

No. 1-12-0587

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 08 CR 4348
)	
DEMETRIUS SHELTON,)	
)	Honorable Thomas V. Gainer Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

- ¶1 **Held:** Because there was no evidence to substantiate that defendant’s conduct was reckless rather than intentional, trial counsel did not render ineffective assistance by failing to: (1) inform defendant about the possibility of requesting a jury instruction on involuntary manslaughter or (2) request such an instruction. The defendant was not denied a fair sentencing hearing because the trial court properly relied on evidence from his particular trial and drew reasonable inferences from that evidence.
- ¶2 Following a jury trial, Demetrius Shelton was convicted of first degree murder for the beating

death of Douglas Haynes.¹ The trial court sentenced Shelton to 32 years in prison.

¶ 3 On appeal, Shelton argues that his jury should have been instructed on the lesser offense of involuntary manslaughter because there was ample evidence that he acted recklessly, rather than with the intent and knowledge required for a first degree murder conviction. Shelton also claims that his trial attorney was ineffective for failing to inform him about the lesser involuntary manslaughter instruction and for failing to request such an instruction. Shelton further claims that the trial court abused its discretion by sentencing him to 32 years as the instigator of the incident by erroneously relying on evidence from co-defendant Hopkins's trial that was not presented at Shelton's trial. We affirm.

¶ 4 BACKGROUND

¶ 5 I. The Trial Evidence

¶ 6 At Shelton's jury trial, which began March 8, 2010, Charlene Ross, the victim's mother, testified that, in December 2007, she lived on the 4800 block of West Ferdinand with her daughter, Dominique Haynes and her 18 year old son, Douglas Haynes. Haynes, who was six feet three inches tall and weighed 335 pounds, was obese and suffered from a number of ailments, including an enlarged heart that was dilated and "flabby," congestive heart failure, and a sickle cell trait.

¶ 7 The State's principal eyewitnesses were LaJarvis Franklin and his cousin Genard Rhodes. At trial, Franklin testified that he lived across the street from the victim and had known him for eight

¹ A co-defendant, Reginald Jones, was also convicted of first degree murder for the beating death of Haynes. We have disposed of his appeal by separate order. The third defendant, Terrence Hopkins, was also found guilty but has not filed an appeal with this court.

to ten years. Franklin had known Shelton his whole life but did not identify him in court.

¶ 8 Rhodes testified that he lived across the street from Haynes and was his friend. Rhodes said Shelton was his “best friend” and that he was also a friend of Jones (nicknamed “Dirty Red”), Shelton’s brother, Marquis Shelton, and Prentice “Bill” Johnson. Rhodes identified Shelton in court.

¶ 9 These witnesses, and others, testified regarding the incident in question, which we summarize chronologically. On the evening of December 31, 2007, Haynes decided to go out and celebrate New Year’s Eve with some of his friends. Haynes left his house and drove his van to meet Franklin and Rhodes. After stopping by various locations with friends, Haynes, Franklin, and Rhodes entered Haynes’s van. Haynes and Franklin dropped Rhodes off, who went to meet Johnson.

¶ 10 At about 11:00 p.m., Haynes and Franklin went to obtain food. When they returned, they drove to the 4800 block of West Ferdinand Street, where three other people joined them in the van: Rhodes, Johnson, and Marquis Shelton. They drove around for a while before deciding to go to a liquor store, where Franklin and Rhodes each bought a bottle of liquor. As they headed back to Ferdinand Street, Shelton, co-defendant Jones, and two other men yelled and waved at Haynes to stop his van. When the van stopped, Shelton, Jones, and the two other men got into Haynes’s van. Once in the van, Shelton and Haynes immediately “started arguing.” The argument became physical when Shelton and Jones began hitting and punching Haynes in the head. Franklin then tried to intervene, but someone grabbed him from behind and told him not to get involved.

¶ 11 After swerving, the van came to a stop, and Haynes fled from the van. At that time, Shelton and Jones searched the van for the keys. When they could not find the keys to the van, they left the van and chased Haynes. Rhodes, along with others, exited the van and started walking down the

block. Rhodes saw Haynes and Shelton standing face- to-face, and he watched them “tussle[] a little bit, and they both fell to the ground.” Rhodes observed a crowd kicking Haynes. Rhodes tried to intervene after hearing Haynes say that he could not breathe, but Rhodes was told to stay away. He then picked up his liquor and walked away. Rhodes did not call the police because he did not believe that anyone would be hurt.

¶ 12 Franklin was the last person who left the van, staying behind to find his hat and liquor, which had been misplaced during the fight in the van. After leaving the van, he walked halfway down the block and saw four men standing around Haynes kicking him, while he was on the ground. Franklin also testified he saw Shelton and Jones punching Haynes.² Franklin, who was not concerned about Haynes, left the scene and went to his girlfriend’s house to drop off the liquor he purchased.

¶ 13 Franklin went back to the scene a short time later and found Haynes standing alone in the street and bleeding from his face. Haynes, who was only wearing a T-shirt at this point, attempted to walk with Franklin, but the blood in his face made it difficult for Haynes to see. Franklin took Haynes’s van keys, left Haynes on the corner of Hubbard Street, and went to Haynes’s house for help. He returned to the scene with Haynes’s mother, Charlene, and his sister, Dominique.

¶ 14 When Charlene arrived, she saw Haynes lying on the ground in the cold without a coat. Haynes told his mother that he could not breathe, so she took off her coat, covered him, and told Dominique to call an ambulance. A fire truck and an ambulance arrived and paramedics attempted to stabilize Haynes, who by that time was unconscious, unresponsive, and gasping for air. The

² Before the grand jury, Franklin testified that he did not see any punching, only kicking.

paramedics determined that Haynes needed more specialized care than could be provided in an emergency room, so they transported him to the nearest trauma center. When his mother saw Haynes at the hospital, he was in a coma and could not communicate with her.

¶ 15 Haynes died several weeks later, on January 18, 2008. Dr. J. Lawrence Cogan, a forensic pathologist from the Cook County Medical Examiner's Office, testified that he performed Haynes's autopsy on January 19, 2008. He prepared a written report that was admitted as an exhibit. Cogan testified that Haynes's cause of death was "pneumonia due to amphetamine intoxication with other significant conditions being multiple injuries due to an assault." He classified the manner of death as a homicide. Cogan explained that "there was the question of the relationship between the assault and the . . . death." Although Cogan described Haynes's death as "somewhat complex," he stated that the beating he underwent on December 31, 2007, caused the conditions that led to his death. Cogan opined, in essence, that but for the beating, there would have been no conditions that would have caused Haynes's death.

¶ 16 Cogan also testified that, before he conducted Haynes's autopsy, he reviewed his patient history, including medical records and reports. Some of those reports indicated Haynes had been assaulted, developed rhabdomyolysis in the hospital, and died. Cogan acknowledged that the physicians at the hospital concluded that Haynes's death was caused by "[r]habdomyolysis with adult renal failure and liver failure and most probably due to Ecstasy use."

¶ 17 In explaining the cause of death, Dr. Cogan noted that Haynes was in the hospital for 18 days after being attacked and beaten, and sustaining injuries to his face. Because of the attack, Haynes experienced shortness of breath, collapsed, and became unresponsive. Paramedics were able to

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resuscitate him, but when he was taken to the hospital, he “had [the] beginning of elevations of creatine acidosis . . . so he was developing renal failure, and his consciousness was not so good, and his breathing again was not good, it required intubation.” Although urine tests were positive for amphetamines, there was no proof that Haynes was suffering from a drug overdose.

¶ 18 In the subsequent days, Haynes developed rhabdomyolysis, a potentially lethal condition where the muscles in the body are destroyed. This condition causes remnants of the destroyed muscles to block the kidneys and liver, causing them to fail. Haynes’s liver started to fail, resulting in the need for him to be intubated for a long period of time, which then led to the development of pneumonia. The pneumonia led to sepsis and eventually Haynes died.

¶ 19 Cogan described three possible causes, which alone or together may have caused Haynes’s rhabdomyolysis. First, he noted that it “occurs very frequently after the use of cocaine or amphetamines.” Hospital staff concluded his condition was caused by amphetamine use. Cogan testified that “stress or exercise such as running could cause rhabdomyolysis” and agreed that even “flight or running for a short period of time” can cause it to develop “in the right individual” and possibly did in this case. Cogan also noted that Haynes had a “sickle cell trait” that rendered him 200 times more likely to get “exercise[-]induced rhabdomyolysis.”

¶ 20 During Haynes’s autopsy, Dr. Cogan noted “healing injuries” in addition to evidence of hospital treatment. Haynes had cuts on his face and injuries to his hands. There was hemorrhaging under the scalp (subdural hemorrhages), which was indicative of blunt trauma. There was evidence of head injuries caused by kicking or punching. Some of the injuries were made by a “blow” and the others were made from some type of sharp weapon or object with “two or more sharp edges.”

The injuries Haynes sustained were consistent with being attacked.

¶ 21 Cogan also testified that Haynes had a number of preexisting conditions. In particular, he referenced that Haynes had congestive heart failure and noted that the “initial collapse and [cardiac] arrest [was] due to the assault.” Cogan testified that Haynes had “congestive heart failure, his heart [was] bad, the assault put additional strain on the heart and the heart failed.” According to Cogan, the assault on December 31, 2007, was the trigger for all of the conditions that contributed to Haynes’s death. The testimony on this issue included the following colloquy:

“Prosecutor: Doctor, was the death of Douglas Haynes the result of the assault that occurred prior to his admission to Mount Sinai Hospital?

Cogan: Yes, it was.

Prosecutor: Did the assault cause the conditions that led to the death of Douglas Haynes?

Cogan: Yes, it did.

Prosecutor: In other words, if the assault had not taken place, would there have existed conditions that caused his death?

Cogan: In my opinion, no.”

Cogan summarized his findings, stating:

“Basically, the rhabdomyolysis began after the cardiac arrest, and because of these pre-existing conditions, heart failure, overweight, sickle cell trait, use of amphetamines, all these things set him up for the rhabdomyolysis which eventually killed him.”

¶ 22 Furthermore, Cogan testified that if he were to write a new autopsy report, it would be different. After the autopsy, Cogan reviewed the case with prosecutors, who “brought up the question about rhabdomyolysis,” so he conducted research on the internet for rhabdomyolysis and came “across exercise[-]induced rhabdomyolysis, which [he] had not considered in this particular case.” As a result, Cogan would have stated his conclusion as to Haynes’s death differently:

“If I were to re-word it today, it would probably be rhabdomyolysis due to multiple injuries from assault with other conditions being amphetamines, intoxication. I would downplay the amphetamines.”

¶ 23 At trial, Franklin was unable to identify Shelton in open court. He had, however, previously identified Shelton. Franklin viewed a photo array on January 2, 2008, and he identified Shelton as one of the people who punched the victim several times in the van, chased the victim, and punched and kicked the victim on the street.

¶ 24 Shelton was arrested on January 17, 2008. On that day, a physical lineup was organized and viewed separately by Franklin and Rhodes. In a lineup conducted by Chicago Police Detective Joe Kell, Franklin identified Shelton as one of the men who beat Haynes. Rhodes also viewed the lineup and identified Shelton as one of the men who punched the victim several times in the van, and then kicked and punched Haynes during the attack on the street.

¶ 25 At trial, Rhodes’s handwritten statement was read to the jury. According to his statement, Rhodes was in Haynes’s van on December 31, 2007, when people on the street hollered for the van to stop. He stated that Shelton, Jones, James Marshall, and another guy got into the van. Rhodes testified that there was a commotion in the van before it stopped and Haynes “jumped out” of the

driver's side door. Rhodes stated that when he got out of the van, Shelton was the only person still inside. When he was out of the van, Rhodes could "see [Haynes] fighting with people." Initially, he saw Haynes and Shelton both standing and punching, and he then looked away. After looking back at them, Haynes and Shelton were both on the ground. Once Haynes and Shelton were on the ground, Jones and the unknown fourth man were "kicking [Haynes] as he was laying on the ground." Rhodes stated that he tried to stop the fight when he heard Haynes say he could not breathe, but someone told him not to get involved. The fight had lasted approximately two minutes at that point.

¶ 26 The parties stipulated that a video from the Chicago Police Department's "pod" camera at Lamon Avenue and Hubbard Street accurately portrayed events that occurred near that intersection on December 31, 2007. The video, which was played to the jury, corroborated the trial testimony of Franklin and Rhodes and also Rhodes's written statement. The video, although grainy and often rotated away to show areas not relevant to the incident, reveals that the fight occurred during a snowy night. It shows Haynes's van stopping in the street and Haynes exiting the driver's side of the van. It also shows several other people exiting the van. In the video, Haynes is seen on the ground with people standing around him, kicking him, and punching him. Later, the video shows Haynes sitting on the curb in the snow, wearing just a t-shirt. Next, Haynes and Franklin are on the corner of Lamon Avenue and Hubbard Street; Franklin is standing and Haynes is lying on the ground. Finally, the video shows people standing around Haynes and a fire truck and an ambulance on the scene.

¶ 27 After Shelton's jury was excused, evidence was presented concerning co-defendant Terrence Hopkins's January 18, 2008 written statement. That statement was published to the jury. In that statement, Hopkins stated he was with Shelton and Jones on the night of January 31, 2007, when

they entered Haynes's van. Hopkins stated that Shelton began hitting Haynes's head with his fists until Haynes stopped the van and ran away. Hopkins indicated that Shelton told Marshall "to go catch" Haynes. Hopkins stated that all of the defendants punched and kicked Haynes. After a while Hopkins stopped kicking Haynes, but Shelton and Jones continued. He estimated that the fight continued for about three or four minutes and then Jones picked up a bottle from the curb, broke it, and "carve[d]" Haynes's face and "jug[ged]" or stabbed him "several times in the body and in the face." According to Hopkins, "he got involved because he thought it was only going to be a beat down and he didn't know anyone was going to get stabbed."

¶ 28 After the prosecution rested, Shelton informed the trial court he did not want to testify. He also informed the trial court that he had discussed with his attorney the possibility of instructing the jury on the lesser offense of aggravated battery, and that he wanted such an instruction given. The trial court instructed the jury on first degree murder, accountability, causation, and aggravated battery. Following deliberations, the jury found Shelton guilty of first degree murder.

¶ 29

II. Post-Trial Proceedings

¶ 30 During the post-trial phase, Shelton terminated his trial attorney. Shelton's new counsel, Stephen Richards, filed an amended motion for a new trial and or judgment notwithstanding the verdict. Attached to Shelton's post-trial motion was a written report by forensic pathologist, Dr. Shaku Teas, who explained that Haynes was obese and his heart was enlarged and weighed 500 grams, 350 grams being normal. Teas described Haynes's injuries as "superficial and external" and found no evidence they "could have led to his death." She concluded that Haynes:

“[D]ied as a result of Acute Exertional Rhabdomyolysis with renal failure associated

with sickle cell trait and amphetamine use. The running and ‘beating’ and the associated exertion probably played a contributory role, as did his physical condition (obesity and cardiac enlargement). Acute exertional rhabdomyolysis can occur even in well conditioned individuals and often occurs unexpectedly so it cannot be predicted. The diagnosis is difficult and many professionals do not consider it in the differential diagnosis as in this case. Generally, sickle cell trait is thought to be a relatively benign condition by most medical personnel but it can lead to sickle cell crisis and rhabdomyolysis in certain situations.”

¶ 31 As a result of Teas’s findings, Shelton’s post-trial motion argued that he could not have known that his actions were “practically certain” to cause death or great bodily harm to Haynes, as required for a first degree murder conviction. Shelton’s motion also relied on Cogan’s testimony, noting that Cogan testified that Haynes’s death was caused by a “freakish combination” of conditions. These conditions included “sickle cell anemia, excessive weight, an underlying heart condition, and possibly, amphetamine use, which, together with the injuries sustained from the assault, triggered the rhabdomyolysis which ultimately caused his death.” Cogan also testified that the rhabdomyolysis “could have been triggered merely by the exertion involved in running away from the assault, even without the blows and kicks.”

¶ 32 On July 20, 2011, the trial court heard argument on Shelton’s post-trial motions, with Shelton adopting the arguments of Jones and both parties seeking an evidentiary hearing. Noting that Cogan and Teas concluded that the beating “caused [Haynes’s] death 22 days later . . . because of a prior existing condition,” Shelton’s post-trial counsel contended that trial counsel incompetently argued

that Haynes's death was not the result of the beating, so that the beating could only be characterized as an aggravated battery. The counsel pointed out that there were two problems in asserting this defense. First, there was no expert to counter Cogan's testimony and autopsy report. Second, because common law mandates that a defendant take his victim as he finds him, if the beating in any way contributed to Haynes's death, then Shelton was liable for the homicide and could not be "convicted logically of aggravated battery because the battery is [the] cause of death." Shelton's counsel argued that trial counsel did not "submit a lesser-included for involuntary manslaughter, which . . . was [the] logical and appropriate verdict."

¶ 33 Counsel for Shelton argued that the jury should have been given an involuntary manslaughter instruction because Shelton did not have the mental state required for first degree murder. Instead, he was merely reckless in performing acts that ultimately led to Haynes's death. Here, Shelton's counsel pointed out that Cogan did not even consider the diagnosis of acute exertional rhabdomyolysis until he came across it in preparation for trial. Under that diagnosis, Shelton did not have the required mental state because that occurs unpredictably and unexpectedly.

¶ 34 The trial court rejected Shelton's claim that an involuntary manslaughter instruction was appropriate in this case. The trial court stated that: "I'm convinced that had that request been made of the court, I would not have given [an] involuntary manslaughter instruction." In evaluating the evidence, the trial court found there was no basis for the instruction because the evidence showed that defendants acted intentionally stating: "I don't believe that there's any way that a reasonable jury could find these defendants acted in a reckless manner in this case." The trial court also noted that "This was a very vicious and brutal beating" that did not result in "superficial injuries." According

to the trial court:

“These were not reckless acts. These were intentional acts that began the moment these two men and their cohorts got into Douglas Haynes’[s] vehicle and continued after Douglas Haynes tried to run away, tried to escape. That’s not reckless, those are intentional things these men did. And I wouldn’t have given [them] the involuntary manslaughter instruction under these circumstances.”

The trial court also noted that Haynes was outnumbered and a weapon may have been used in the attack.

¶ 35 In considering the argument that trial counsel was ineffective for not calling an expert in pathology to challenge the medical expert’s testimony, the trial court found that Cogan and Teas “reached almost the same conclusion” about the cause of Haynes’s death. Thus, the trial court determined there was no need for any evidentiary hearing. The trial court rejected the ineffective assistance of counsel claim, but continued the matter for consideration of the remaining issues raised in the post-trial motions.

¶ 36 At the next court date, on November 10, 2011, Shelton’s counsel renewed his claim, but the trial court still concluded that trial counsel was not ineffective, stating:

“It was the strategy of the first attorneys to attack the cause of death and argue that at worst what happened here was an aggravated battery because there’s no denying what’s depicted on that video. This wasn’t reckless. This was intentional. They knowingly and intentionally beat this man. To simply argue that this was a reckless act would have been like throwing a beach ball to the prosecutor who’s got a huge

basketball bat just waiting to hit it out of the park because there's nothing reckless about what these guys did. They stopped the van, they got into the van, they began to beat the man, they chased the man down, when they got him they caught him, they beat him to the ground, they kicked him, they beat him some more and they left him for dead. That's not reckless, that's not involuntary."

¶ 37 The trial court went on to state that "a reasonable trier of fact could assume that the defendants acted intentionally, knowingly, or at a minimum knew that what they were doing was likely to cause death or great bodily harm notwithstanding the fact that the cause of [Haynes's] death got tied up with who he is." The trial court first noted trial counsel's strategy of attacking the cause of the victim's death, which entailed "argu[ing] that [Haynes's] didn't die from the beating as much as he died from who he was," but the jury rejected that strategy. The trial court next noted that the jury also had the "alternative of finding that they beat [Haynes] but they didn't intend to kill or even do great bodily harm," which the court characterized as a "good strategy." But the jury also rejected that theory. In sum, the trial court denied all the pending post-trial motions.

¶ 38 The trial court sentenced Shelton to 32 years' imprisonment. The court found that defendants acted without provocation and the incident arose among friends. The court also found Shelton was the instigator as he was the "ring leader" who "had the beef with the victim" and "told the others what to do." The trial court explained:

"For the reader of this record the sentence for Mr. Shelton should be enhanced by virtue of the fact that he is the person [who] put this entire operation in motion when he initially attacked the victim in the van and then participated in the brutal, vicious

beating on the corner that ultimately resulted in the death of [Haynes].”

This appeal followed.

¶ 39

ANALYSIS

¶ 40

I. Ineffective Assistance of Counsel

¶ 41 Shelton argues that because his trial attorney rendered ineffective assistance, his case should be remanded for a new trial. He first claims his counsel unreasonably failed to request an involuntary manslaughter instruction when the underlying facts in this case showed his actions pertaining to the brutal beating of Haynes was reckless and not intentional. Thus, according to Shelton, tendering an aggravated battery instruction to the jury left it no choice but to convict on first degree murder.

¶ 42 Shelton also claims that his trial attorney rendered ineffective assistance because he employed an unreasonable and deficient trial strategy by attacking the cause of Haynes’s death. Here, Shelton points out that the strategy was doomed from the start because the law requires that he take the victim as he finds him, and as long as his actions contributed in some way to Haynes’s death there was sufficient proof of causation despite his pre-existing health conditions.

¶ 43 Shelton also argues that his trial counsel’s performance was deficient because he provided no response to the State’s theory of accountability and there was no evidence that Shelton detached himself from the criminal enterprise.

¶ 44 Shelton further claims that the trial court abused its discretion in finding that the circumstances in this case did not warrant an involuntary manslaughter instruction. Here, Shelton claims the trial court’s rejection of his ineffective assistance of counsel claim constitutes a manifest

abuse of discretion because the court improperly: (1) conflated the idea of an intentional act with an intentional or knowing mental state, (2) weighed factors that were not dispositive, (3) ignored the presumption that recklessness is a jury issue, (4) rejected Haynes's pre-mortem health which was relevant to the issue of recklessness, and (5) relied on an inapplicable test from *People v. Perry*, 2011 IL App (1st) 081228, ¶ 30.

¶ 45 A determination of “whether defense counsel provided ineffective assistance involves a bifurcated standard of review, wherein we defer to the trial court’s findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel’s actions support an ineffective assistance claim.” *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009) (citing *People v. Berrier*, 362 Ill. App. 3d 1153, 1166-67 (2006), *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004)). Thus, when the facts surrounding a claim of ineffective assistance of counsel are not disputed, courts will review a defendant’s claim *de novo*. *Id.* (citing *Berrier*, 362 Ill. App. 3d at 1167).

¶ 46 A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) his counsel’s performance was deficient because it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Id.* at 687-88. A defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Counsel’s performance must be viewed at the time of his actual performance, rather than in hindsight. *People v. Whittaker*, 199 Ill. App. 3d 621, 627 (1990).

Further, counsel's competence should be judged from the totality of his conduct and not on the basis on what appellate counsel might have done in his stead. *People v. Nunez*, 263 Ill. App. 3d 740, 748 (1994). As to prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶ 47 “The failure to establish either deficient performance or prejudice dooms an ineffectiveness claim.” *Stanley*, 397 Ill. App. 3d at 613 (citing *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994)). Thus, “[m]anifestly, ineffectiveness claims can be solely on the prejudice component, without establishing whether counsel's performance was deficient.” *Id.* (citing *Strickland*, 466 U.S. at 697).

¶ 48 Involuntary Manslaughter Instruction

¶ 49 Shelton argues that he was entitled to have the jury instructed on the offense of involuntary manslaughter because there was ample evidence that he acted recklessly rather than with the intent or knowledge required to sustain a conviction of first degree murder. “The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct resulting in the victim's death.” *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Thus, involuntary manslaughter requires a less culpable mental state than first degree murder. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). A person commits first degree murder when he kills an individual without lawful justification and he knows that his “acts create a strong probability of death or great bodily harm.” 720 ILCS 5/9-1(a)(2) (West 2013). A person commits involuntary manslaughter if he performs acts that are “likely to cause death or great bodily harm to some individual, and he performs them recklessly.” 720 ILCS 5/9-3(a) (West 2013). Recklessness is defined as follows:

“A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the term ‘wantonly’, unless the statute clearly requires another meaning.”

720 ILCS 5/4-6 (West 2013).

¶ 50 “An instruction is justified on a lesser offense where there is some evidence to support the giving of the instruction.” *People v. Castillo*, 188 Ill. 2d 536, 540 (1999). Thus, “[i]f there is some credible evidence in the record that would reduce the crime of first degree murder to involuntary manslaughter, an instruction should be given.” *DiVincenzo*, 183 Ill. 2d at 249 (citing *People v. Foster*, 119 Ill. 2d 69, 87 (1987), *People v. Ward*, 101 Ill. 2d 443, 451 (1984)). In other words, “if there is any evidence in the record which, if believed by the jury, would reduce a charge of murder to manslaughter” that instruction should be given. *People v. Carter*, 208 Ill. 2d 309, 323 (2003). Thus, a trial court’s failure to give an instruction constitutes an abuse of discretion if there is “some evidence” that supports the instruction. *Id.*

¶ 51 A defendant’s state of mind can rarely be proved by direct evidence, but it can be shown by surrounding circumstances, including the character of the defendant’s acts and the nature and seriousness of the victim’s injuries. *People v. Williams*, 165 Ill. 2d 51, 64 (1995). In this case, Shelton did not testify as to his mental state so there is no direct evidence on the issue. Instead,

Shelton relies on the surrounding circumstances as demonstrated by testimony of the other witnesses.

¶ 52 “Although not dispositive, certain factors may suggest whether a defendant acted recklessly and whether an involuntary manslaughter instruction is appropriate. These include: (1) the disparity in size and strength between the defendant and the victim [citations]; (2) the brutality and duration of the beating, and the severity of the victim’s injuries [citations]; and (3) whether a defendant used his bare fists or a weapon, such as a gun or a knife [citations]. In addition, an involuntary manslaughter instruction is generally not warranted where the nature of the killing, shown by either multiple wounds or the victim’s defenselessness, shows that defendant did not act recklessly. [Citation.] Whether an involuntary manslaughter instruction is warranted depends on the facts and circumstances of each case.” *DiVincenzo*, 183 Ill. 2d at 251.

¶ 53 The record amply establishes that Shelton acted deliberately and intentionally by brutally attacking and beating Haynes. The pod video and testimony establish that Haynes’s beating was particularly brutal and vicious. After flagging Haynes down, Shelton and the members of their group entered his van and proceeded to beat him in the head. Haynes was eventually able to escape the beating by fleeing from his own van. The group, apparently not satisfied with the initial beating, chased Haynes down the street. When the group caught up to Haynes, members punched and kicked him while he lay defenseless in the snow-covered street. The group ignored Haynes when he screamed that he could not breathe. After finishing their brutal attack, they stole his jacket and left him sitting in the snow, bleeding and grasping for air.

¶ 54 The severity of Haynes’s multiple injuries show that Shelton intentionally and brutally attacked Haynes. Cogan testified that Haynes had cuts on his face and injuries to his hands

consistent with having been attacked. Haynes had hemorrhaging under the scalp, which was indicative of a blunt trauma. There was evidence of head injuries caused by kicking and punching. Some of Haynes's injuries were caused by a "blow" and others were made from some type of sharp weapon or object with "two or more sharp edges." Haynes's injuries were so severe that hospital doctors had to place a device in his skull to monitor his brain because of potential swelling.

¶ 55 Shelton attempts to analogize his case to *People v. DiVincenzo*, 183 Ill. 2d 239 (1998) and *People v. Jones*, 404 Ill. App. 3d 734 (2010). These cases, however, are factually distinguishable. In *DiVincenzo*, the defendant and victim fought one-on-one and were the same general size and strength. There were only two blows exchanged, no weapon was used, and the fight was over in a matter of seconds. The resulting injury (a torn cerebral artery which caused a subarachnoid hemorrhage) was a rare phenomenon that resulted in the victim's death. In finding that the trial court erred in refusing to instruct the jury on involuntary manslaughter, the *DiVincenzo* court found that "[s]ome of this evidence could have suggested to the jury that defendant acted recklessly but without knowledge of a strong probability of death or great bodily harm." *DiVincenzo*, 183 Ill. 2d at 251. In this case, Shelton was not acting alone nor did he merely deliver two blows which did not appear to be life-threatening, and the beating lasted between two to five minutes. Shelton attacked Haynes with a gang of men, repeatedly and severely beat him by punching, cutting, and kicking him in the head. *DiVincenzo* is therefore inapposite as these facts and circumstances show that Shelton did not act recklessly.

¶ 56 Shelton's reliance on *Jones* is also misplaced. *Jones* involved a fistfight between two people. The victim in *Jones* died of asphyxia due to compression of the neck. The *Jones* court found it

significant that the defendant asphyxiated the victim with his foot and not his hands. The court concluded that the defendant would have applied pressure with his foot in an attempt to simply hold the victim down and not to kill him. The court also found that there was nothing in the record showing that the defendant would have known that applying a certain amount of pressure to the neck, and not the jugular vein, for one minute would have been enough to asphyxiate the victim. *Jones*, 404 Ill. App. 3d at 747-49. More importantly, the medical examiner testified that the fight was not the cause of the death. As a result, the *Jones* court ultimately concluded that the evidence presented at trial was insufficient to establish that at the time the defendant placed and held his foot on the victim's neck, he intended to kill the victim or that he was consciously aware that his conduct was "practically certain" to cause a particular result. *Id.* at 750. However, the evidence was sufficient to establish that the defendant acted recklessly when he placed his foot on the victim's neck and exerted sufficient pressure to cause the victim's death. *Id.* The *Jones* court reduced the degree of the offense from first degree murder to involuntary manslaughter. *Id.*

¶ 57 In this case, unlike *Jones*, Shelton cannot credibly claim that they did not know that repeatedly kicking and punching someone in the head was not likely to cause great bodily injury or death. As stated, this case did not involve a one-on-one fight; rather, it involved Shelton and others severely kicking and punching one man. There was also evidence of a sharp weapon being used during the beating.

¶ 58 The facts of this case are more closely analogous to those in *People v. Perry*, 2011 IL App (1st) 081228. In *Perry*, the defendant was convicted of first degree murder. On appeal, the defendant contended that the trial court committed reversible error when it refused to instruct the

jury on the lesser-included offense of involuntary manslaughter. This court determined that the defendant was not entitled to an involuntary manslaughter instruction because the events showed that he did not act recklessly. In applying the factors outlined in *DiVincenzo*, the court explained:

“In this case we have a defenseless victim by all accounts. * * * We have, most importantly, a gang of eight or nine gang members, one of whom is the defendant, who surround and aggressively attack the victim. The disparity between the sides is not even close. * * * You have multiple wounds lasting more than a moment or two, as opposed to *DiVincenzo*.

2011 IL App (1st) 081228, ¶ 31.

¶ 59 Here, Haynes experienced shortness of breath, collapsed and became unresponsive. Haynes had hemorrhaging under the scalp, indicative of blunt trauma caused by kicking or punching. He had other injuries that were made from some type of sharp weapon. Thus, as in *Perry*, the evidence in this case shows that an involuntary manslaughter instruction was not warranted.

¶ 60 Furthermore, while some cases hold that “death is not ordinarily contemplated as a natural consequence of blows from bare fists * * * these same cases also stand for the proposition that death may be the natural consequence of blows with bare fists where there is great disparity in size and strength between the two parties.” *People v. Brackett*, 117 Ill. 2d 170, 180 (1987). In this case, the group who beat Haynes was bigger and stronger than Haynes. The beating involved more than just bare fists as feet were used to kick Haynes in his head and a weapon was used to cut him. As such, the evidence shows that these punches and kicks continued even after Haynes told defendants and others that he could not breathe. Although Shelton claims he acted recklessly, repeatedly kicking

a person in the head is an intentional act creating a strong probability of great bodily harm. The evidence showed that Shelton's mental state was consistent with that of first degree murder and inconsistent with that of involuntary manslaughter. In other words, he knew his acts created a "strong probability of death or great bodily harm." 720 ILCS 5/9-1(a)(2). Because these facts and circumstances amply demonstrate that Shelton acted intentionally, an involuntary manslaughter instruction was not warranted. *Perry*, 2011 IL App (1st) 081228, ¶¶ 31-35.

¶ 61 Shelton also argues that the trial court should have considered Haynes's health in deciding whether he acted recklessly. But whether Shelton was aware of Haynes's health issues is not a factor that needed to be considered in determining if he acted intentionally because it is hornbook law that a "defendant takes his victim as he finds him." *Brackett*, 117 Ill. 2d at 178. In other words, as long as Shelton's acts "contribute[d] to the death, there is still sufficient proof of causation, despite the preexisting health condition." *Id.* "The focus of the proximate cause theory of liability is whether the defendant's actions 'set in motion a chain of events that ultimately caused the death of the decedent.'" *People v. Jones*, 376 Ill. App. 3d 372, 388 (2007) (citing *People v. Lowery*, 178 Ill. 2d 462, 473 (1997)). Here, the State does not need to prove that Shelton's acts "constituted the sole and immediate cause of [Haynes's] death [citations], but rather must show that defendant's acts were a contributing cause of death, such that death did not result from a source unconnected with or independent of those acts." *Id.* (citations). In this case, Cogan testified that the assault was the trigger for all of the conditions that contributed to Haynes's death.

¶ 62 Accordingly, the trial court did not abuse its discretion or otherwise commit error by denying Shelton's post-trial motions. It follows that Shelton has failed to show that his trial counsel's

representation was deficient under *Strickland*. These determinations render Shelton's other related contentions moot.

¶ 63 II. Shelton's Sentencing Hearing

¶ 64 Shelton argues that he was denied his right to a fair sentencing hearing because the trial court relied on evidence from co-defendant Hopkins's statement to the authorities, which was never presented to Shelton's jury or offered in the presence of Shelton or his trial counsel. In particular, Shelton complains that the trial court improperly relied on evidence presented to Hopkins's jury that Shelton was the instigator who put the entire operation in motion by initially attacking Haynes in his van which led to Haynes's fatal beating. Shelton points out that, at his trial, neither Franklin nor Rhodes ever indicated, in their testimony or written statements, that Shelton was the ringleader or "had a beef" with Haynes. Thus, Shelton claims that the trial court deprived him of his constitutional right to a fair sentencing hearing by relying on evidence adduced outside his presence and by failing to provide his trial counsel with an opportunity to test that evidence by cross-examination. Shelton frames this issue as both an evidentiary and an ineffective assistance of counsel issue.

¶ 65 The State argues that Shelton forfeited this claim by not raising it before the trial court and by failing to include it in a post-sentencing motion. The State also asserts that even if Shelton's claim can be reviewed under the plain error doctrine, there were no clear or obvious errors that so fundamentally deprived Shelton of a fair sentencing hearing.

¶ 66 The plain error doctrine allows a reviewing court to "by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights * * * although they were not brought to the attention of the trial court.'" *People v. Eppinger*, 2013 IL 114121, ¶ 18 (citing Ill. S. Ct. R.

615(a)). Plain error review is proper under either of two circumstances: “(1) when ‘a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error’; or (2) when ‘a clear or obvious error occurred and that error is so serious that if affected the fairness of defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of evidence.’” *Id.* (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). “In the context of a sentencing hearing, we will review an error that is not properly preserved as plain error where the evidence is closely balanced or the error is so fundamental that it may have deprived the defendant of a fair sentencing hearing.” *People v. Thomas*, 178 Ill. 2d 215, 251 (1997) (citing *People v. Beals*, 162 Ill.2d 497, 511 (1994)). Presuming, for the sake of completeness, that Shelton did not waive this issue below, we will review this issue under the plain error doctrine.

¶ 67 “[T]his court has consistently held that the imposition of sentence is a matter of judicial discretion and the standard of review to determine whether a sentence is excessive is whether the trial court abused that discretion.” *People v. O’Neal*, 125 Ill. 2d 291, 297-98 (1988) (citing *People v. Younger*, 112 Ill. 2d 422, 427 (1986), *People v. La Pointe*, 88 Ill. 2d 482, 492 (1981)). This reasoning is based on the fact that “the trial court is in the best position to consider, *inter alia*, credibility, demeanor, general moral character, mentality, social environment, habits and age.” *Id.* at 298 (citing *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977)). A “reviewing court will not substitute its judgment for that of the trial court merely because it would have balanced the appropriate sentencing factors differently.” *Id.* (citing *People v. Cox*, 82 Ill. 2d 268, 280 (1980)).

¶ 68 The record establishes that the trial court did not abuse its discretion in its sentencing

determination because that determination was based on evidence adduced at Shelton's trial and on reasonable inferences from that evidence. For example, Shelton's jury heard testimony that all of the men were friends or acquaintances and that, on the evening in question, Haynes stopped his van and allowed Shelton and his friends to get in. Once inside the van, Shelton and Haynes argued, and Shelton began punching Haynes in the head. Thus, these facts support the trial court's reasonable inference that Shelton was upset with Haynes and was the instigator. At sentencing, the trial court noted that there "was no strong provocation" for the attack. The trial court specifically explained:

"For the reader of this record the sentence for Mr. Shelton should be enhanced by virtue of the fact that he is the person that put the entire operation in motion when he initially attacked the victim in the van and then participated in the brutal, vicious beating on the corner that ultimately resulted in the death of this [victim]."

¶ 69 The trial court also properly considered aggravating and mitigating factors in sentencing Shelton. In particular, the trial court discussed Shelton's criminal behavior, which began when he was 14 years old and consisted of a number of convictions, including drug convictions and the unlawful use of a weapon by a felon. The trial court found that Shelton's criminal conduct caused serious physical harm and noted the jury was correct when it found Shelton guilty of first degree murder on the basis of the evidence.

¶ 70 First degree murder has an applicable sentencing range of not less than 20 years and not more than 60 years. 720 ILCS 5/5-4.5-20(a) (West 2013). The sentence imposed is within the statutory range, and the trial court provided a lengthy explanation applying appropriate mitigating and aggravating factors, the pre-sentence investigation, and argument of counsel. In sum, Shelton has

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not met his burden to show that the trial court relied on improper evidence at sentencing. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010).

¶ 71 Because Shelton cannot establish the trial court erred regarding his sentencing determination, his related claim of ineffective assistance of post-trial counsel necessarily fails.

¶ 72 **CONCLUSION**

¶ 73 Accordingly, we affirm the judgment of the trial court of Cook County.

¶ 74 Affirmed.