SECOND DIVISION
JULY 26, 2011

2011 IL App (1st) 090743-U
1-09-0743

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 8598
	)	
DORWIN DAVIS,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: The trial court committed harmless error in refusing to grant defense counsel's request for an involuntary manslaughter jury instruction; the plain error doctrine did not apply to reach the forfeited issue regarding the trial court's omission to instruct the jury of the requisite mental state of a sentencing enhancement factor; and the defendant's sentences should be vacated and remanded for the imposition of a sentence for intentional first-degree murder and a consecutive sentence for armed robbery.

¶ 1 Following a jury trial in the circuit court of Cook County, the defendant, Dorwin Davis, was convicted of first-degree murder and armed robbery. Subsequently, he was sentenced to concurrent terms of 52 years of imprisonment for first-degree murder and 20 years of imprisonment for armed

robbery. On appeal, the defendant argues that: (1) the trial court erred in denying the defendant's request for jury instructions on involuntary manslaughter; (2) the trial court erred in failing to instruct the jury on the required mental state element for the defendant's sentencing enhancement; and (3) the defendant's conviction and sentence for armed robbery should be vacated as a lesser-included offense of first-degree murder. For the following reasons, we affirm the convictions but vacate the defendant's sentences, and remand the cause to the circuit court of Cook County for resentencing.

¶ 2 BACKGROUND

¶ 3 On March 17, 2005, at approximately 7p.m., the defendant, while armed with a firearm, robbed, shot and killed the victim, Lionel Reed,[1] in the victim's car near 94th Street and Wabash Avenue in Chicago, Illinois. Subsequently, the defendant was arrested along with codefendant William Kenlow (codefendant Kenlow), who was present during the robbery and shooting, and codefendant Latrice Burns (codefendant Burns), who drove the trio's getaway car.

¶ 4 At the time of the defendant's arrest, police officers recovered a .45 caliber handgun and a shoebox containing a pair of white Nike gym shoes in the rear of the getaway car. Police officers also recovered a fired cartridge case and a fired bullet inside the victim's car, which, according to firearms testing, were fired from the handgun recovered from the getaway car.

¶ 5 A few hours after the defendant's arrest, police officers performed a "gunshot residue test" on both the defendant and codefendant Kenlow. The results of the gunshot residue test revealed that the defendant's hands tested positive for gunshot residue particles, while codefendant Kenlow's

[1]The spelling of Lionel Reed's name varies throughout the record.

hands tested negative.

¶ 6 Subsequently, at the police station, the defendant made incriminating statements about the crime to Detective Danny Stover (Detective Stover), stating that he and codefendant Kenlow had planned to rob the victim of his car, money and shoes and to "beat his [expletive]." The defendant then also made a videotaped statement to Assistant State's Attorney Catherine Nauheimer (ASA Nauheimer) regarding his account of the robbery and shooting. Consequently, the defendant was charged with first-degree murder and armed robbery.

¶ 7 On January 13, 2009, a four-day jury trial was held. The defendant and codefendant Kenlow were jointly tried, but two separate juries were impaneled to render separate verdicts for each defendant. At trial, Officer Delroy Taylor (Officer Taylor) testified that on March 17, 2005, at approximately 7p.m., he and his partner, Officer Moreno, were patrolling the area near the Chicago Transit Authority (CTA) station at 95th and State Streets when Officer Taylor observed a white "Grand AM" vehicle pulling into a nearby alley and extinguishing its headlights. The engine of the vehicle remained running. Officer Taylor then noticed that two men, later identified as the defendant and codefendant Kenlow, exited the vehicle and walked northbound onto 94th Street toward Wabash Avenue, after which Officer Taylor lost sight of them. Shortly thereafter, Officer Taylor heard a loud bang "[s]imilar to a gunshot fire" from the vicinity of 94th Street, and saw the defendant and codefendant Kenlow running back towards the white vehicle in the nearby alley. Officer Taylor testified that codefendant Kenlow was carrying a shoebox while he was running, which codefendant Kenlow did not possess in his hand when he first exited the white vehicle. Officer Taylor stated that the defendant and codefendant Kenlow then reentered the white vehicle, which immediately "sped

off at a high rate of speed." Officer Taylor noticed that the driver of the white car was female, who was later identified as codefendant Burns. Officer Taylor testified that he then used the police radio to communicate with other police officers about what he had witnessed and gave a description of the white vehicle and the three individuals. As a result of Officer Taylor's description of the white vehicle, the defendant and codefendants Kenlow and Burns were apprehended by police officers near 91st and State Streets. Within minutes, Officer Taylor arrived at that location and identified the white vehicle and the defendant, codefendant Kenlow and codefendant Burns as the three individuals he had observed in the alley near the CTA station. Subsequently, Officer Taylor and his partner, Officer Moreno, went to the area of 94th Street and Wabash Avenue, where they learned that the victim had been shot and was being treated by paramedics.

¶ 8 During the trial, the defendant's videotaped statement to ASA Nauheimer and a transcript of the videotape recording were published to the jury. In the videotaped statement, the defendant recounted the following events of March 17, 2005. He stated that at noon on March 17, 2005, codefendant Burns drove the defendant to codefendant Kenlow's home, where codefendant Kenlow informed the defendant that the victim, Lionel Reed, sold shoes from his car and carried a large sum of money. The two men then hatched a plan to rob the victim because codefendant Kenlow wanted a pair of shoes and the defendant needed money. Codefendant Kenlow also told the defendant that the victim was a "big man" and that the victim "wouldn't be scared if [the defendant] just told him [the defendant] was gonna take [the shoes]." The defendant and codefendant Kenlow then obtained a "shared gun," which was loaded with one bullet. At 3:30p.m., the defendant telephoned the victim to inquire about Nike "Air Force One shoes," and informed the victim that the defendant would

telephone him again at a later time to set up a meeting location. At approximately 6:20p.m., codefendant Burns returned to codefendant Kenlow's home in the white vehicle and picked up the defendant and codefendant Kenlow. In the videotaped statement, the defendant noted that codefendant Burns drove the white car while he sat in the front passenger seat, and codefendant Kenlow sat in the rear seat of the vehicle. During the car ride, the defendant handed codefendant Kenlow the handgun, who "cocked it back to see if the bullet was in there, *** put it on fire and gave it back to [the defendant]." The defendant then put the handgun into the pocket of his coat. As the trio traveled near 95th and Halsted Streets, the defendant used codefendant Burns' cellular telephone to call the victim, and arranged to meet him at 94th Street and Wabash Avenue. Codefendant Burns then drove to the area of 93rd Street and Wabash Avenue, where the defendant exited the vehicle and walked to the victim's waiting car on 94th Street. Once the defendant approached the victim, the victim "opened up his trunk and showed [the defendant] the shoes," after which the defendant telephoned codefendant Kenlow and informed him that he needed $10 more in order to purchase the shoes. The defendant then entered the front passenger seat of the victim's car, and the victim drove a short distance to the corner of 94th Street and Wabash Avenue to meet codefendant Kenlow. At that point, the defendant exited the victim's car, rejoined with codefendant Kenlow, and discussed how they would rob the victim at gunpoint. Subsequently, the defendant reentered the front passenger side of the victim's car, haggled over the price of the shoes with the victim and handed the shoes to codefendant Kenlow, who was standing on a sidewalk. The defendant then informed the victim that he and codefendant Kenlow had to "take these shoes." When the victim protested and tried to drive away, the defendant pointed the handgun at the victim and then moved his hand

to the trigger. According to the defendant, at that point, the victim grabbed the defendant's wrist and the handgun discharged. The defendant stated that he was at first "stunned" because it was not his "intent to do it," and that "the gun just went off." Subsequently, both the defendant and codefendant Kenlow fled to codefendant Burns' vehicle and drove away.

¶ 9 Dr. Clare Cunliffe (Dr. Cunliffe) testified at trial that she performed the autopsy on the victim. She stated that the victim suffered a single gunshot wound to his chest and that there was no evidence of close-range firing. Dr. Cunliffe concluded that the handgun was fired from more than 18 inches away from the victim.

¶ 10 Detective Stover testified at trial regarding the incriminating statements that the defendant made to him following his arrest, which paralleled the defendant's account of the shooting reflected in the videotaped statement to ASA Nauheimer. Detective Stover stated that two cellular telephones were recovered from the defendant following the defendant's arrest, and that one of the two cellular telephones was registered to codefendant Burns. Detective Stover testified that telephone records from the cellular telephone registered to codefendant Burns showed that a call was placed to the victim's cellular telephone shortly before the shooting.

¶ 11 During the jury instruction conference, the State submitted, without objection from defense counsel, a jury instruction for the charge of first-degree murder (IPI Instruction 7.02). IPI Instruction 7.02 stated that in order to sustain a charge of first-degree murder, the State must prove that first, "the defendant performed the acts which caused the death of [the victim]"and second, that "when the defendant did so, he intended to kill or do great bodily harm to [the victim]'; or "he knew that his acts would cause death to [the victim]"; or "he knew that his acts created a strong probability of

death or great bodily harm to [the victim]"' or "he was committing the offense of armed robbery." Defense counsel then requested that a jury instruction for involuntary manslaughter also be given, arguing that the defendant's incriminating statements to Detective Stover and ASA Nauheimer showed that there was a struggle for the handgun between the defendant and the victim. Defense counsel further argued that if the jury, as the fact finder, determined that no armed robbery was committed, then the jury would be able to determine whether involuntary manslaughter had occurred based on the defendant's incriminating statements that he and the victim had struggled over the firearm prior to the shooting. The State then argued against the inclusion of an involuntary manslaughter instruction, noting that "[w]e can probably nip this whole thing in the bud if you're considering the involuntary. We can nolle the intentional counts and go on felony murder." After hearing the parties' arguments, the trial court denied defense counsel's request to tender an involuntary manslaughter instruction to the jury and stated the following:

> "I remember looking at the video and I think reading it in conjunction with observing [the defendant's] testimony from the video, and it helps me make up my mind along with the other facts that go along with this case. And he did very clearly say that he had his hand – his finger on the trigger.
>
> There is no indication that there was a struggle. There was an indication that the victim put his hand or hands on the gun, or on his wrist actually, on [the defendant's] wrist, and that the trigger was pulled.

> There is no indication that he had – the victim had his hands on the gun or any place on the trigger. It was on the wrist. And it was at that point, at least according to the testimony I heard, that [the defendant] pulled the trigger.
>
> And taking that in conjunction with the testimony of the expert as to what the trigger pull is, that's the intent to go there to rob the victim, that the victim was unarmed. I don't believe involuntary manslaughter is warranted under these circumstances. So that will be denied."

¶ 12 Following deliberations, the jury found the defendant guilty of first-degree murder and armed robbery.[2] Specifically, the jury found that the defendant "personally discharged a firearm that proximately caused the death" of the victim.

¶ 13 On February 13, 2009, the defendant filed a motion for a new trial, which the trial court denied on March 5, 2009. On March 5, 2009, the trial court sentenced the defendant to 52 years of imprisonment for the first-degree murder conviction, which included an additional 25 years for personally discharging the firearm that proximately caused the victim's death. Further, the trial court sentenced the defendant to a concurrent term of 20 years of imprisonment for the defendant's armed robbery conviction, and stated that the "murder counts will merge together."

¶ 14 On March 12, 2009, the trial court denied the defendant's motion to reconsider sentence.

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[2]A separate jury also found codefendant Kenlow guilty of first-degree murder and armed robbery.

¶ 15 On March 16, 2009, the defendant filed a notice of appeal before this court.

¶ 16 ANALYSIS

¶ 17 We determine the following issues: (1) whether the trial court erred in denying the defendant's request for jury instructions on involuntary manslaughter; (2) whether the trial court failed to instruct the jury on the required mental state element for the defendant's sentencing enhancement; and (3) whether the defendant's sentences should be vacated.

¶ 18 We first determine whether the trial court erred in denying the defendant's request for a jury instruction on involuntary manslaughter, which we review on an abuse of discretion standard. See *People v. Perry*, ___ Ill. App. 3d ___, ___, ___ N.E.2d ___, ___ (2011).

¶ 19 The defendant argues that the trial court erred in denying his request for an involuntary manslaughter jury instruction because his incriminating statements to the police provided "at least some evidence" that he did not intend to shoot the victim and that the handgun discharged accidentally when the victim grabbed the defendant's wrist during the struggle for the firearm. He contends that giving the requested involuntary manslaughter instruction would have allowed the jury to decide whether the defendant's mental state was merely reckless or whether it was culpable enough to rise to the level of a first-degree murder conviction.

¶ 20 The State counters that the defendant's request for an involuntary manslaughter jury instruction was properly denied because the evidence showed that "the homicide was murder which involved a voluntary and willful act having the natural tendency to cause death or great bodily harm," and that the surrounding circumstances of the shooting indicated that the defendant intended to shoot the victim. Further, the State argues that even if the trial court committed error in refusing to instruct

the jury on involuntary manslaughter, such error was harmless.

¶ 21 A jury instruction "is justified on a lesser offense where there is some evidence to support the giving of the instruction." *People v. DiVincenzo*, 183 Ill. 2d 239, 249, 700 N.E.2d 981, 987 (1998). A defendant is entitled to the instruction on the lesser offense even if the evidence "tending to prove the defendant guilty of the lesser offense rather than the greater [offense] *** is very slight." *People v. Washington*, 375 Ill. App. 3d 243, 249, 873 N.E.2d 540, 546 (2007). Where some evidence supports the instruction for involuntary manslaughter, as a lesser offense of first-degree murder, the trial court's failure to tender the involuntary manslaughter instruction to the jury constitutes an abuse of discretion. *DiVincenzo*, 183 Ill. 2d at 249, 700 N.E.2d at 987. "Whether an involuntary manslaughter instruction is warranted depends on the facts and circumstances of each case." *Id.* at 251, 700 N.E.2d at 988.

¶ 22 "The basic difference between involuntary manslaughter and first[-]degree murder is the mental state that accompanies the conduct resulting in the victim's death." *DiVincenzo*, 183 Ill. 2d at 249, 700 N.E.2d at 987. "Involuntary manslaughter requires a less culpable mental state than first[-]degree murder." *Id.* A defendant commits first-degree murder when he kills an individual without lawful justification and that, in performing the acts which cause the victim's death, he "intends to kill or do great bodily harm *** or knows that such acts will cause death"; or knows that his acts "create a strong probability of death or great bodily harm"; or "is attempting or committing a forcible felony other than second[-]degree murder." See 720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2008). By contrast, a defendant commits involuntary manslaughter when he unintentionally kills an individual without lawful justification and, in bringing about the victim's death, "he performs acts

that are likely to cause death or great bodily harm to another and he performs these acts recklessly." *DiVincenzo*, 183 Ill. 2d at 250, 700 N.E.2d at 987; see 720 ILCS 5/9-3 (West 2008). A defendant acts recklessly when he "consciously disregards a substantial or justifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2008). "Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm." *DiVincenzo*, 183 Ill. 2d at 250, 700 N.E.2d at 987.

¶ 23 In the case at bar, the jury was instructed by the trial court on first-degree murder and armed robbery. However, we find that the defendant was entitled to an involuntary manslaughter instruction because some evidence, though slight, was presented at trial that would support a finding of recklessness and involuntary manslaughter. Based on the defendant's custodial statements to Detective Stover and ASA Nauheimer, the defendant robbed the victim of a pair of gym shoes at gunpoint, but stated that the handgun discharged when the victim grabbed the defendant's wrist. The defendant's videotaped confession further stated that he was at first "stunned" because it was not his "intent to do it," and that "the gun just went off." This evidence, if believed, would have allowed the jury to convict the defendant of the lesser offense of involuntary manslaughter, rather than the greater offense of first-degree murder. The jury could have determined that the defendant's mental state at the time of the shooting was reckless in that he consciously disregarded the substantial or justifiable risk that pointing a loaded gun at the victim, although he did not intend to fire it, could result in the victim's death.

¶ 24 We further find the cases cited by the State to be distinguishable from the facts of the case at bar where, in those cases, there was no dispute that the defendant's *act* of firing the gun was intentional even though the *result* of the act of firing the gun was unintended. See *People v. Washington*, 399 Ill. App. 3d 664, 676, 926 N.E.2d 899, 907 (2010) (involuntary manslaughter instruction not warranted where evidence at trial, including the defendant's own testimony, showed that the defendant purposely pointed his gun at the victim and pulled the trigger); *People v. Sipp*, 378 Ill. App. 3d 157, 166, 883 N.E.2d 1133, 1139 (2007) (involuntary manslaughter instruction not warranted where the defendant's own testimony showed that he "intended to fire his weapon to the right of the group [of individuals] as a warning and to demonstrate that he was willing to protect his family"). Unlike the facts of *Washington* and *Sipp*, some evidence was presented at trial in the instant case that the defendant did not intend to shoot the victim and that the "gun just went off" when the victim grabbed the defendant's wrist. Further, we reject the State's argument that the defendant's intentional act of bringing the firearm to meet with the victim "unequivocally established" the defendant's intent to shoot the victim. Evidence was produced at trial to show that the defendant and codefendant Kenlow brought the firearm in order to scare the victim. Thus, we find that there was at least some evidence presented at trial to support an involuntary manslaughter instruction. Therefore, the trial court abused its discretion in failing to grant defense counsel's request to tender an involuntary manslaughter instruction to the jury.

¶ 25 However, even though the trial court committed error in refusing to give an involuntary manslaughter instruction, we find such error to be harmless. See *Washington*, 375 Ill. App. 3d at 249, 873 N.E.2d at 546. A trial court's error in giving or refusing to give an instruction "will not

always justify reversal when the evidence of defendant's guilt is so clear and convincing that the jury could not reasonably have found him not guilty." *Id.* "Similarly, where the evidence is sufficient to convict a defendant of the greater offense, it is not reversible error to instruct the jury only 'as to that offense.' " *Id.*, citing *People v. Fonville*, 158 Ill. App. 3d 676, 685, 511 N.E.2d 1255, 1262 (1987). Here, the evidence was sufficient for the jury to ultimately convict the defendant of the greater offense of first-degree murder. This means that the jury did not find credible the defendant's claim that he did not intend to shoot the victim or that the firearm discharged accidentally. Because the jury found that the defendant *intended* to shoot the victim, it would not have returned a conviction for involuntary manslaughter instead of first-degree murder had that option been presented to the jury. Accordingly, the defendant cannot show that he was prejudiced by the trial court's refusal to tender an involuntary manslaughter instruction. Therefore, we find that the trial court's error was harmless and does not require a reversal of the defendant's conviction.

¶ 26 We next determine whether the trial court failed to instruct the jury on the required mental state element for the defendant's sentencing enhancement.

¶ 27 The defendant argues that the trial court erred in failing to instruct the jury that the sentencing enhancement factor–"personally discharged a firearm"–included a mental state element that the defendant "knowingly and intentionally" performed this act. He contends that in the absence of instructing the jury on the mental state component required for the sentencing enhancement, the jury "may have assumed that his mere act of firing the weapon, absent any mental state whatsoever, rendered him guilty beyond a reasonable doubt of that enhancement factor." The defendant maintains that the trial court's error was prejudicial to him because evidence was presented at trial

that his "act of pulling the trigger may have been involuntary–and hence, not knowing or intentional." Thus, the defendant argues, the 25-year enhancement to the sentence for first-degree murder should be vacated.

¶ 28 The State counters that the defendant forfeited this issue for review on appeal and that the plain error doctrine does not apply to circumvent forfeiture because the evidence against the defendant was overwhelming. The State maintains that the jury instructions, taken as a whole, shows that the jury was fully apprised of the relevant legal principles. Because the jury returned a general verdict of first-degree murder, which the State interprets as "intentional murder," the State argues that the jury's specific finding that the defendant personally discharged the firearm that proximately caused the victim's death necessarily meant that it also found that the defendant's discharge of the firearm was knowing and intentional.

¶ 29 We find that the defendant has forfeited this issue on appeal because defense counsel neither objected at trial nor presented it in the defendant's motion for a new trial. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472-73 (2005) (a defendant who fails to either make a timely trial objection and include the issue in a posttrial motion forfeits the review of the issue). However, the plain error doctrine allows a reviewing court to consider unpreserved issues when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious, regardless of the closeness of the evidence. *Id.* at 178-79, 830 N.E.2d at 475; *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The first step in a plain error analysis is to determine whether an error occurred at all. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964, 971 (2008).

¶ 30 In criminal cases, "the trial court is responsible for fully instructing the jury on the elements of the offense, the burden of proof and the presumption of innocence." *People v. Delgado*, 376 Ill. App. 3d 307, 314, 876 N.E.2d 189, 196-97 (2007). " 'The purpose of jury instructions is to provide the jury with correct legal [principles] to apply to the evidence, thus enabling the jury to reach a proper conclusion based on the applicable law and the evidence presented.' " *Id.* at 314, 876 N.E.2d at 197.

¶ 31 Section 5-8-1 of the Unified Code of Corrections (Code) states that "if, during the commission of [first-degree murder], the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). "A person is considered to have 'personally discharged a firearm' when he or she, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm." 720 ILCS 5/2-15.5 (West 2008).

¶ 32 Illinois Pattern Jury Instructions (IPI) 28.01 and 28.03 set forth the following:

"**28.01 Enhancement/Extended Term Factor(s)**

The State has alleged that

[1] during the commission of the offense of _____

the defendant *[*(*was armed with a firearm*) (*personally discharged a firearm*) (*personally discharged a firearm that proximately caused [great bodily harm] [permanent disability] [permanent*

disfigurement] [death] to another person)].

* * *

28.03 Issues in Enhancement/Extended Term Factor(s)

To sustain the allegation made in connection with the offense of _____ the State must prove the following proposition:

That

[1] during the commission of the offense of _____ the defendant *[(was armed with a firearm) (personally discharged a firearm) (personally discharged a firearm that proximately caused [great bodily harm] [permanent disability] [permanent disfigurement] [death] to another person.] [A person is considered to have 'personally discharged a firearm' when he, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm]*." (Emphases in original.) Illinois Pattern Jury Instructions, Criminal, Nos. 28.01, 28.03 (4th ed. 2000).

The committee notes under IPI 28.01 refers to IPI 28.03[1] for the definition of the term "personally discharged a firearm." The committee notes under IPI 28.03 in turn states that "[t]he definition of the term 'personally discharged a firearm' is set forth in accordance with [section 2-15.5 of the Illinois Criminal Code]." IPI, Criminal, Committee Notes, Nos. 28.01 and 28.03 (4th ed. 2000); see

720 ILCS 5/2-15.5 (West 2008). Further, the committee notes state that "[t]he jury should be instructed on every enhancement/extended term factor at issue when there is sufficient evidence of that enhancement/extended term factor to submit to the jury." IPI, Criminal, No. 28.00 (4th ed. 2000).

¶ 33 In the instant case, the trial court instructed the jury on the following sentencing enhancement for first-degree murder:

> "The State has also alleged that, during the commission of the offense of first[-]degree murder, the defendant personally discharged a firearm that proximately caused the death of [the victim]. The defendant has denied that allegation.
>
> * * *
>
> To sustain the allegation made in connection with the offense of first[-]degree murder, the State must prove the following proposition:
>
> That during the commission of the offense of first[-]degree murder[,] the defendant personally discharged a firearm that proximately caused the death of [the victim].
>
> If you find from your consideration of all the evidence that the above proposition has been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was proven.
>
> If you find from your consideration of all the evidence that the

> above proposition has not been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was not proven."

¶ 34 Comparing the trial court's instructions to the jury with the relevant statutes and IPI instructions, we find that the complained-of instruction in this case failed to contain the requisite language regarding the defendant's culpable mental state for having "personally discharged a firearm that proximately caused" the victim's death. Specifically, the trial court failed to instruct the jury that the term "personally discharged a firearm" that proximately caused the victim's death required that the defendant acted knowingly and intentionally in firing the firearm. Thus, we find that the trial court's omission to instruct the jury of the requisite mental state was error. See *People v. Armstrong*, 183 Ill. 2d 130, 150, 700 N.E.2d 960, 969 (1998) (trial court committed error in failing to instruct the jury of the requisite mental state for murder).

¶ 35 However, despite the trial court's error, we find that the plain error doctrine does not apply to reach the forfeited issue. First, evidence of the defendant's guilt was overwhelming, which included a videotaped confession from the defendant that he and codefendant Kenlow hatched a plan to rob the victim at gunpoint with a loaded firearm. The record also shows that even after the defendant had successfully taken the shoes from the victim and handed them to codefendant Kenlow, who was standing on a sidewalk, the defendant pointed the handgun at the victim and moved his hand to the trigger. The record further reveals that the defendant was fully aware that the handgun was loaded with a bullet when he pointed it at the victim, that the victim was not visibly armed, and that he pulled the trigger of the firearm from a distance of more than 18 inches away from the victim.

Thus, we find that the defendant intended to shoot and kill the victim and the evidence is not closely balanced. See *id.* at 151-52, 700 N.E.2d at 969; but *cf. Delgado*, 376 Ill. App. 3d at 319, 876 N.E.2d at 201 (trial court's failure to give jury any instruction defining "sexual conduct" was plain error where the evidence was closely balanced).

¶ 36 Second, the record shows that the jury had been instructed on the issue of the defendant's culpable mental state under IPI Instruction 7.02, which pertained to three theories of first-degree murder against the defendant: intentional murder, knowing murder, and felony murder predicated on the commission of the offense of armed robbery. The jury returned a guilty verdict, on a general verdict form, for first-degree murder. "Such a general verdict raises the presumption that the jury found that the defendant committed the most serious crime alleged–intentional murder." *Armstrong*, 183 Ill. 2d at 152, 700 N.E.2d at 969. Based on the jury's guilty verdict against the defendant for intentional first-degree murder, we find that it could reasonably be concluded that the jury, in rejecting the defendant's assertion that the firearm accidentally discharged when the victim grabbed the defendant's wrist, found that the defendant knowingly and intentionally fired the handgun that proximately caused the victim's death. Accordingly, we find that the trial court's error was not so serious as to deprive the defendant of a substantial right or a fair trial. Therefore, the plain error doctrine does not apply to reach the forfeited issue.

¶ 37 We next determine whether the defendant's sentences should be vacated.

¶ 38 The State argues on appeal that the defendant's case must be remanded to the trial court for resentencing because the trial court improperly imposed concurrent sentences for first-degree murder and armed robbery, when consecutive sentences are mandated by Illinois law. The State argues that

Illinois law provides that whenever a defendant commits multiple offenses, including first-degree murder, consecutive sentences must be imposed. See 730 ILCS 5/5-8-4(a)(i) (West 2008). The imposition of consecutive sentences is mandatory and failure to impose them renders the defendant's sentence void. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995). An appellate court has the authority to correct a void sentence at any time. *Id.*

¶ 39 The State notes that "[i]t is well[-]settled that when an indictment alleges three forms for a single murder–intentional, knowing and felony murder–and a general verdict is returned, the net effect is that the defendant is guilty as charged in each count and there is a presumption that the jury found that the defendant committed the most serious crime alleged, which is intentional murder." *People v. Davis*, 233 Ill. 2d 244, 263, 909 N.E.2d 766, 776 (2009). The State urges this court to remand the case to the trial court for the imposition of judgment on the most serious intentional first-degree murder count, with the armed robbery sentence to be served consecutively.

¶ 40 In the instant case, as discussed, the jury was given a general verdict form and jury instructions on three theories of first-degree murder against the defendant: intentional murder, knowing murder, and felony murder predicated on the commission of the offense of armed robbery. The jury returned a guilty verdict, on a general verdict form, for first-degree murder. However, the sentencing order shows that the defendant was sentenced to 52 years of imprisonment for felony murder, to be served concurrently with 20 years of imprisonment for armed robbery.

¶ 41 Current Illinois case law compels us to vacate the defendant's sentence for felony murder. We must presume that the jury's determination of conviction as reflected on the general verdict form found the defendant guilty on all three counts of first-degree murder–intentional, knowing and felony

murder. *Id.* at 263, 909 N.E.2d at 776. There is a longstanding rule in Illinois, the "one good count rule," which provides that "a general verdict of guilty on a multiple-count indictment is interpreted to be a finding of guilt on each count." *People v. Moore*, 397 Ill. App. 3d 555, 564, 922 N.E.2d 435, 443 (2009). Pursuant to the "one good count rule," the defendant in the instant case must be sentenced on the most serious of the offenses for which he was convicted–specifically, intentional murder. *Id.*; *People v. Calhoun*, 404 Ill. App. 3d 362, 382-83, 935 N.E.2d 663, 681 (2010).

¶ 42 The defendant acknowledges the principle that a general verdict on first-degree murder counts charging three different theories of murder presumes a conviction on the most serious charge; hence, he does not dispute the continued vitality of the "one good count rule." See *People v. Smith*, 233 Ill. 2d 1, 18-22, 906 N.E.2d 529, 539-41 (2009). Nonetheless, he asserts that the "one good count rule" was inapplicable to the case at bar because the sentencing consequences in his multiple-count indictment alleging intentional, knowing and felony murder differed depending on the theory of murder proven. He argues that the jury's guilty verdict on a general verdict form "did not provide the specificity necessary to enter a conviction for intentional murder where the sentencing consequences stemming from an intentional murder conviction were more onerous than those stemming from a felony murder conviction," and cites to *Smith* for support. See *Smith*, 233 Ill. 2d at 23, 906 N.E.2d at 542 (vacating the defendant's conviction and sentence for attempted armed robbery and holding that the trial court abused its discretion in refusing the defendant's request for separate verdict forms where "specific findings by the jury with regard to the offenses charged could result in different sentencing consequences"). Thus, the defendant urges this court to find that the "one good count rule" was inapplicable in the instant case and therefore we should vacate his

conviction and sentence for armed robbery as a lesser-included offense of felony murder.

¶ 43 We reject the defendant's contention that the "one good count rule" was inapplicable and that his armed robbery conviction and sentence should be vacated based on the holding in *Smith*. Our supreme court in *Davis*, 233 Ill. 2d at 271-73, 909 N.E.2d at 781-82, has clarified that the narrow holding in *Smith* was "conditioned on the trial court's refusal to grant [the defendant's] request [for specific verdict forms] and did not establish a rule that the court must act *sua sponte* to give a specific verdict form." *Id.* at 273, 909 N.E.2d at 781-82. Here, defense counsel never objected to the tendering of a general verdict form for first-degree murder to the jury and did not request that the trial court provide a special verdict form. We find that the trial court did not have a *sua sponte* duty to give a specific verdict form to the jury where it was not requested by defense counsel. Thus, based on the "one good count rule" and the presumption that the jury found that the defendant committed the most serious crime alleged when it returned a guilty verdict on a general verdict form for first-degree murder, a sentence for intentional murder should be imposed on the defendant.

¶ 44 We further note that the defendant, in his opening brief before this court, argued that the trial court committed reversible error in failing to comply with the mandates of Supreme Court Rule 431(b), which required the trial court to ascertain potential jurors' understanding and acceptance of four basic principles of a fair trial. See Ill. S. Ct. R. 431(b) (eff. May 1, 2007). However, after the defendant filed his opening brief, our supreme court issued its decision in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), which held that a violation of Rule 431(b) did not require an automatic reversal of the defendant's conviction, that it did not constitute a structural error, and that it did not necessarily render a trial unfair. In his reply brief, the defendant concedes this argument

in light of the holding in *Thomspon*. Thus, we need not address this issue further.

¶ 45 For the foregoing reasons, we affirm the defendant's convictions but vacate the defendant's sentences. We remand the case to the trial court with directions to sentence the defendant on the intentional first-degree murder count, with imposition of a consecutive sentence for the armed robbery conviction.

¶ 46 Affirmed in part, vacated in part, remanded to the trial court with directions.