2017 IL App (1st) 160990-U

No. 1-16-0990

Order filed December 27, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 23216
	)	
ERIK JENSEN,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for second-degree murder is affirmed over his contentions that: (1) the State failed to prove beyond a reasonable doubt that he had the requisite intent to kill; (2) the trial court erred in failing to hold the State to its burden of proof after he presented evidence of self-defense; and (3) his sentence is excessive.

¶ 2 Following a bench trial, defendant Erik Jensen was found guilty of second-degree murder (720 ILCS 5/9-2 (West 2012)) and sentenced to 16 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because there was

insufficient evidence to establish that he acted with the requisite intent to kill. Defendant also contends that the court erred when it failed to hold the State to its burden of proof after he offered evidence that he acted in self-defense. Finally, defendant contends that his sentence of 16 years' imprisonment is excessive given the presence of mitigating factors, such as the fact that he was a first-time offender. We affirm.

¶ 3 On November 28, 2012, Raymond O'Gara died as a result of stab wounds to his neck. Defendant was arrested and charged with first-degree murder. The indictment alleged that defendant committed first-degree murder "in that he, without lawful justification, intentionally or knowingly stabbed and killed *** O'Gara" with scissors. 720 ILCS 5/9-1(a)(1) (West 2012). Defendant waived his right to a jury and, on February 10, 2016, the case proceeded to a bench trial.

¶ 4 At trial, Jonathan O'Gara testified that, on November 27, 2012, his brother, Raymond O'Gara, left him a voicemail at approximately 7:30 p.m. Jonathan returned his brother's phone call at approximately 10:30 p.m. During their phone conversation, Raymond invited him over to his house to drink alcohol. In the background, Jonathan heard defendant say, "Tell your f***in [*sic*] brother to get his f***in [*sic*] as [*sic*] over here." Jonathan said that defendant's tone of voice sounded "disturbing," and he decided not to make the two-hour drive to his brother's house.

¶ 5 Chicago police sergeant Torres testified that, at approximately 1:25 a.m., on November 28, 2012, he was called to 5402 North Natoma Avenue based on a report of a possible dead woman at that location. When Sergeant Torres arrived, Chicago police personnel were already on the scene. Torres entered the residence and saw defendant seated on a bar stool in the kitchen.

In the living room, Torres saw O'Gara's body lying in a pool of blood. On the floor, next to O'Gara's body, Torres saw a pair of scissors, a towel, and napkins. Despite the initial report, there was no dead woman found at the scene.

¶ 6 Torres spoke with defendant in the kitchen. As he did so, he observed that defendant slurred his words, but was able to respond to the questions Torres asked of him. Torres noticed a broken glass in the kitchen and asked defendant about it. Defendant told Torres that he and O'Gara had engaged in "fisticuffs" because of the broken glass, but that they "kissed and made up." Torres asked if there was anybody else in the residence other than defendant and O'Gara, to which defendant replied that there was not. Torres asked defendant the name of the individual lying on the floor in the living room. Defendant replied that he did not know. Torres then escorted defendant into the living room and again asked him who was lying on the floor. Defendant replied, "Oh, my God, that's Raymond." Defendant told Torres that he called 9-1-1 and that he tried to apply a towel to O'Gara to stop him from bleeding. Defendant never told Torres that he had suffered any injuries, nor did he ask for any medical treatment. Torres told Officer Leverette, a Chicago police officer at the scene, that defendant needed to be taken to "the Area" for possible investigation.

¶ 7 On cross-examination, Torres acknowledged that defendant smelled of alcohol, had bloodshot eyes, and "moderate[ly]" slurred his speech. Torres reiterated that defendant responded to his questions. Torres also acknowledged that there was no evidence that defendant attempted to flee. Torres testified that the scissors were "not even a foot" from O'Gara's body and that "it was possible" that O'Gara had the scissors in his hands at the time of his death.

¶ 8 Chicago police officer Leverette testified that, on November 28, 2012, she was on routine patrol when she received a call to assist at 5402 North Natoma Avenue. Upon entering the residence, Leverette saw O'Gara's body lying on the living room floor. Leverette proceeded into the kitchen where defendant was talking with another Chicago police officer. Leverette asked defendant to explain what had happened. Defendant told her that his mother had recently passed away and that he had come to the house to drink with O'Gara. Leverette asked defendant about the dead body in the living room to which defendant responded that he did not know who that was. Defendant continued to talk about his deceased mother and how "depressed" his family was because it was close to the holidays. After Leverette again asked him about the dead body in the living room, defendant replied, "Is that Raymond?"

¶ 9 Leverette testified that defendant did not appear intoxicated and that he was calm and comfortable during their conversation. Defendant answered all the questions that Leverette asked of him. Leverette spoke to defendant for 20 minutes, and did not witness any injuries to defendant, nor did defendant ever complain of any injuries. Leverette testified that, other than a broken glass in the kitchen, she did not observe any objects knocked or tipped over in the residence.

¶ 10 After Sergeant Torres asked her to take defendant to the "Area" for further questioning, Leverette removed defendant from the residence and placed him in her squad car. Leverette was alone in the car with defendant. Because it was a cold night, Leverette asked defendant if the temperature of the car was comfortable for him, to which he replied that it was. Leverette then asked defendant if he had any objection to the country music that she was playing on the car's radio. Defendant replied that the music was "fitting." Leverette asked defendant why the music

was fitting. Defendant replied, "Well, I just killed my cousin." Leverette excused herself from the squad car and relayed defendant's statement to a detective at the scene.

¶ 11 On cross-examination, Leverette testified that she initially entered the kitchen as defendant was speaking to another officer. Shortly after arriving, defendant stated that the other officer was acting like a "jerk" and that he would prefer to speak to Leverette. Leverette then took over the discussion with defendant, who had bloodshot eyes. Leverette could not recall whether defendant was handcuffed when she put him in her squad car. Leverette never told defendant that he was under arrest.

¶ 12 Police forensic investigator Smith testified that, on November 28, 2012, he was called to 5402 North Natoma Avenue to process a homicide scene. Upon arriving, Smith marked the evidence, photographed and videotaped the scene, and collected the physical evidence. Smith returned to the "Area" where he photographed defendant and his clothing. Smith's photographs and the DVD of his video recording were introduced into evidence. Smith went through each of the photographs he took and described their contents for the court. Additionally, the court was shown a video Smith filmed of the crime scene. As the video played, Smith described the contents for the court[1].

¶ 13 On cross-examination, Smith was shown a photograph depicting the kitchen. He testified that the photograph depicted a pair of men's eyeglasses underneath a stool, which were not inventoried as evidence. Smith acknowledged that the photographs depicting defendant's hands did not indicate any cuts, bruises, or lacerations.

[1] Smith's crime scene photographs and video were not provided to this court as part of the appellate record.

¶ 14 The parties stipulated that, if called, an Emergency Communication representative would testify that the recordings of two 9-1-1 calls[2] that were placed on November 28, 2012, were true and accurate representations of calls that were received at 1:05 a.m. and 1:11 a.m. The recordings were played in open court.

¶ 15 Detective Heerdt testified that, on November 28, 2012, he was assigned to investigate a homicide at 5402 North Natoma. When Heerdt arrived at the scene, he noticed Officer Leverette seated in the driver's seat of her squad car with defendant in the backseat. Shortly after, Leverette came to Heerdt and told him about a conversation she had with defendant. After hearing about the conversation, Heerdt removed defendant from Leverette's squad car. Heerdt acknowledged that defendant had been drinking, but stated that he was not intoxicated. Heerdt described defendant as behaving normally and not slurring his speech. Defendant was responsive to the questions that Heerdt asked of him. Defendant did not complain of any injury to Heerdt, nor did Heerdt observe any injury to defendant.

¶ 16 Upon removing defendant from the squad car, Heerdt spoke to him about what had transpired. Defendant told Heerdt that he and O'Gara had participated in "fisticuffs" and that he put O'Gara into a headlock. Heerdt stopped defendant and informed him of his *Miranda* rights. Defendant acknowledged that he understood his rights and continued to speak with Heerdt. Defendant asked Heerdt if the deceased person in the home was O'Gara. When Heerdt told defendant that it was O'Gara, defendant replied that he did not remember hurting him. Heerdt asked defendant if it was a "self-defense situation" that caused him to stab O'Gara. Defendant replied that he would say whatever Heerdt wanted him to say in regards to that. Heerdt

[2] The 9-1-1 recordings were not provided to this court as part of the appellate record.

responded that he was only interested in the truth. Defendant reiterated that he could not recall how O'Gara was killed and that no one else was present in the residence. Defendant was transported to the "Area" where Heerdt continued questioning him. Heerdt collected defendant's clothing and provided it to Smith to be photographed. Six hours after defendant was brought to the "Area," he complained of an injury to the top of his head and the inside of his lip. An evidence technician photographed the complained of areas.

¶ 17 On cross-examination, Heerdt acknowledged that defendant smelled of alcohol. Heerdt did not recall him slurring his speech or having bloodshot eyes. Heerdt's opinion was that defendant was not drunk. Heerdt did not see any visible injuries to defendant.

¶ 18 Doctor Arunkmar, an expert in forensic pathology, with the Cook County Medical Examiner's Office, testified that, on November 28, 2012, she performed the autopsy on O'Gara's body. Arunkmar determined that O'Gara's cause of death was multiple stab wounds to the neck and that the manner of his death was homicide. Arunkmar stated that O'Gara was six feet and five inches tall and weighed 221 pounds. Arunkmar indicated O'Gara's blood alcohol content was .34. Arunkmar took several photographs during the course of her autopsy. These photographs were introduced into evidence[3] and Arunkmar described the contents of the photographs to the court.

¶ 19 Arunkmar testified that the photographs showed that O'Gara had several injuries on his body, including bruises and hemorrhages. Arunkmar indicated that photographs showed multiple bruises on O'Gara's face, forearms, and knees. Arunkmar identified photographs that showed that O'Gara had petechial hemorrhages in both eyes. She testified that a petechial hemorrhage is

[3] Dr. Arunkmar's photographs were not provided to this court as part of the appellate record.

a result of blunt force trauma. According to Arunkmar, photographs of O'Gara's neck showed two oblique stab wounds on his left side, and a third stab wound on the front of his neck. She described the first stab wound as being deeper than 2 inches, and the second stab wound was deeper than 1 inch. She described the wound on the front of O'Gara's neck as being 0.5 inches deep. Arunkmar testified that O'Gara's stab wounds were consistent with him having been stabbed with scissors. Arunkmar described photographs of O'Gara's hands as showing no wounds.

¶ 20 On cross-examination, Arunkmar testified that she found no defensive wounds on O'Gara's body. She acknowledged that the photograph of O'Gara's hand depicted a discoloration around the knuckles that she did not note as an injury during the autopsy. Arunkmar speculated that the discoloration could be from dried blood or the ink from fingerprinting, although she conceded that the photographs were taken after the hands had been washed. Arunkmar also stated that it was possible that the discoloration of the knuckle could be in the area where an individual holding scissors would be gripping those scissors.

¶ 21 On redirect-examination, Arunkmar reiterated that she did not notice any injury to O'Gara's hands during her autopsy. She added that there were black ink stains on O'Gara's fingers from when the body was fingerprinted. Arunkmar acknowledged that they "try to clean the hands as much as [they] can," but she noted that even after the washing took place, the photographs still depicted dried blood on O'Gara's hand. She explained that the creases and discoloration pointed out by defense counsel were "most likely" ink stains that were made when O'Gara was fingerprinted. Arunkmar viewed another photograph of O'Gara's hands and stated that the marks, pointed out by defense counsel, "appear[ed] more like blood."

¶ 22 The parties stipulated to the testimony of six State witnesses. All of the stipulated testimony related to the collection, preservation, custody, and testing of forensic evidence. Specifically, the testimony related to the following pieces of evidence: scissors found near O'Gara's body, defendant's jeans from the night in question, paper towels found in O'Gara's kitchen, a hand towel recovered from O'Gara's bathroom, finger nail clippings from O'Gara, and a buccal swab from defendant. The parties stipulated that all of the evidence was properly collected, preserved, and tested for blood, DNA, or fingerprints. The following items tested positive for blood: the scissors, defendant's blue jeans, the paper towels, the hand towel, and O'Gara's fingernail clippings. When tested, the blood found on those items was a positive match for O'Gara's blood. The scissors did not have any identifiable fingerprints on them. The State then rested.

¶ 23 Defendant testified that he had a close relationship with O'Gara that dated back to when they were children. As adults, they would get together a few times during the year to reminisce. These meetings would include the consumption of "a lot" of alcohol. Defendant described himself as a "binge drinking alcoholic," which he said meant that he did not drink alcohol every day, but whenever he did drink he would do so until he was intoxicated.

¶ 24 On November 21, 2012, defendant's mother passed away. A few days later, defendant got into an argument with his aunt over his mother's possessions. Defendant called his other aunt, O'Gara's mother, and she told defendant to speak to O'Gara because he was a "good listener." Defendant called O'Gara and the two of them made plans to get together on November 27, 2012.

¶ 25 On that date, defendant arrived at O'Gara's house at approximately 4:20 p.m. Defendant brought with him a case of 30 beers, a bottle of rum, and "some Crystal Light" to mix with the rum. Defendant brought the rum and the drink mix for O'Gara's brother, who defendant assumed was going to join them. When defendant arrived, O'Gara had already been drinking "straight vodka." O'Gara did not have any visible bruises when defendant arrived. The two began to drink heavily. Defendant and O'Gara were seated on stools in O'Gara's kitchen. Defendant was wearing his eyeglasses, which he stated were the same ones seen on the kitchen floor in one of the photographs entered into evidence. The two discussed defendant's mother and the situation with defendant's aunt. Defendant suggested to O'Gara that they should call O'Gara's brother and ask him to join them. Defendant felt that O'Gara was in a "dark place" and he hoped that O'Gara's brother could help to cheer him up. Around 7:30 p.m., O'Gara called his brother, but was unable to reach him, and instead left a voice message.

¶ 26 During the evening, O'Gara mentioned defendant's recent weight loss. Defendant asked O'Gara if he "wanted a shot at the title," which defendant explained was a reference to the fact that he and O'Gara often engaged in lighthearted "shadow boxing" when they were together. O'Gara replied, "Yeah, I don't mind if I do." The two proceeded to "shadow box" for a few minutes. Defendant described it as "just having fun." According to defendant, no blows landed and no one was injured as a result. The two continued to consume alcohol for the next few hours. At approximately 10:30 p.m., O'Gara's brother called to say that he would not be coming over to join them. At this point, defendant switched from drinking beer to drinking rum. Defendant estimated that he had consumed "13 or 14" beers by that time. O'Gara grabbed two glasses and filled them with rum. Defendant intended to mix the rum with the drink mix he had brought with

him, but O'Gara had filled up his entire glass with only rum. O'Gara told defendant he had to drink the rum "like a man," which defendant understood to mean without mixing it. Defendant proceeded to sip the rum and then take a sip of the drink mix from its container. The two continued their conversation about defendant's mother. During their conversation, O'Gara became animated and knocked over a drinking glass while gesticulating with his hand. Defendant told O'Gara that they had to clean up the broken glass, but O'Gara told defendant to "leave it."

¶ 27 About midnight, defendant was feeling intoxicated and wanted to order food. O'Gara said he did not want food and that no one would deliver food at this hour. At this point, O'Gara "disappeared" for around 20 minutes, which defendant stated was not unusual. O'Gara returned and defendant tried to use O'Gara's laptop computer to show him a message defendant posted on the Internet about his mother. Defendant was too intoxicated, however, to retrieve the letter. Instead, defendant told O'Gara the contents of the letter, which included a reference to defendant's wife. Defendant told O'Gara that O'Gara's brother often said that defendant "hit the wife lottery." This statement angered O'Gara, who began shouting that defendant "always had everything" and that he, O'Gara, had "nothing." Defendant told O'Gara that this was not true, but O'Gara charged at him "like a linebacker."

¶ 28 Defendant jumped up from his stool and grabbed O'Gara by the shoulders. Defendant kissed O'Gara's cheek multiple times and begged for him to stop. O'Gara told defendant again that he had "nothing" and he head-butted defendant in the lip, knocking defendant's eyeglasses to the ground. Defendant stated that this contact caused the injury to his lip that was later photographed. O'Gara had his arms around defendant and "body slamm[ed]" him into the

refrigerator. Next, O'Gara threw defendant, which caused defendant to "slam" his head on the floor. Defendant was in a "fetal position," when O'Gara stormed out of the room. Defendant heard loud bangs, but did not know what caused them. Defendant laid on the floor for a few minutes until he went into the bathroom to retrieve paper towels in case he was bleeding.

¶ 29 After retrieving the towels, defendant returned to the living room where he encountered O'Gara, who was seated on the living room floor. Defendant noticed O'Gara was "huffing and puffing" and that his forehead was swollen. Defendant got down onto one knee in front of O'Gara and told him he needed to "stop this craziness." O'Gara shouted something in "drunk speak" at defendant. The two began to argue. Defendant asked O'Gara what his father would "think of all of this." At that point, O'Gara lunged at defendant. O'Gara's left hand moved toward defendant's chest. Defendant noticed that O'Gara's hand was holding something "sharp." Defendant reached out and grabbed O'Gara's hand, stopping it inches from his chest. The two struggled, and the scissors moved "back and forth." Defendant described O'Gara as being "in a rage" and "out of his mind." Defendant was able to overpower O'Gara and O'Gara "just fell backwards." Defendant realized that it was scissors in O'Gara's hand and that O'Gara had a neck wound that was bleeding "a lot." Defendant ran into the kitchen and tried to call 9-1-1 from his cellular phone, but he was in "total shock" and the room was "spinning." Defendant does not remember successfully calling 9-1-1. The remainder of what happened is a "blur," of which defendant only remembers "snapshot images." According to defendant, his memories of the night in question came back "during bond court" when the State's attorney mentioned scissors being involved, which "opened the floodgates" for defendant's memories to return.

¶ 30 On cross-examination, defendant acknowledged that he voluntarily drank alcohol on the night in question. He could not recall using towels to clean up O'Gara's blood or assist O'Gara. Defendant denied that he struck O'Gara maliciously that night. He also acknowledged that, during the 10 hours he was interrogated, he never told the police that O'Gara attacked him.

¶ 31 Video footage[4] from defendant's interrogation interview on November 28, 2012, was played in open court. The video clips depicted various portions of the 10-hour interview. Defendant acknowledged that these videos depicted him offering various explanations for what happened to O'Gara. Defendant did not recall making the 9-1-1 calls where he told the operators that there was a dead woman in the home. He admitted that he never told detectives that he had acted in self-defense because he could not remember. Defendant insisted that his alternative explanations for what happened to O'Gara were speculation based on his "40-year relationship" with O'Gara. Defendant acknowledged that he never told detectives the version of events he testified to because he did not remember them at the time.

¶ 32 Based on this evidence, the court found defendant guilty of the lesser-included offense of second-degree murder. In announcing its decision, the court stated that "the issue at first blush" was whether the State had proven defendant guilty of first-degree murder beyond a reasonable doubt. The court summarized the evidence that supported a finding of first-degree murder, which included the injuries to O'Gara, defendant's "nonsensical" 9-1-1 calls, his various stories during the interrogation interview with detectives, his failure to recall particular details, his sudden recollection, his statement to Leverette that he "killed his cousin," and his attempt to clean up the blood before police arrived. The court noted, however, that both defendant and O'Gara were

[4] The video footage was not provided to this court as part of the appellate record.

intoxicated. The court described that night as "a bender in every sense of the word" for both individuals. But the court believed that "the evidence support[ed] a conviction" of first-degree murder.

¶ 33 Having determined that the State met its burden and proved that defendant committed first-degree murder beyond a reasonable doubt, the court considered "the next issue," which was whether defendant proved the presence of a mitigating factor, such that defendant should be convicted of the lesser offense of second-degree murder. The court explained:

> "Now, it's the defendant's burden of proof, once first degree murder has been established, and it has in this case, by a preponderance of the evidence that a mitigating factor exists to make this murder of the second degree rather than murder in the first degree. That is to say, the law requires that it only be more probably true than not true, that the defendant at the time he committed the act that caused the death, that being the stabbing in this case, believed the circumstances were such, mistakenly, that justified the use of *** deadly force, and that that belief was unreasonable."

¶ 34 The court stated that it found defendant's testimony to be "questionable to say the least." The court described defendant's testimony as being "narcissistic, grandiose, and self-serving ***." The court noted, however, that the record supported, "at least marginally," the portion of defendant's testimony that O'Gara caused injury to defendant's head and lip. The court concluded that, while it was "clear" that nothing defendant testified to would obviate his guilt of first-degree murder by way of self-defense, there was, at some point, mutual combat. The court noted, then, that the only "real issue" was whether it was "more probably true than not that the mechanism that caused the death, the stabbing of [] O'Gara, occurred during a period of time in

which [defendant] *** unreasonably believed that he was defending himself." Finding that to be the case, the court announced that defendant was guilty of second-degree murder. The case proceeded to posttrial motions and sentencing.

¶ 35 The court denied defendant's motion for a new trial. The court then heard arguments in aggravation and mitigation. In aggravation, O'Gara's mother, brother, and friend read victim impact statements describing O'Gara's character and detailing the significance of his death to the family. Additionally, the State read into evidence several other victim impact statements. The State asked that defendant be sentenced to the maximum term under the law due to the brutal nature of the attack on O'Gara and defendant's failure to take full responsibility for his actions.

¶ 36 In mitigation, defendant's wife read a letter that detailed defendant's character. She also read a letter prepared by their 13-year-old son. Additionally, defendant's brother-in-law read letters attesting to defendant's character written by himself, his wife, and their two sons. Defense counsel also entered into evidence several additional letters attesting to defendant's character. During argument, counsel noted that defendant was a 50-year-old adult with no criminal record and, therefore, was unlikely to commit similar acts in the future. Defense counsel asked the court to sentence defendant to probation.

¶ 37 In allocution, defendant took responsibility for his actions and "how they contributed to [O'Gara's] death ***." He expressed remorse to O'Gara's family and praised O'Gara for being a fantastic person. Defendant acknowledged his problem with alcohol and stated that he was now sober. He told the court that he created a website to educate others on the effects of binge drinking and that he wished to help prevent similar incidents like this from ever occurring.

¶ 38 In announcing sentence, the court noted that it was taking the following factors into consideration: the evidence adduced at trial, the presentence investigation (PSI) report, the impact statement letters, the statutory factors in aggravation and mitigation, the financial impact of incarceration, the arguments of the attorneys, and defendant's allocution. The court noted its obligation to consider defendant's rehabilitative potential and, to that end, highlighted defendant's "very limited interaction with the criminal justice system." The court also noted that it was "important" that defendant initially told "these crazy lies in order to push away any association of guilt onto himself" in both his 9-1-1 calls and in his interviews with police officers. The court stated that it was mindful of the fact that this was a case of the "most serious nature" and described defendant's actions as "unconscionable." The court then sentenced defendant to 16 years' imprisonment.

¶ 39 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he intended to kill or cause great bodily harm to O'Gara. As a result, he requests that this court vacate his conviction.

¶ 40 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences from the record must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48. We will not substitute our judgment for

that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Brown*, 2013 IL 114196, ¶ 48. A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Id.*

¶ 41 A person commits the offense of second-degree murder when he commits first-degree murder, and at the time of the killing, he believes that his use of force is necessary to prevent imminent death or great bodily harm to himself, but his belief is unreasonable. *People v. Reid,* 179 Ill.2d 297, 308 (1997); *People v. Garcia*, 407 Ill.App.3d 195, 203 (2011). To establish that defendant committed first-degree murder, the State needed to prove that when he intentionally stabbed O'Gara to death with scissors, he intended to kill or do great bodily harm to O'Gara, or knew that such acts would cause death to O'Gara. 720 ILCS 5/9-1(a)(1) (West 2012).

¶ 42 As an initial matter, we note that defendant has arguably failed to present this court with a sufficiently complete record with which to review this contention. The record on appeal does not include various exhibits entered into evidence, and upon which defendant's argument relies, including: photographs and a DVD of the crime scene, photographs depicting the wounds of both defendant and O'Gara, and the 9-1-1 recordings. It is well-settled that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant,* 99 Ill.2d 389, 391–92 (1984); see also *People v. Fair,* 193 Ill.2d 256, 264

(2000) (applying *Foutch* in the context of a criminal appeal). That said, the record at bar demonstrates no basis upon which to reverse the ruling of the trial court.

¶ 43 After viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could find that defendant intended to kill or do great bodily harm to O'Gara beyond a reasonable doubt. Here, the circumstantial evidence, including O'Gara's injuries, and defendant's conduct all support the inference that defendant intended to kill O'Gara See *People v. Weeks*, 2012 IL App (1st) 102613, ¶ 35; *People v. Coleman*, 311 Ill. App. 3d 467, 473 (2000) ("The factual determination of whether defendant acted knowingly or with intent may be inferred from the circumstances surrounding the incident, defendant's conduct, and the nature and severity of the victim's injuries.").

¶ 44 It is undisputed that O'Gara was stabbed in the neck three times with a pair of scissors. *People v. Terrell*, 132 Ill. 2d 178, 204 (1989) ("[W]hen a defendant intentionally uses a deadly weapon upon the victim, it may properly be inferred that he intended to cause the death of the victim."). In addition, the severity of O'Gara's injuries supports the inference that defendant intended to kill or do great bodily harm to him. *People v. Givens*, 364 Ill. App. 3d 37, 45 (2005) ("[D]efendant's intent c[an] be inferred based on the severity of [the victim's] injuries."). The record shows that O'Gara's stab wounds ranged in depth from 0.5 to 2.0 inches deep. O'Gara also had bruises covering several parts of his body including his face, lip, forearms, and knees. Moreover, shortly after the murder, defendant told Officer Leverette that he had "just killed" his cousin. This evidence, and the reasonable inferences therefrom, support the conclusion that defendant intended to kill or do great bodily harm to O'Gara.

¶ 45 Defendant nevertheless argues that his testimony established that: he had no motive to kill O'Gara, he was not the aggressor, he never held the scissors, and he attempted to aid O'Gara when he realized that he was severely injured. Defendant's arguments are, essentially, asking us to reweigh the evidence in his favor and substitute our judgment for that of the trier of fact. This we cannot do. See *People v. Abdullah*, 220 Ill. App. 3d 687, 690 (1991) ("A reviewing court has neither the duty nor the privilege to substitute its judgment for that of the trier of fact."). In announcing its finding, the trial court found defendant's testimony to be "questionable" as he was "narcissistic, grandiose, and self-serving in almost everything he said." We will not disturb that credibility determination or overturn defendant's conviction where the evidence presented was not so unreasonable, improbable, or unsatisfactory so that there remains a reasonable doubt of his guilt.

¶ 46 Defendant next contends that the trial court erred by not holding the State to its burden of proof to disprove self-defense after he raised "some evidence" that he acted in self-defense. Specifically, defendant argues that comments made by the trial court during oral pronouncement misstated the law and shifted the burden of proof onto defendant when it was the State's burden to disprove self-defense.

¶ 47 As an initial matter, we note that defendant has failed to preserve this issue for appeal by not raising the issue in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion raising the issues are required in order to preserve the issue for review on appeal). The State, however, does not argue that defendant has forfeited this issue and, therefore, has waived its forfeiture argument. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 ("The rules of waiver also apply to the

State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture."); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture."). As such, we will review the issue.

¶ 48 Due process requires the prosecution to prove beyond a reasonable doubt every element of an offense. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). Once an affirmative defense is raised, the State has the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). The elements of the affirmative defense of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). If the State negates any one of these elements, the defendant's claim of self-defense must fail (*Id.*) and the trier of fact must find the defendant guilty of murder either in the first or second degree. *Jeffries*, 164 Ill. 2d at 127-28. To reduce his offense from first-degree murder to second-degree murder, defendant bears the burden of proving the presence of a statutorily defined mitigating factor by a preponderance of the evidence 720 ILCS 5/9-2(c) (West 2012). One such mitigating factor is if defendant believes that the circumstances justified using self-defense, but his belief was unreasonable. 720 ILCS 5/9-2(a)(2)(c).

¶ 49 The trial court is presumed to know, and properly apply, the law regarding burden of proof. *Howery*, 178 Ill. 2d at 32; *Cameron*, 2012 IL App (3d) 110020, ¶ 28. When the record

shows that there is strong affirmative evidence to the contrary, however, that presumption may be rebutted. *Howery*, 178 Ill. 2d at 32. On review, therefore, our question is whether the record contains strong affirmative evidence that the trial court did not hold the State to its burden of disproving defendant's self-defense claim. *Id.*

¶ 50 After reviewing the record, we find no evidence that the trial court erred regarding the allocation of the burden of proof. The record shows that the trial court correctly stated that its first task was to determine "whether or not the State has proved the defendant's guilt beyond a reasonable doubt [as to] the offense of first degree murder." The court then went through numerous individual pieces of evidence, and concluded that the evidence "support[ed] a conviction" of first-degree murder. The court then addressed the "next issue," which was whether defendant had proven by a preponderance of the evidence the presence of a mitigating factor. In doing so, the court explained: "That is to say, that the law requires that it only be more probably true than not true, that defendant at the time he committed the act that caused the death, *** believed the circumstance were such, mistakenly, that justified the use of *** deadly force, and that that belief was unreasonable." See *People v. Coan*, 2016 IL App (2d) 151036, ¶ 28 (explaining that a proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true).

¶ 51 With regard to this issue, the court noted that defendant's testimony was "questionable to say the least," but that the record did "at least marginally" support the portion of his testimony that indicated there was "at some point *** mutual combat." The court specifically noted that "[n]othing in what [defendant] said would obviate his guilt of first degree murder by way of self-defense. That's clear." But the court found it to be the case that "it was probably more true than

not true that the mechanism that caused the death, the stabbing of [O'Gara], occurred during a period of time in which [defendant] *** unreasonably believed that he was defending himself." Although the court mentioned defendant's self-defense claim during its discussion of defendant's burden of proof regarding the mitigating factor for second-degree murder, that alone is not "strong affirmative evidence" that the court misappropriated the burden of proof. *People v. Weston*, 271 Ill. App. 3d 604, 616 (1995) ("The presumption that the circuit court knows the law is not so easily rebutted in this case by one isolated statement, especially where the court demonstrated excellent knowledge of law and facts throughout the trial."). Given this record, we cannot say that defendant has provided "strong affirmative evidence" to overcome the presumption that the trial court correctly applied the law regarding the burden of proof in this case.

¶ 52 Finally, defendant contends that his 16-year sentence is excessive given the presence of mitigating factors, such as the fact that he was a first-time offender.

¶ 53 As an initial matter, we note that defendant has failed to preserve this issue for appeal by not objecting to the court's oral pronouncement or filing a motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). The State, however, does not argue that defendant has forfeited this issue and, therefore, has waived its forfeiture argument. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 ("The rules of waiver also apply to the State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture."); *People v.*

Reed, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture."). As such, we will review the issue.

¶ 54 The Illinois Constitution requires that a trial court impose a sentence that reflects both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In reaching this balance, a trial court must consider a number of aggravating and mitigating factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). Absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 55 Ultimately, the trial court is in the superior position to weigh the appropriate factors and so its sentencing decision is entitled to great deference. *Id.* Where that sentence falls within the statutory range, it is presumed proper and will not be disturbed on review absent an abuse of discretion. *Alexander*, 239 Ill. 2d at 212-13. An abuse of discretion exists where the sentence imposed is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212.

¶ 56 Here, we find that defendant's sentence was not excessive and that the trial court did not abuse its discretion when it imposed the 16-year term. A conviction for second-degree murder is a Class 1 felony. 720 ILCS 5/9-2(d) (West 2012). A Class 1 felony has a sentencing range of 4 to 20 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2012). Accordingly, the 16-year sentence imposed by the trial court falls well within the permissible statutory range and, thus, we presume

it proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12; *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 57 Defendant does not dispute that his 16-year sentence is within the applicable sentencing range and is therefore presumed proper. Rather, he argues that his sentence does not reflect that several mitigating factors were present, which justified only a sentence at the lower end of the statutorily prescribed range. Specifically, defendant points to his strong educational and work history, the support from his family, and his lack of a criminal record as mitigating evidence that does not support a sentence only two years shy of the statutory maximum.

¶ 58 As mentioned, however, absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19. As such, in order to prevail on these arguments, defendant "must make an affirmative showing [that] the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant cannot make such a showing here because the record reflects that the court considered all evidence in mitigation.

¶ 59 We initially note that it is not necessary for a trial court to "detail precisely for the record the exact thought process undertaken to arrive at the ultimate sentencing decision or articulate its consideration of mitigating factors." *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 32; *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). That said, the record at bar shows that the trial court expressly considered the relevant factors in reaching its sentencing decision. In announcing its decision, the trial court noted that it had read defendant's PSI "in its entirety." The PSI detailed defendant's educational and work history. Additionally, the court heard testimony from

defendant's wife and brother-in-law, as well as several impact statement letters, which spoke of the support defendant had from members of his family. The court also noted that it was "mindful" of the need to look at rehabilitation to curb recidivism and, to that end, highlighted defendant's "limited interaction with the criminal justice system." But the court also noted the facts of the case, which included defendant's "crazy lies to push away any association of guilt onto himself." In sentencing defendant to a 16-year term, the court acknowledged that this was a case of "the most serious nature," where defendant's actions were "unconscionable." See *Busse*, 2016 IL App (1st) 142941, ¶ 28 ("In fashioning the appropriate sentence, the most important factor to consider is the seriousness of the crime."); see also *People v. Coleman*, 166 Ill. 2d 247, 261 (1995) ("A defendant's rehabilitative potential *** is not entitled to greater weight than the seriousness of the offense.").

¶ 60 Given that all of the factors defendant raises on appeal were discussed in defendant's PSI report or in arguments in mitigation, defendant essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. As noted above, this we cannot do. See *Busse*, 2016 IL App (1st) 142941, ¶ 20 (explaining that a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently). As the trial court is presumed to have considered all evidence in mitigation, and the evidence suggests that it did, we find that the trial court did not abuse its discretion in sentencing defendant to 16 years' imprisonment for committing second-degree murder. See *Alexander*, 239 Ill. 2d at 212-14.

¶ 61 In reaching this conclusion, we need not consider *People v. Parikh*, 2014 IL App (2d) 130188-U, cited by defendant in support of his argument that the presence of mitigating factors

requires a term toward the lower end of the statutory range. Unpublished orders, such as *Parikh*, have no precedential authority and may only be cited to support claims of double jeopardy, *res judicata*, collateral estoppels, or law of the case. Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). Because defendant is not citing *Parikh* for any of those reasons, we will not consider it on review.

¶ 62 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 63 Affirmed.