomorrow."

¶ 56 On cross-examination, Baker agreed that the Hannibal-related search results on the computer at 1178 Vail Court were related to music, trailers, and movie scenes. He did not open all of them. Baker did not know who actually performed the search. Baker agreed that the computer station did not appear to be disturbed or displaced in any way. He first arrived at the residence at about 1:45 p.m. on January 23, 2014.

¶ 57 Following Baker's testimony, the State then called Daniel Ragusa, a Naperville detective. He is an investigator with the high tech crimes unit. Ragusa is Baker's partner, and he arrived at 1148 Vail Court at the same time Baker did. He testified consistently with Baker as to the condition of the computer in the loft area, including the contents of the monitor's screen when the computer was taken out of sleep mode. His testimony was largely corroborative of that of Baker, in material aspects. Ragusa testified regarding some searches pertaining to "the Jason Bourne movies." Over a defense objection, Ragusa responded to the following query: "And in your review of the Bourne movie series, did one of the movies feature a scene that had similarities or appeared to be relevant to your investigation of the scene at 1148 Vail Court?" Ragusa described the scene: "There was a magazine placed in the toaster and was pressed to start the magazine on fire." The scene was then played for the trial court. Ragusa also testified that "vie cor meum" means "see my heart." Ragusa viewed a video file taken from the computer found at 1148 Vail Court, which was also played for the trial court.

¶ 58 On cross-examination, Ragusa acknowledged that he did not know whether anyone actually played the "clips" that were up on the screen when they took the computer out of sleep mode at 1148 Vail Court. He did not see the clip concerning "vie cor meum" until the day before the trial at the request of the State.

¶ 59 Officer Elizabeth Guerrero-Davis also testified for the State. She is the supervisor of the crime scene unit of the Naperville police department. On January 22, 2014, she was assigned to process the crime scene at 1148 Vail Court. She arrived at about 10:45 a.m. The residence is a townhouse that is part of a four-unit structure. It took three days to process the scene. She identified a number of exhibits, which were entered into evidence. One picture shows a bottle of lighter fluid in a kitchen cabinet.

¶ 60 Defendant called a number of witnesses that addressed previous incidents the victim had been involved in, as it pertained to his character. We will summarize this testimony. Alfred Setian testified that he was working as a cab driver in June 1991 and picked up the victim from a wedding reception. After a verbal conflict, the victim threatened, struck, and choked Setian with a belt. He then drove off in the cab after Setian left the vehicle. Bernard Keegan, a Naperville police officer, testified that he arrested the victim in June 2005 for driving with a revoked license and domestic battery of his mother. Officer Shawn Moy testified that he was dispatched to 1148 Vail Court to check on the victim, who was limping after having fallen down. It appeared defendant had been drinking. Vincent McCants, the victim's neighbor, testified that he knew the victim to drink Christian Brothers Brandy and that "[e]very time he went to the store, he bought a half a gallon." When the victim was drunk, he was "belligerent," "real loud, [and] real aggressive." A few days prior to January 22, 2014, he heard the victim arguing with his girlfriend—he was loud and was cursing. McCants added that they argued a lot and the victim was "very loud."

¶ 61 Dijon Mitchell, the victim's nephew, testified that on July 31, 2006, the victim attacked him in the bathroom, putting him into a chokehold until Mitchell briefly lost consciousness. The victim was drinking brandy and cognac (E&J and Hennessy). The victim called his nephew "bitches and motherfuckers." Mark Samel testified that he witnessed the victim, who was driving, strike a female in the passenger seat of a car several times. Miguel Cortez testified that, on June 3, 2012, he was behind a taxi parked in front of a Sam's Club. The passenger was talking with the cab driver. Cortez beeped his horn. The passenger (the victim) approached Cortez's truck and banged his fists on the hood. He then followed Cortez to a parking space and punched the driver's side window. The victim also tried to pull Cortez's three-year-old daughter

from her car seat. Officer Greg Rink testified that he arrested the victim based on the incident to which Cortez had testified. Keith Nealy, a former friend of the victim, testified that he filed a police report after the victim choked and kicked him, in an attempt to show him some martial arts moves.

¶ 62 The defense called Eric Richards, a Naperville police officer. He transported defendant to Edward Hospital in the early morning of January 24, 2014. He was present during Hartmann's examination of defendant. Defendant told Hartmann that he did not want to undergo the rape kit examination because he "did not want to humiliate himself any further." On cross-examination, Richards testified that defendant made this decision after Hartmann had explained "all of the evidence collection that could be done in this case."

¶ 63 Janice Linear testified that she had been the victim's girlfriend since about 2009. She knew the victim to drink "quite a bit." His favorite drink was E&J Brandy. He would drink at least four days per week. The victim would drink to the point he became intoxicated, and his demeanor would change. He would become angry and "would get mean." Sometimes he got loud, and sometimes he would cry. He would become "aggressive" and "start hollering." Linear recalled an incident where the victim had been drinking brandy heavily and fell down the stairs. On cross-examination, Linear testified that the victim "drank a lot and became intoxicated frequently." He also called the police frequently when he was intoxicated. She testified that the victim was in "[o]kay health." He did not work out, but he could "move quickly" and was "fast when he would walk."

¶ 64 Defendant next called Sharon Mussatto-Roscher, his maternal aunt. On January 23, 2014, Mussatto-Roscher was living in North Carolina. However, on that date, she was in the Chicago area on business. She had some free time, so she called defendant to arrange to meet for

lunch. Defendant texted her an address in Romeoville, where he was staying. She picked defendant up there. She noted that defendant was "visibly injured." Defendant was "hobbling" and "walking with a cane." She had never seen him use a cane previously. Defendant was bruised, had a torn lip, his clothes were dirty, and it was difficult for him to sit down. Mussatto-Roscher noted blood pooling in the whites of defendant's eyes. Defendant was "quiet but upset." Mussatto-Roscher stated, "[I]t seemed to me, like, to me, that he had been through something pretty traumatic." As they began to drive off, her car was stopped by Naperville police officers and defendant was taken into custody. On cross-examination, Mussatto-Roscher testified that she did not notice that defendant's jeans were bloody. She added, "It looked like dirt to me."

¶ 65 Defendant next called Officer Richard Arsenault. Arsenault testified that he is a "violent crimes detective" for the city of Naperville. He became involved in the investigation into the victim's death on January 22, 2014. Caruso was also assigned to this case. Arsenault acknowledged that if he told defendant that Arsenault had been to the crime scene prior to the interrogation, it was a lie. He did not recall doing so, but stated that if it was on the video recording of the interrogation, then he did so. Arsenault testified that he asked defendant if he had struck the victim with a table more than one time.

¶ 66 Arsenault was present when defendant was taken for a walkthrough of the crime scene. Despite defendant's claim that he started a fire in the garage, Arsenault did not bring him there, as there was no evidence to support this claim. Throughout the walkthrough, defendant made "continuing comments about [the victim] giving him shots [of alcohol]." Arsenault described his recollection of the walkthrough. He did not direct anyone to have the victim's underwear sent for testing.

¶ 67 On cross-examination, Arsenault testified that when defendant was brought into the police station, he was wearing bloody pants, he looked and smelled dirty, and his hair was greasy. It did not appear that he had showered recently. After initially denying starting a fire in the victim's residence, defendant eventually admitted that he stuffed papers in the toaster and caused a fire. Defendant also first stated that his fight with the victim occurred exclusively in the master bedroom but later changed his story. Similarly, defendant first asserted that the victim put the Clorox wipes in the oven and later admitted to doing it himself. Defendant was, at first, adamant that nothing sexual had occurred but later stated that it did. Defendant stated that he was "stumbling" drunk during the course of the evening on which the fight occurred.

¶ 68 Defendant recalled Dr. McElligott. She testified that there were no injuries to the back of the victim's head. Further, the marks on defendant's face and neck could have been made by fingernails. On cross-examination, she stated that there were no open wounds to the back or sides of the victim's head. The wounds on the victim's head were consistent with being hit by a hard object. On redirect-examination, McElligott clarified that there were neither internal nor external wounds to the back of the victim's head.

¶ 69 Defendant also recalled Caruso to testify. He stated that he "[had] been made aware that, say, cannabis stays in someone's system for a month, approximately" and "[o]ther drugs, such as cocaine, maybe a day or two." How long a drug stays in one's system depends on the type of drug. He admitted not knowing how long a barbiturate would stay in a person's system.

¶ 70 The trial court watched the recording of defendant's interrogation as well. At one point, Caruso asked defendant about medications, and defendant states that he took Klonopin on the night of the incident. The foregoing summary of the record is provided to facilitate an

understanding of the issues that follow. Additional evidence will be discussed as it pertains to the issue presented in this appeal.

¶ 71 The trial court began its ruling by finding defendant guilty of aggravated arson and residential arson; further finding that these charges merged. It found that the State had not carried its burden of proving defendant guilty of the charge of concealing a homicidal death, as it was not established that defendant knew the victim was actually dead. Given that defendant took back his own money after the fight and that doing so was "an afterthought," the trial court found defendant not guilty of robbery.

¶ 72 Regarding the homicide counts, the trial court began by noting that both defendant and the victim were "extremely intoxicated." It noted that defendant "gave a bunch of different versions of what happened." It found that the victim was the initial aggressor in the conflict. Moreover, the trial court observed, there was "evidence in this case [showing] that [the victim is]" loud, aggressive, belligerent, and mean when he is intoxicated. The trial court chronicled the testimony concerning the numerous aggressive events the victim had been involved in. It noted that his girlfriend acknowledged that the victim was mean when he drinks. According to the trial court, the Naperville police apparently had an extensive history with the victim. The trial court acknowledged that, as even defendant stated, when he was not drinking, the victim was "affable." However, the autopsy revealed that the victim's blood-alcohol content was "twice the legal limit to drive," which indicates he was intoxicated during the incident.

¶ 73 The trial court then observed that "[s]elf-defense is recognized in Illinois as a legal defense." Once the defense is raised by a defendant, the burden rests with the State to prove, beyond a reasonable doubt, all of the elements of murder and also that the murder was not carried out in self-defense. To successfully raise this defense, the trial court explained, a

defendant must introduce evidence on each of the following elements: that force was threatened against the defendant; that the defendant was not the aggressor; that the danger was imminent; that the threatened force was unlawful; that the defendant actually, subjectively believed that a danger existed necessitating the use of force; and that the defendant's belief was reasonable. If the State negates any one of these elements, the defense is not available to the defendant.

¶ 74 The trial court next found that the State had carried its burden of proving first degree murder. The trial court did not discuss the elements in detail. The trial court then discussed second degree murder, as it pertained to this case—that is, the doctrine sometimes referred to as imperfect self-defense. In accordance with that doctrine, first degree murder is mitigated to second degree murder if a defendant has an honest but unreasonable belief that the circumstances would justify the killing. A defendant has to prove this proposition by a preponderance of the evidence, the trial court explained. Given the victim's "violent past" along with similarities between past incidents the victim was involved in and the events that took place in the present case, the trial court found that this burden had been met. It further expressly found that defendant's belief was not reasonable, "because there was [*sic*] other steps that he could have taken." The trial court did not identify what these "other steps" were.

¶ 75 Defendant was sentenced to 14 years' imprisonment for second degree murder and 6 years' imprisonment on the arson count, running consecutively. This appeal followed.

¶ 76 III. ANALYSIS

¶ 77 On appeal, defendant raises five main issues. First, defendant asserts that the State did not disprove his self-defense claim beyond a reasonable doubt. Second, he argues that his due process rights were violated where an allegedly deceptive statement by a police officer "effectuated that loss of potentially exculpatory blood screen evidence." Third, defendant

alleges error in the trial court's disregard of his desire to proceed *pro se*. Fourth, he claims that the evidence was insufficient to convict him of either arson count. Fifth, he contends that the trial court erred in considering a movie clip from The Bourne Supremacy. We disagree with defendant's arguments, save for the second, which we find better suited to postconviction proceedings.

¶ 78 Two arguments raised by defendant implicate the sufficiency of the evidence. When a defendant challenges the sufficiency of the evidence upon which his or her conviction is based, "we construe all of the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2015 IL App (1st) 131873, ¶ 12. Further, the weight to be attributed to testimony of witnesses, their credibility, and what reasonable inferences are to be drawn from evidence, are all matters for the trier of fact in the first instance. *Id*. We will reverse a criminal conviction only if "the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id*. It is not our role to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Circumstantial evidence may be considered and given whatever weight it is due. *Id*. Finally, it is well settled that we review the result at which the trial court arrived and not the reasoning that produced it. *People v. Primbas*, 404 Ill. App. 3d 297, 301 (2010).

¶ 79 Matters committed to the trial court's discretion, such as evidentiary issues, are reviewed for an abuse of discretion. *People v. Johnson*, 385 Ill. App. 3d 585, 596 (2008). An abuse of discretion occurs only if no reasonable person could agree with the trial court. *People v. Farris*, 2012 IL App (3d) 100199, ¶ 26. Questions of law, of course, are reviewed *de novo*. *People v.*

Johnson, 206 Ill. 2d 348, 359 (2002). With these standards in mind, we now turn to defendant's arguments.[3]

¶ 80 A. SUFFICIENCY OF THE EVIDENCE: SELF-DEFENSE

¶ 81 We will first address defendant's argument that the State failed to disprove his claim of self-defense beyond a reasonable doubt. Self-defense is an affirmative defense. *People v. Olaska*, 2017 IL App (2d) 150567, ¶ 143. Thus, before self-defense is even considered, the State must prove the defendant guilty of first degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 118 (1995). To raise self-defense, a defendant must present some evidence on each of the following elements:

> "(1) force had been threatened against defendant; (2) defendant was not the aggressor; (3) the danger of harm is imminent; (4) the force threatened was unlawful; (5) defendant actually believed that a danger existed, that force was necessary to avert the danger, and that the amount of force he used was necessary; and (6) that the beliefs were reasonable." *People v. Willis*, 217 Ill. App. 3d 909, 917 (1991).

Once a defendant successfully raises the issue, the burden is on the State to prove beyond a reasonable doubt that defendant did not act in self-defense. *Olaska*, 2017 IL App (2d) 150567, ¶ 143. If the State negates any one element, the defense fails. *Willis*, 217 Ill. App. 3d at 917-18. Further, if the elements are otherwise met, but the defendant acted with an actual though *unreasonable* belief that his or her actions were justified, the defendant is guilty of the lesser offense of second-degree murder, which is sometimes called imperfect self-defense. *People v.*

[3]We note that at times, defense counsel does not provide pinpoint citations to the authorities relied upon. Pinpoint citations are helpful to the court and remove any ambiguity as to what portion of a case a party intends to rely upon.

Castellano, 2015 IL App (1st) 133874, ¶ 148. This issue presents a question of fact, so review requires us to take all evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v. Young*, 347 Ill. App. 3d 909, 920 (2004).

¶ 82 Defendant notes that the trial court found that he actually believed that the circumstances were such that he was justified in his use of force against the victim. The question before us, then, is whether the trial court properly found that this belief was not reasonable. In arguing that it was reasonable, defendant first points to the extensive evidence regarding the victim's history of violence. He notes that he was the only witness to his altercation with the victim. He further notes that the victim was much larger than him and was intoxicated. Moreover, the victim digitally penetrated him. Further, defendant asserts, the similarities between some of the victim's past violent acts and the events at issue here enhance defendant's credibility. Essentially, the evidence defendant relies on indicates that the victim was a dangerous person. It does not, however, explain why defendant's use of force was reasonable. The trial court noted that defendant could have taken other actions to protect himself.[4] The availability of other options militates against a finding that a use of potentially deadly force was reasonable. See *People v. Martinez*, 4 Ill. App. 3d 1072, 1076 (1972) ("Although there is no duty to retreat in the face of a wrongdoer [citation], the ease of the defendant's escape from his assailants, the time he had to open the door of his car and take his gun from under the seat, the distance between the two automobiles, and the advantage obtained by the defendant when he possessed a loaded

[4] Defendant contends that the trial court erroneously imposed upon him an obligation to retreat. We will address this argument later.

shotgun while his supposed assailants were unarmed, would support the conclusion that he was unreasonable in believing that he had to use such deadly force to defend himself.").

¶ 83 Indeed, we note that defendant took no steps to protect himself after the victim left the room and apparently showered. Defendant states he was sexually assaulted, but did not call the police despite being left alone and having an opportunity to do so. Prior to the killing, the victim actually directed defendant to leave and defendant declined, explaining that he had already paid the rent. We also note that defendant armed himself by picking up a table. He then approached the victim from behind and struck him. Further, that defendant related several, not entirely consistent versions of events to the police during his interrogation undermines his credibility (at this stage of the proceedings, as noted above, we must construe the record in the State's favor).

¶ 84 In sum, defendant has not convinced us that his decision to strike the victim from behind with a table was reasonable under the totality of the circumstances.

¶ 85 Defendant contends that by finding that there were "other steps he could have taken," the trial court improperly imposed a duty to retreat upon him. We see no basis for this assertion. Here, defendant successfully interposed an imperfect self-defense theory, resulting in a conviction for second degree murder rather than first degree murder. If the trial court believed defendant had a duty to retreat that he did not fulfill, it would not have found the imperfect self-defense theory applicable, as the only difference between self-defense and imperfect self-defense is the reasonableness of a defendant's belief in the necessity of acting to defend oneself. *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 39 ("Second degree murder is a "lesser mitigated offense" of first degree murder and is distinguished from self-defense only in terms of the nature of the defendant's belief at the time of the killing."); see also *Commonwealth v. Rivera*, 983 A.2d 1211, 1224 (Penn. 2009) (holding that "a claim of imperfect self-defense must satisfy all the

requisites of justifiable self-defense (including that the defendant was not the aggressor and did not violate a duty to retreat safely), with the exception that imperfect self-defense involves an *unreasonable*, rather than a reasonable, belief that deadly force was required to save the actor's life" (emphasis in original)); *People v. Hardin*, 102 Cal. Rptr. 2d 262, 268 (Cal. App. 2000) (holding imperfect self-defense not available where the defendant had and did not fulfill duty to retreat).

¶ 86 More fundamentally, the trial court found that defendant could have taken "other steps." It did not find that defendant should have left the residence. Calling the police, for example, would have prevented the need for the use of potentially deadly force without requiring defendant to retreat. Hence, we find defendant's argument on this point ill taken.

¶ 87 To conclude, we hold that the record adequately supports the trial court's finding concerning imperfect self-defense and the trial court did not improperly impose upon defendant a duty to retreat.

¶ 88 B. THE ALLEGED LOSS OF POTENTIALLY EXCULPATORY EVIDENCE

¶ 89 Defendant next argues that an intentional misrepresentation by Caruso caused him to forego having his blood tested which led to the loss of potentially exculpatory evidence, thus violating his due process rights. During the interrogation, defendant, after suggesting that the victim had drugged him, asked Caruso how long such drugs would remain in a person's system. Caruso replied: "Day. Couple days." Defendant then stated, "I was gonna say, maybe I could do a blood test to find out." Caruso answered, "That's why, like, right when this happened, if you would've come to us, we would've—that would've been one of the first questions we asked you. Specifically, knowing what we know."

¶ 90 However, at trial, Caruso was asked, "Do you have an understanding as to how long barbiturates may stay in one's system?" He replied, "I do not." Defendant asserts that this testimony indicates that Caruso was lying during the interrogation. Defendant argues that "Caruso made a material representation to [him] that drugs used to 'spike' another's drink leave the system in a day or a couple days." Indeed, as Caruso admitted that he did not know how long barbiturates remained in a person's system, it is hard to attribute to these statements by Caruso some purpose other than to dissuade defendant from seeking a blood test.

¶ 91 Defendant further claims that a drug screen that was positive for barbiturates would have allowed him to interpose an involuntary-intoxication defense. See *People v. Brown*, 98 Ill. App. 3d 852, 857 (1980). Defendant asserts that "[e]vidence of a drugged condition or involuntary intoxication could have been effectively connected to statements [he] made during the walkthrough and to healthcare providers in order to prove that [he] acted unknowingly and unintentionally." He points out that he told the police that he started to get "tired really fast" shortly after drinking a shot the victim had given him. He described not being aware that the victim sat down next to him, despite the victim's size and weight. Defendant further stated he was "dazed" and "zoned out" after the victim allegedly assaulted him.[5]

[5] We note that at oral argument the State asserted that defendant's admission that he had taken Klonopin prior to his confrontation with the victim defeats any claim of involuntary intoxication. We fail to see how this would render it impossible for the victim to have further drugged defendant; indeed, that defendant had previously taken a different drug may very well have made him more susceptible to the effects of a second drug, and it is axiomatic that one takes one's victims as one finds them (*People v. Brackett*, 117 Ill. 2d 170, 178 (1987)).

¶ 92 The State first counters that this issue is forfeited. It points out that defendant did not preserve it properly during proceedings below. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Moreover, defendant did not ask that we conduct plain-error review in his opening brief; however, he does address it in his reply brief. Our supreme court has held that "although [a] defendant did not argue plain error in his opening brief, he has argued plain error in his reply brief, which is sufficient to allow us to review the issue for plain error." *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010); see also *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 15. Thus, plain error review is available here. Of course, for plain error to exist, there must first be error. *People v. Lewis*, 234 Ill. 2d 32, 53 (2009).

¶ 93 In this case, it is not known whether the results of a blood test would have supported defendant's position, thus we are dealing here with evidence that is only potentially useful to defendant. In such circumstances, *Arizona v. Youngblood*, 488 U.S. 51 (1988), controls. See *People v. Sutherland*, 223 Ill. 2d 187, 236 (2006). In *Youngblood*, 488 U.S. at 52-54, the defendant allegedly kidnapped and sexually assaulted a minor and the State failed to refrigerate the victim's clothing or promptly test stains on it. The defendant was convicted solely based on the victim's identification. Hence, testing the stained clothing might have exonerated the defendant. The Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. As there was no evidence of bad faith in *Youngblood*, the Supreme Court found no due process violation. *Id*.

¶ 94 We note that the duty *Youngblood* imposes on the State is a duty to *preserve* evidence. *Id*. The State is under no duty to *gather* evidence. See *Miller v. Vasquez*, 868 F. 2d 1116, 1119 (9th Cir. 1989); *cf. Youngblood*, 488 U.S. at 58-59 (holding that due process imposes upon the

police no duty to employ any particular investigatory tool). In this case, the State never had possession of the evidence defendant now claims it failed to preserve. Defendant cites nothing to support the proposition that the State had a duty to preserve evidence it did not possess, or, alternatively, that Caruso's actions somehow implicated the duty to preserve evidence. The weight of authority does not support defendant's position.

¶ 95 Quite simply, the State cannot preserve what it does not possess, so the duty to preserve is limited to evidence in the State's possession. *People v. Hall*, 235 Ill. App. 3d 418, 424-25 (1992) ("We recognize that it is the State's duty to zealously protect evidence in its possession, and the record must be carefully scrutinized for evidence of bad faith where relevant materials are alleged to be lost or destroyed."); see also *People v. Nunn*, 2014 IL App (3d) 120614, ¶ 35 (Schmidt, J., dissenting) ("The majority cites no case law for the proposition that the police have a duty to preserve evidence which they do not, and never did, possess."). Numerous cases have come to similar conclusions. See, *e.g.*, *United States v. Thomas*, 61 F. Supp. 3d 1221, 1225 (D.N.M. 2014) ("Framed in this manner, *Trombetta* and *Youngblood* are best read as regulating government conduct only with respect to the evidence it possesses; precedent does not require that the government serve as investigator for the defendant."); *Magraw v. Roden*, 743 F.3d 1, 7 (1st Cir. 2014) ("A pair of Supreme Court decisions [(*Trombetta* and *Youngblood*)] speak to the dimensions of a defendant's rights when requested evidence, formerly in the government's possession, is lost, destroyed, or otherwise unavailable."); *People v. Webb*, 862 P.2d 779, 795 (Cal. 1993) ("The due process principles invoked by defendant are primarily intended to deter the police from purposefully denying an accused the benefit of evidence that is in their possession and known to be exculpatory."); *March v. State*, 859 P.2d 714, 716 (Alaska Ct. App. 1993) ("The state's duty to preserve evidence that is discoverable by the defendant 'attaches

once any arm of the state has first gathered and taken possession of the evidence in question.' [Citations.] In this case, the state never had possession or control of any items that might have been found at the kill site, so the duty to preserve evidence was never activated.").

¶ 96 In *State v. Krosch*, 642 N.W.2d 713, 718 (Minn. 2002), the Minnesota Supreme Court considered whether the State's failure to test the defendant's blood-alcohol content violated due process where the defendant interposed a voluntary-intoxication defense to two murder counts. The defendant had been apprehended while driving, several hours after a pair of shootings, and smelled of alcohol. The police decided it was not necessary to test the defendant's blood-alcohol content, as the crimes he was suspected of were shootings. After noting the rule set forth in *Youngblood*, the court held, "The state's duty to preserve evidence exists only with respect to evidence it collects during the investigation of a crime." *Id.* at 718. It explained, "The reason for this is obvious, as it would be illogical to impose an obligation on the state to preserve evidence that it does not possess." *Id*. As such, the court found no due process violation. In so holding, it relied on *Arizona v. Rivera*, 733 P.2d 1090 (Ariz. 1987) (*en banc*), where the Arizona Supreme Court considered essentially the same question and came to the same conclusion (*Rivera* was decided approximately contemporaneously with *Youngblood* and, though it does not mention *Youngblood*, it conducts a similar analysis to cases decided after *Youngblood*).

¶ 97 We recognize that there is a minor distinction between the instant case and those discussed above, where the police simply failed to gather evidence. Here, Caruso arguably encouraged defendant to forego collecting evidence. However, defendant cites nothing applying *Youngblood* in the latter circumstances. Moreover, the record indicates that defendant was taken to the emergency room, had access to doctors, was offered the opportunity for a full examination, and made the ultimate decision not to be tested himself. As a result, we cannot ascribe such

significance to Caruso's comments regarding how long barbiturates would remain in defendant's system as to elevate it to a due process violation. As such, we find this argument unpersuasive and not in accord with the weight of existing authority.

¶ 98 C. SELF REPRESENTATION

¶ 99 Defendant also claims that the trial court ignored his request to represent himself. It is true that a defendant has a right to self representation. *People v. Baez*, 241 Ill. 2d 44, 115 (2011). In order to exercise this right, a defendant must make a knowing and intelligent waiver of his or her right to counsel. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). Our supreme court has held that "[a] defendant waives his right to self-representation unless he ' "articulately and unmistakably demands to proceed *pro se*." ' " *Baez*, 241 Ill. 2d at 116 (quoting *Burton*, 184 Ill. 2d at 22 (quoting *United States v. Weisz*, 718 F.2d 413, 426 (D.C. Cir. 1983))). A court must "indulge every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977). We review this issue using the abuse-of-discretion standard. *Baez*, 241 Ill. 2d 116.

¶ 100 Defendant acknowledges that he did not expressly invoke his right to self representation. In fact, he stated, "Judge, I've just fired Paul DeLuca" (his attorney). The trial court replied, "No, you didn't." It later stated, "Obviously, if you want to discharge your lawyers, I'm going to hear what you have to say, but I'm not going to hear it at this moment, okay?" Defendant asserts that the trial court subsequently never gave him an opportunity to address the issue. Defendant argues, "Although [defendant] did not formally request to proceed *pro se* on the record, his request to fire trial counsel was tantamount to invoking this right." He provides no legal authority to support this latter proposition.

¶ 101 Defendant faces two problems here. First, by failing to support a key proposition with any authority whatsoever, he has forfeited this issue. *People v. Borowski*, 2015 IL App (2d)

141081, ¶ 6. Second, the authority we have located contradicts defendant's position. See *Baez*, 241 Ill. 2d at 116 (quoted above). Finally, as we read his statement about firing his attorney, it is at least as consistent with a request for new counsel as it is a request for self representation. In short, we find this argument wholly unpersuasive.

¶ 102 D. SUFFICIENCY OF THE EVIDENCE: ARSON

¶ 103 Defendant next argues that he was not proven guilty beyond a reasonable doubt of either arson count. As noted above, our review consists of construing the evidence in the light most favorable to the State and determining whether any rational trier of fact could find the elements of the offenses beyond a reasonable doubt. *Brown*, 2015 IL App (1st) 131873, ¶ 12. Defendant was convicted of residential arson and aggravated arson (the convictions merged). Residential arson is defined as follows: "A person commits residential arson when he or she, in the course of committing arson, *knowingly damages, partially or totally, any building or structure* that is the dwelling place of another." (Emphasis added.) 720 ILCS 5/20-l(b) (West 2014). The statute setting forth aggravated arson consists, *inter alia*, of the following: "A person commits aggravated arson when in the course of committing arson he or she *knowingly damages, partially or totally, any building or structure*, including any adjacent building or structure, including all or any part of a school building, house trailer, watercraft, motor vehicle, or railroad car, and *** he knows or reasonably should know that one or more persons are present therein." (Emphasis added.) 720 ILCS 5/20-1.1 (West 2014). Thus, both require proof that defendant knowingly damaged a building or structure. Defendant contends that the State did not prove this element.

¶ 104 A person acts "knowingly" with respect to "[t]he result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2014). Construing the

evidence in the light most favorable to the State, we cannot conclude that the evidence is so lacking as to leave a reasonable doubt as to defendant's guilt. The State's exhibits 15 to 18 show the toaster in which defendant started a number of papers on fire, and its proximity to the bottom of a cabinet. There are outlet plates in the background on the wall between the counter and the cabinet. The distance between the toaster and the cabinetry appears to be approximately equivalent to the long side of two outlet plates. Thus, the toaster was quite close to the cabinet. The pictures also show charring to the cabinet.

¶ 105 Construed in the light most favorable to the State, it is difficult to conceive how defendant would not have known that starting a fire in this location would result in damage to the cabinet. See *People v. Stewart*, 406 Ill. App. 3d 518, 527 (2010) ("Given the weather conditions at the time, a jury could rationally conclude that defendant's actions of using a flammable substance to ignite a fire on an outdoor wooden structure attached to the building at 5405 South Shields made it a practical certainty that the fire would spread to a nearby building."). Charring constitutes burning. *People v. Oliff*, 361 Ill. 237, 245 (1935) ("It is contended that the charred and scorched condition was not sufficient to constitute a burning sufficient to prove arson. There must be a wasting of the fibers of the wood, no matter how small in extent, to constitute a burning. The charring of a wall or floor is sufficient."). Although burning is no longer a necessary component of the damage necessary to prove arson (*People v. Lockwood*, 240 Ill. App. 3d 137, 143-44 (1992)), burning, scorching, or charring clearly constitutes "damage" for the purpose of proving arson (*Id.* at 144).

¶ 106 Defendant makes a number or arguments that are simply off point. For example, defendant states that the reason he set the fire was to destroy papers that linked him to the residence. He asserts that he watched the papers burn out and then, "[h]aving accomplished

what he set out to do," he left. Intent is not at issue here; regardless of the reason the fire was set, we cannot say that a finding that defendant was practically certain the fire would damage the cabinetry was not adequately supported by the record, particularly given the deferential standard of review in play here. Similarly, defendant's contention that since he watched the fire burn out, he knew the structure would not burn misses the point. The question is what he knew at the time he started the fire—not what he learned after the fire was extinguished. Moreover, if defendant watched the fire burn out, he saw the damage to the cabinetry, so the factual predicate for defendant's argument is lacking as well. Defendant further argues that "common sense dictates" that people do not start papers on fire by sticking them in a toaster. However, by doing so, defendant exposed paper to open heating elements. As we must construe the evidence in the light most favorable to the State (*Brown*, 2015 IL App (1st) 131873, ¶ 12), the proposition that it is practically certain that fire would follow and the cabinetry would be damaged finds sufficient support in the record.

¶ 107 In sum, defendant has not convinced us that he was not proven guilty beyond a reasonable doubt of either arson count.

¶ 108 E. THE BOURNE MOVIE

¶ 109 Defendant's final contention is that the trial court erred in considering the content of a scene from a Jason Bourne movie (The Bourne Supremacy). Generally, all relevant evidence is admissible unless barred by some other rule of law. Ill. R. Evid. 402; *People v. Pike*, 2016 IL App (1st) 122626, ¶ 33. One such rule provides that evidence shall not be admitted "if its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403. A trial court's decision concerning the admission of evidence is reviewed for an abuse of discretion. *People v. Purcell*, 364 Ill. App. 3d 283, 293 (2006).

¶ 110 Defendant first contends that the Bourne movie was not relevant to anything at issue in this case. The scene in question involves the protagonist blowing up a residence by cutting a gas line, placing papers in a toaster, and turning the toaster on. The papers ignite, and the building explodes. There was some evidence in the record that defendant was familiar with this scene.

¶ 111 Defendant contends that the movie "in no way tends to show that it is more likely than not Defendant's actions would affect anything beyond the papers in the toaster." We tend to agree that the movie would not be appropriate evidence to show what would happen in the real world under such circumstances. Indeed, that might be an appropriate subject for expert testimony. The movie is a work of fiction; the substance of the scene does not make it "practically certain" that any particular result would follow. *Cf.* People *v. Willis*, 409 Ill. App. 3d 804, 813 (2011) ("Rather, the CSI comment was a benign reference to the jurors' common knowledge that this was not an investigatory television mystery, but rather a real-world criminal case supported by overwhelming evidence of defendant's guilt.").

¶ 112 However, we disagree with defendant's claim that his actions were meaningfully different that those depicted in the movie. Defendant contends that because Bourne cut a gas line and defendant left the stove on, his "actions are not equivalent." However, construing this in the light most favorable to the State, Bourne cut the gas line to fill the residence up with explosive gas and it is inferable that the reason defendant left the stove on was to fill the residence up with explosive gas. Thus, this difference does not meaningfully distinguish the movie clip from the current situation.

¶ 113 Nevertheless, to be admissible, the movie had to be relevant to something properly provable at trial. *People v. Herron*, 125 Ill. App. 2d 18, 23 (1970). The State points out that one of the counts of which defendant was acquitted was concealing a homicidal death. The Criminal

Code of 1972 provides that "[a] person commits the offense of concealment of homicidal death when he or she knowingly conceals the death of any other person with knowledge that such other person has died by homicidal means." 720 ILCS 5/9-3.4 (West 2014). The State argues that the movie clip is relevant to intent regarding this offense; we think it relevant to motive here.

¶ 114 Evidence of motive may be admissible under appropriate circumstances:

> "It has long been recognized by this court that motive is not an essential element of the crime of murder, and the State has no obligation to prove motive in order to sustain a conviction of murder. [Citations.] It is also well established, however, that any evidence which tends to show that an accused had a motive for killing the deceased is relevant because it renders more probable that the accused did kill the deceased." *People v. Smith*, 141 Ill. 2d 40, 56 (1990).

In this case, keeping in mind the standard of review, it is reasonable to infer that this evidence supports an inference that defendant, cognizant of the movie scene, turned on the gas and attempted to ignite it using the toaster. If, in fact, there were a homicidal death to conceal, this would explain why defendant attempted this. That he was ultimately acquitted of this count does not diminish this evidence's relevance at the time of trial.

¶ 115 Moreover, we fail to see how defendant was meaningfully prejudiced by the trial court's consideration of the movie clip, assuming it was error to do so. Defendant claims prejudice existed in the State's use of this evidence to establish his "mindset." He points out that the State repeatedly referenced the movie clip while asserting it was defendant's intention to destroy the residence. Defendant contends there was no other evidence that defendant "meant to do anything other than destroy the paperwork when he placed it into the toaster." He continues,

"No other testimony or exhibits suggested that [he] had the requisite knowledge upon which to base the arson related convictions."

¶ 116 We disagree. We first point out that the requisite mental state was that defendant acted *knowingly* (720 ILCS 5/20-l(b) (West 2014); 720 ILCS 5/20-1.1 (West 2014)); hence, defendant's contentions about what he "meant to do" are beside the point, as they concern his *intent*. Regarding *knowledge*, we fail to see how anything in the movie clip could have affected the inferences the trial court drew from the fact that defendant started a fire a short distance (about the length of two outlet plates) beneath a wooden cabinet. Even if defendant was simply trying to burn the papers, it was still inferable that he knew it would result in damage to the cabinetry. See *Stewart*, 406 Ill. App. 3d at 527. An error that does not affect the outcome of a proceeding is harmless. *People v. Brookins*, 333 Ill. App. 3d 1076, 1085 (2002); *People v. Walker*, 136 Ill. App. 3d 177, 180-81 (1985). We also note that defendant was acquitted of concealing a homicidal death.

¶ 117 Similarly, we note that defendant complains about a statement the trial court made that, though the fire ended up being very small, "the scary part and the part that concern[ed] [the trial court] is that had the fire gone further, people—innocent people could have died in the buildings next door." Defendant claims that the only evidence that the fire could have spread was the movie clip. This contention is meritless. Setting a fire in a residence that is attached to three other residences presents an obvious danger to the other residences, regardless of whether an actual explosion occurred.

¶ 118 Therefore, we hold that the trial court did not abuse its discretion in considering the movie clip, and, assuming *arguendo* that it did, any error was harmless.

¶ 119 IV. CONCLUSION

¶ 120 In light of the following, the judgment of the circuit court of Du Page County is affirmed.

¶ 121 Affirmed.