2016 IL App (1st) 133646-U

FIFTH DIVISION
December 30, 2016

No. 1-13-3646

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 07 CR 19990
JASON MUNOZ,	)	
Defendant-Appellant.	)	Honorable Steven J. Goebel, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.[1]

ORDER

¶ 1 *Held*: Affirming judgment of circuit court of Cook County convicting defendant of first degree murder.

¶ 2 Following a jury trial, Jason Munoz (defendant) was found guilty of first degree murder and sentenced to 75 years in the Illinois Department of Corrections. Defendant raises three issues in this direct appeal. First, he argues that the trial court erred in denying his motion to suppress. Second, defendant contends that he was denied effective assistance of counsel where

[1] This appeal was assigned to the panel in 2016.

his trial attorney informed the jury during his opening statement that defendant was guilty of second degree murder. Third, defendant claims he was denied effective assistance of counsel where his trial attorney failed to request a jury instruction defining recklessness. For the reasons discussed herein, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with eight counts of first degree murder, including felony murder, and one count of attempted armed robbery in connection with the attempted robbery of Shane Hess and the fatal shooting of Hess's friend Scott Christopher ("Chris") Himle (Himle) in the early morning hours of August 31, 2007. At approximately 11:35 a.m. on that date, defendant was arrested and transported to Area 5 police headquarters for questioning, where he was placed in an interview room with the electronic recording system activated.

¶ 5 In a motion to suppress, defendant alleged that during his time at the station: (a) he was visibly under the influence of drugs; (b) he was not permitted to place a private telephone call to his family members and was informed that he could not place a second call; (c) the officers "made no effort to secure an attorney" for defendant and did not inform defendant of his right to appointed counsel; and (d) defendant initially was not offered medical care despite the fact that "it was apparent that [d]efendant was seriously ill either from withdrawal or from related medical issues." Defendant argued that his purported admissions regarding his participation in the shooting were made without the benefit of counsel and without a knowing or voluntary waiver of the right to counsel. He also contended that his purported admissions were the "direct result" of his "deteriorating medical and psychological condition and his need for medical assistance." He sought suppression of all statements he made subsequent to his "first request to secure counsel by speaking to his family."

¶ 6 During a hearing on the motion to suppress, Arthur Young, Edward Schak, and David Healy, three Chicago police detectives who were assigned to investigate the homicide testified. Portions of the electronic recording from the interview room were played for the circuit court throughout the testimony. As discussed below, the circuit court ultimately found that detectives "caution[ed] and re-cautioned" defendant regarding his *Miranda* rights and consistently respected his wishes.

¶ 7 Detective Young (Young) testified, in part, that at approximately 12:25 p.m. on August 31, 2007, defendant was placed in the interview room. After Young advised defendant of his *Miranda* rights and defendant indicated his understanding, Young interviewed defendant from approximately 1:25 p.m. to 1:31 p.m. Defendant did not appear to be physically or mentally ill at that time, and he did not make any admissions regarding the Himle shooting. At approximately 4:44 p.m., Young conducted another interview with defendant. Defendant did not complain of any illness and did not appear to be "dope sick," *i.e.*, ill due to drug withdrawal.

¶ 8 Young escorted defendant to make a telephone call at approximately 5:55 p.m. Defendant was unable to reach his mother, but was permitted to immediately place a second call to his brother. The detective overheard defendant inform his brother that he was in custody and he needed a lawyer. Young further testified: "He began to talk about basically saying that you remember where I was last night. I was over with Sammy drinking all night." Young believed defendant was attempting to establish an alibi and ordered him to hang up the telephone.

¶ 9 At approximately 8:06 p.m., defendant requested to speak with Young, who entered the room a few minutes later. The detective re-advised him of his *Miranda* rights, and defendant continued to wish to speak with Young, even without a lawyer present. Defendant neither exhibited signs of illness nor indicated that he was ill. Young interviewed defendant until

approximately 9:02 p.m.

¶ 10 At approximately 10:41 p.m. when defendant became ill Young was not present in the police station. He learned that defendant was taken to the hospital for approximately one hour. On the following day from approximately 1:27 a.m. to 1:58 a.m., Young again interviewed defendant after he advised defendant of his *Miranda* rights and defendant indicated his understanding. Among other things, Young asked defendant whether he was becoming dope sick, and defendant responded that he was not. Defendant stated that he was "hung over." He also indicated that he occasionally used crack and heroin. Defendant did not make any admission regarding the shooting during the interview.

¶ 11 At approximately 7:40 a.m., Young entered the interview room to discuss defendant's earlier offer to take a polygraph examination. Defendant wished to take the examination, but indicated that he wanted to speak with a lawyer first. Young then informed defendant of his *Miranda* rights and had no further conversations with defendant regarding the facts of the shooting at that time.

¶ 12 On cross-examination, Young testified, in part, that he never observed defendant sleeping between the interviews conducted on August 31 and the early morning hours of September 1. Defendant had informed Young during the initial interview that he had been drinking between midnight and 6:00 or 7:00 a.m. on August 31, and had not arrived home until 9:00 a.m. When asked why defendant was not taken to lockup, Young responded that there were no video cameras in lockup and that defendant remained in the interview room "to preserve the integrity of the interview process." He also acknowledged that defendant was taken to the hospital a second time during the interviews.

¶ 13 Detective Schak (Schak) testified that, together with Young, he had participated in the

interviews of defendant at 4:44 p.m. on August 31, 2007, and 7:40 a.m. on the following day. At approximately 12:21 p.m. on September 1, 2007, defendant knocked on the door of the interview room and asked to speak with the detectives. Defendant wished to call his mother and an attorney. Schak informed defendant that he could not speak with him further and advised him of his *Miranda* rights. Defendant subsequently participated in a lineup. At approximately 2:43 p.m., defendant was allowed to call his mother. Upon his return to the interview room, defendant made a statement implicating himself in the Himle shooting.

¶ 14 In the video recording of the interview, defendant informed Schak that he had intended to sell a handgun so he could purchase drugs. He met up with an individual known as "Ice," who suggested a robbery. After unsuccessfully attempting to sell the weapon to two individuals, Ice suggested they rob nearby bicyclists. Defendant pulled one of the bicyclists off of his bicycle and pointed the handgun at his head. After another bicyclist started walking toward him, defendant pointed the weapon at him and directed him to stop approaching him. Defendant informed Schak that he was "jumpy," the "gun went off," and the victim dropped to the ground. During the hearing, Schak testified that defendant did not appear to be dope sick or otherwise physically or mentally ill while making these statements.

¶ 15 On cross-examination, Schak testified, in part, that defendant had informed him he frequently used cocaine and had previously been a heroin user. The detective also confirmed that defendant consumed "a lot" of coffee and cigarettes during his time in custody. On redirect examination, Schak testified that he had re-advised defendant of his *Miranda* rights[2] after defendant had knocked on the door at 2:36 p.m. and asked to speak with him. Schak testified that defendant stated, "let's reinitiate."

[2] In the video recording, defendant indicates his understanding of the *Miranda* warnings.

¶ 16 Detective Healy (Healy) testified, in part, that at approximately 3:58 p.m. on September 1, 2007, he was informed that defendant wished to speak with a detective and had instructed the detective to bring a notebook and pen. Healy entered the interview room at 4:06 p.m. and advised defendant of his *Miranda* rights; defendant indicated his understanding. Defendant described prior crimes he had committed and expressed relief regarding his statements. He also described the handgun used in the Himle shooting as black with a wood handle, but would not reveal who had provided him with the weapon. Defendant never indicated that he was dope sick or otherwise did not feel well during that conversation. At approximately 4:57 p.m. and at 7:03 p.m., defendant was permitted to use the telephone. Healy believed defendant called his brother both times.

¶ 17 Healy further testified that at approximately 7:25 p.m., defendant asked for his medication. Healy called for an ambulance to transport defendant to the hospital so he could receive his medication. Defendant indicated that he had received a different medication during his earlier trip to the hospital, but Healy could not recall the name of the medication. On cross-examination, Healy testified that he did not personally observe whether defendant had the opportunity to sleep during the period between his arrest and his second trip to the hospital.

¶ 18 Defendant did not testify during the hearing on the motion to suppress. During arguments, his counsel asserted that his rights were violated given, among other things, the length of his time in custody, his drinking and drug use prior to his arrest, and his physical condition, including lack of sleep. Defense counsel also intimated that the police officers purposely did not place defendant in the lockup because, if he was placed there, he would have been processed through the court system and assigned a public defender, and their interviews of defendant would likely have terminated.

¶ 19 In denying the motion to suppress, the circuit court[3] noted the "ultra high category pristine credibility" of the detectives. The court "was able to watch the entire process unfold on videotape, and their testimony in court pretty much matched everything that occurred on the videotape." The court also specifically observed that: defendant's *Miranda* rights were respected; he exhibited intelligence and coherence and "voluntarily re-engage[d] the officers" in conversations; his illness was handled properly; and he was allowed to speak with his family. The circuit court concluded that "considering the totality of the circumstances surrounding this situation, the defendant freely, voluntarily, intelligently, and coherently opted to make statements to the police."

¶ 20 During opening statements at trial, defense counsel described defendant as an alcoholic and a drug addict who was attempting to obtain cocaine by selling or trading a handgun to "thugs." Defense counsel argued that after defendant was surrounded and sensed he was "in trouble," one of the "thugs" – who had previously suggested a robbery – indicated they should "go get" three nearby bicyclists. Seeing "his way out," defendant ran after the bicyclists and pulled one off of his bicycle, and then pointed the weapon at another bicyclist. According to defense counsel, defendant "freaked out" and "panicked," and the "gun went off," killing Himle.

¶ 21 Defense counsel then stated, in part:

> "I am not here because Jason Munoz is not guilty. He is guilty of second degree murder. Did he intend to go out there and kill someone? Did he intend to go out there and rob someone? Absolutely not. But does he have regrets, does he wish he could go back in time and make this go away? Of course, he does. Does he know what he did is wrong? Of course, he does.

[3] Judge Wadas ruled on the motion to suppress; Judge Goebel presided over the trial.

I want you to listen to Jason Munoz. I want you to listen to the Judge when he instructs you on the law on what it means to commit first degree murder, what it means to commit second degree murder, what compulsion is and necessity is[.] ***"

¶ 22 An exchange during a sidebar requested by the assistant State's Attorney (ASA) included the following:

"THE COURT: *** Mr. Munoz, your attorney in opening statement has just told the jury that you are guilty of second degree murder and not first degree murder but second degree murder. That is obviously trial strategy, and at this point I haven't heard the evidence. I don't know if I would give second degree murder or not, but you have to understand that your attorney has asked the jury at this point to find you guilty of second degree murder.

Do you agree with that trial strategy?

THE DEFENDANT: Yes.

THE COURT: Have you talked about that with [defense counsel]?

THE DEFENDANT: Yes.

THE COURT: And you are in full favor of that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you are still in favor of that knowing that I have not heard the evidence and I don't know if second degree applies or not at this point, and I may in fact not give second degree, I don't know yet. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you are still in agreement?

THE DEFENDANT: Yes."

¶ 23 At trial, Shane Hess (Hess) testified that he worked with Himle and Himle's girlfriend Michelle Parisi (Parisi). At approximately 3:00 a.m. on August 31, 2007, Hess, Parisi, and Himle after attending a party and dining out headed home on their bicycles. As the three traveled on Maplewood Avenue (Maplewood), Himle and Parisi biked side by side and Hess "was hanging back behind them." While Hess was riding, he felt a hand grab his backpack. He was pulled off of his bicycle and landed in the middle of the street. Although he did not remember seeing Himle and Parisi after he was pulled off of the bicycle, he knew they were nearby. Hess felt a hand on his backpack preventing him from standing up. He did not turn around but heard the man holding his backpack say, "Just give me everything in your wallet, and everything will be okay." Hess did not reach for his wallet.

¶ 24 After the hand released his backpack, Hess stood up and jogged between two parked vehicles. As he reached the sidewalk, he turned and observed Himle and a man in the middle of the street. The man was approximately five to ten feet from Himle and was pointing a handgun at him. Other than Parisi, Hess did not see anyone else standing near the individual holding the weapon. He witnessed a flash as the weapon was fired, although he did not see Himle get hit. Hess later spoke with police officers but was unable to identify anyone as the shooter, testifying that "[i]t was a split second of a glance." On cross-examination, Hess testified that he did not observe anyone on the sidewalk or the nearby area as they biked slowly down Maplewood, and he did not know what direction the person who grabbed his backpack came from.

¶ 25 Parisi testified that, as she turned on to Maplewood, she noticed two men standing "beyond the sidewalk sort of leaning up against a fence that would have been in front of a house there." She was unable to view their faces. As the three rode down the street, Parisi heard

someone running. She looked over her shoulder and observed someone running next to Hess's bicycle. She then viewed Hess sitting on the ground. The person with Hess was "pretty tall" and thin. Parisi could not see the man's face because he was wearing a hoodie.

¶ 26 After stopping her bicycle, she observed Himle walking back toward where she and Hess were standing. The man raised his arm straight out, and Parisi viewed a flat black metal handgun in his hand; he fired once. Parisi testified that no one else was in the street at the time of the shooting other than herself, Himle, Hess, and the shooter. She did not definitively identify the shooter in a subsequent lineup but stated that there was one person who approximated the build and the characteristics of the shooter. On cross-examination, Parisi testified that she did not observe where the runner came from nor did she hear anything said between him and Hess. After Parisi's testimony, the court – outside the presence of the jury – again confirmed that defendant understood that his counsel was "not arguing for a finding of not guilty."

¶ 27 Lori Karra (Karra) next testified that she was sitting with a friend on a stoop on North Avenue east of Maplewood between 2:00 and 3:00 a.m. on August 31, 2007. As she "hung out," another friend nicknamed "Ice" approached her on foot with "a guy on a bike," who she identified in court as defendant. She heard someone "say something about robbing every motherf***** they could get." Karra was not certain whether her friend or Ice made the statement. She then noticed defendant lift his shirt; a handgun was tucked in his pants. Ice and defendant left together, walking onto Maplewood.

¶ 28 Karra testified that as she walked toward the alley to urinate, Ice approached her and stated, "Get off the street, get off the block." She did not know where defendant was at that time. After Karra returned to the stoop, she noticed three bicyclists turn on to Maplewood. A few minutes later, Karra heard a "pop." One or two minutes later, defendant quickly rode by on

a bicycle. Karra subsequently informed the police that "Ice will be able to tell you everything about who did this," and she identified defendant in a lineup. On cross-examination, Karra confirmed that she thought something bad was going to happen when Ice told her to "get off the street."

¶ 29 Donald Mercado, nicknamed "Ice" (Mercado or Ice), testified that he was serving a prison sentence and had previously been convicted of other crimes. On August 31, 2007, he lived in the vicinity of Maplewood and North Avenue. Mercado, who knew defendant for years, testified that defendant approached him, attempting to sell him a .357 revolver. Defendant would not hand him the weapon, and he did not purchase the weapon. Mercado instead unsuccessfully tried to take the weapon from defendant so that he "could get crack."

¶ 30 Mercado testified that he saw Karra on the stoop; he described her as "high on heroin." He was with defendant and Karra briefly and then he and defendant "walked past there," although he later clarified that defendant was on a bicycle. Mercado had agreed to assist defendant with selling the handgun. He took defendant to approximately five gang members "hanging" behind a dumpster on the 1500 block of Maplewood. According to Mercado, the men were not interested in purchasing the weapon. After "three or four white people" went by, defendant "got off the bike and went around the dumpster," running to the street. Mercado heard a gunshot but did not see the shooting because he was behind the dumpster.

¶ 31 According to Mercado, no one was in the street other than the bicyclists and defendant. He testified that he did not tell defendant to run after the bicyclists nor did he provide him with the idea. He further testified that he did not possess a handgun at that time and never told defendant that he had to rob anyone. On cross-examination, he testified that defendant wanted to sell or trade the handgun but never mentioned a robbery. He denied telling Karra to "[g]et off

the street."

¶ 32 At trial, Brandon Smith (Smith) denied or did not recall making various statements to a grand jury in September 2007. His grand jury testimony included the following.[4] At 3:00 a.m. on August 31, 2007, Smith – who was 15 years old – was with his cousin Diamond Davis (Davis) on Maplewood and LeMoyne Street. The two met up with a man they knew as "Ice." While the three spoke, another man – who Smith identified as defendant – rode up on a bicycle. Defendant took a loaded handgun from his waist and showed it to Smith. Ice was "trying to get him to sell" the weapon to Smith and Davis, but Smith was not interested. Five or ten minutes into his conversation with Ice and defendant, three or four people on bicycles rode down Maplewood. Defendant stated "he was going to rob one of them" and went into the street chasing one of the bicyclists. He "[s]natched him by his book bag" and pulled him off of his bicycle. Smith then heard a gunshot from the middle of the street. During his trial testimony, Smith denied identifying defendant in a lineup at the police station on September 1, 2007.

¶ 33 Diamond Davis testified that in the early morning hours of August 31, 2007, he – then 17 years old – and his cousin Smith walked from North Avenue on to Maplewood. A person on a bicycle approached them, who Davis identified in court as defendant. Defendant asked whether he had crack cocaine; Davis responded that he did. Defendant then asked whether Davis would trade the crack for the handgun. Davis declined the offer, and defendant rode off.

¶ 34 According to Davis, he and Smith continued walking when they were again approached by defendant after "[a] couple of seconds." Defendant was with Ice, a person Davis knew from the neighborhood. Defendant continued to ask Davis about a transaction and showed Davis a loaded .357 Magnum. Davis did not wish to purchase the weapon. He testified that he did not

[4] During the subsequent testimony of a retired ASA, portions of Smith's grand jury testimony were published for the jury.

see anyone else on the street with a handgun, and he did not have a handgun at that time.

¶ 35 Davis then testified that "[t]hree people came down the street, and [defendant] wanted to rob them." Defendant "got off the bike and walked to the street." He grabbed the last bicyclist. Davis observed a woman "get off the bike and run back." After he observed defendant pull out the handgun, Davis ran down the alley and called for Smith to join him. He heard a single gunshot as he ran home. Davis later identified defendant in a line-up at the police station.

¶ 36 Detective Young testified, in part, regarding the steps in his investigation, including defendant's placement in an interview room with the electronic recording system activated. Young also testified regarding a recorded interview of Mercado, and portions were played. According to Young, Mercado said "three white people on bikes coming down Maplewood jumped [*sic*] off that f*****g bike, took off running and said I got one and shot old boy."

¶ 37 A forensic scientist for the Illinois State Police who had examined the fired bullet testified that a .357 caliber revolver would be capable of firing it. He also testified that "[t]o get the firearm to fire the trigger does have to be pulled in some way." Another forensic scientist who had tested Hess's backpack and shirt testified it is possible for a person to touch an item of clothing with bare hands and not leave enough DNA to be detected. The parties stipulated that defendant was excluded as a donor to the DNA profiles identified on the backpack and shirt.

¶ 38 Detective Schak testified that Smith had identified defendant in a lineup on September 1, 2007. Schak further testified that at approximately 2:53 p.m. on September 1, 2007, defendant confessed to the shooting. That portion of the electronic recording from the interview room was played for the jury. On cross-examination, Schak testified, in part, that defendant had gone to the hospital "a couple times" during the interview process and that the interview room was windowless.

¶ 39 The State rested, and the trial court denied defendant's motion for a directed verdict. Defendant testified that he arrived at his friend Sam's house on August 30, 2007, shortly after noon and began drinking. At that time, defendant drank at least one case of beer daily; he also used cocaine every other day and marijuana less frequently. Defendant and Sam went to defendant's brother's house at approximately 10:00 p.m. for a "get together," where defendant drank. After two hours, defendant and Sam returned to Sam's residence, where defendant continued drinking and used cocaine at 1:00 a.m.

¶ 40 Defendant testified that he asked Sam for more cocaine, and Sam denied having any. Defendant did not have any money, so he convinced Sam to give him a handgun to sell. After Sam gave defendant the weapon, defendant biked toward North Avenue and Maplewood to attempt to sell it. Upon arrival, Ice flagged down defendant as Ice sat on a stoop with Karra and an "older man." Ice was a "guy that was always around the neighborhood."

¶ 41 Ice asked where defendant was headed. Defendant informed Ice that he had a weapon to sell and showed him the handgun. According to defendant, Ice "makes a big scene and he says we're going to rob everybody out here." Defendant responded "no," and indicated that he wished to sell the weapon, not to rob anyone. He testified that Ice grabbed at the firearm but defendant did not let him take it.

¶ 42 After traveling a few blocks searching unsuccessfully for a potential purchaser, Ice and defendant returned to Maplewood. Defendant heard Ice tell Karra to get off the block "like he was warning her." Ice told him that there "were two guys down Maplewood that [they] could try to sell the gun to." Defendant had previously purchased drugs from Smith and Davis.

¶ 43 Defendant then testified:

"Ice tells them that I was trying to sell a gun and now Ice is trying to get me to

> hand them the gun or hand him the gun. And as we're talking, I'm kind of noticing that [Davis] is sort of kind of circling around me and he's to my right side kind of a little bit behind me and Ice was on this side, my left side a little bit kind of just to my side a little bit to the back of me and [Smith] was in front of me. And they kind of had – Ice had tried to get me to hand the gun off to either him or one of them. They were saying that they wanted to see it to make sure it worked or, you know, make sure it wasn't broken. And they had made a couple of attempts to grab the gun[.]"

Defendant did not permit them to take the handgun. He testified that he "suddenly understood why Ice warned" Karra: defendant felt he was being "set up" so they could take the weapon and probably use it against him.

¶ 44 Defendant testified that as the bicyclists passed, Ice tugged on the sleeve of defendant's hooded sweatshirt, indicating they should rob them. Defendant thought there were four riders. Ice and defendant headed toward the street from the sidewalk. He testified that he went with Ice because he wanted to extricate himself from the situation. He felt that Smith, Davis and Ice were either going to attempt to grab the gun or "jump" him. Defendant later testified that when he was surrounded by them, he felt that he had no other choice than to go with Ice.

¶ 45 According to defendant, he and Ice started to jog toward the bicyclists. Defendant caught up with the last rider and pulled him down from his bicycle. He testified that another bicyclist jumped off of his bicycle and started walking toward defendant. At that point, defendant thought the man he pulled off of the bicycle was still present and that Ice was possibly with him.

¶ 46 Defendant testified that he displayed his handgun to the man walking toward him to prevent him from approaching. Defendant repeatedly told him to stop walking. Defendant

testified, "I thought that he was going to attack me. I thought I was going to get attacked from behind. And well, I guess I got jumpy and fired a shot."

¶ 47 Defendant further testified that he did not intend to shoot the weapon and was not trying to point the weapon at the man. Defendant panicked and headed toward his bicycle. According to defendant, "Ice is back there and again he's trying to get me to hand him the gun still and I'm trying to get away from him." Defendant fled on his bicycle.

¶ 48 Defense counsel inquired why he did not run past the bicyclists after Ice had pulled him away. He responded that he thought Ice was "right there" with him and that if he tried to get away, Ice might grab him from behind. He testified that he never intended to kill anyone or to use the weapon for a robbery or anything else and that he "wasn't aiming at anything."

¶ 49 On cross-examination, defendant indicated that the only thing he was at fault for was trying to sell a handgun. The ASA questioned defendant regarding his inconsistent statements between the police station and his trial testimony, *e.g.*, whether he told detectives that Davis, Smith or Ice were very close to him while they were talking; whether he mentioned Ice telling Karra to get off of the block; and whether he told detectives that Ice touched him in any way. Defendant admitted initially informing detectives that he had no knowledge of the shooting and subsequently stating that Ice had stolen the handgun and committed the shooting. He acknowledged that Davis, Smith, or Ice never verbally threatened to kill or "jump" him.

¶ 50 During the jury instruction conference, defense counsel requested instructions on second degree murder, compulsion and necessity. The trial court denied the request for a second degree murder instruction, finding "no indication at all of self-defense" and that "[s]udden and intense provocation does not apply to a situation under which the Defendant just testified." The trial court initially ruled that compulsion and necessity defense instructions would be given and

denied the defense's request for an involuntary manslaughter instruction. On the following day, the trial court reversed itself, ultimately deciding *not* to give compulsion or necessity instructions, over defense objection, but to give an involuntary manslaughter instruction.

¶ 51 While the trial court and counsel discussed Illinois Pattern Jury Instructions, Criminal No. 7.07 (4th ed. 2000) (I.P.I. No. 7.07) regarding involuntary manslaughter, defense counsel did not request Illinois Pattern Jury Instructions, Criminal No. 5.01 (4th ed. 2000) (I.P.I. No. 5.01), which defines recklessness. During closing statements, defense counsel argued, in part:

> "[I]s he guilty of felony murder or first degree murder? Absolutely not. Is he guilty of involuntary manslaughter? Yes. Were his acts reckless? Of course they were. Were his acts unintentional in killing Chris Himle? Of course they were. Absolutely. *** He didn't want to fire the gun. It went off. He acted recklessly. He should have never been out there on the street. He should never been using a gun to buy cocaine. But he did. Was he reckless? Of course."

After jury deliberations, defendant was convicted of first degree murder, including felony murder.

¶ 52 Defendant filed a motion seeking to overturn the guilty verdicts and enter a finding of not guilty, or in the alternative, find the defendant guilty of involuntary manslaughter or grant him a new trial. He asserted that the court erred in, among other things, denying his motion to suppress and failing to properly instruct the jury regarding second degree murder, compulsion, necessity, and the definition of recklessness. During arguments, the ASA noted that the defense did not request a jury instruction regarding the definition of recklessness. The trial court denied the motion.

¶ 53 Defendant was sentenced to 75 years in the Illinois Department of Corrections. After his

motion to reconsider sentence was denied, defendant filed a timely appeal.

¶ 54 ANALYSIS

¶ 55 Defendant advances three primary arguments on appeal. First, he contends that the trial court erred in denying his motion to suppress his statements based on violations of his Fifth Amendment rights. Second, defendant argues that he was denied effective assistance of counsel where his attorney informed the jury during opening statements that defendant was guilty of second degree murder, but the evidence did not support giving such an instruction. Third, defendant claims he was denied effective assistance of counsel where his attorney failed to request a jury instruction defining recklessness. We address each argument in turn.

¶ 56 Denial of Motion to Suppress

¶ 57 Review of a trial court's ruling on a motion to suppress presents both questions of fact and law. *People v. Richardson*, 234 Ill. 2d 233, 251 (2009). "Findings of fact and credibility determinations made by the circuit court are accorded great deference and will be reversed only if they are against the manifest weight of the evidence." *Id.* We review *de novo* the ultimate legal question posed by the challenge to the trial court's ruling on the suppression motion. *Id.*

¶ 58 "A statement made as a result of a custodial interrogation is admissible if, after being advised of *Miranda* rights, the suspect voluntarily waives his rights prior to making the statement." *People v. Smith*, 333 Ill. App. 3d 622, 629 (2002). The State has the burden of establishing the voluntariness of the confession by a preponderance of the evidence. *People v. Hughes*, 2015 IL 117242, ¶ 31.

¶ 59 "In determining whether a statement is voluntary, a court must consider the totality of the circumstances of the particular case." *Richardson*, 234 Ill. 2d at 253. Factors to consider include the defendant's age, intelligence, background, experience, mental capacity, education,

and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises. *Id.* at 253-54. No single factor is dispositive; rather, the test of voluntariness is whether the individual confessed freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession. *People v. Murdock*, 2012 IL 112362, ¶ 30.

¶ 60 Defendant initially contends that the detectives repeatedly frustrated his efforts to arrange for legal representation. During his time in the interview room, defendant asked to place a telephone call multiple times; some of his requests were denied or seemingly ignored. The State asserts, in part, that "defendant did make two phone calls to alert his family of his location and status and to attempt to obtain legal representation and that, immediately before he confessed, defendant took the opportunity given to him to make a third phone call." Section 103-3 of the Code of Criminal Procedure (725 ILCS 5/103-3 (West 2006)) provides, in part, that "[p]ersons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner." This statutory section is intended to permit a person held in custody to notify his family members of his whereabouts "to enlist their help for procedural safeguards such as hiring an attorney." *People v. Green*, 2014 IL App (3d) 120522, ¶ 55. In the instant case, a detective testified during the hearing on the motion to suppress that he heard defendant during a telephone conversation tell his brother his location and that he needed an attorney during a telephone conversation. While we recognize that isolation during questioning "may contribute to a coercive atmosphere" (*Howes v. Fields*, 132 S. Ct. 1181, 1191 (2012)), we consider the detectives' actions with respect to defendant's requests for telephone calls to be reasonable.

¶ 61 Defendant also argues that "[t]he detectives' statements to [d]efendant implicitly suggested to him that he would receive more lenient treatment if he spoke with them and admitted to mistakenly shooting the victim." To constitute a promise of leniency, the statement must be coupled with a suggestion of a specific benefit that will follow if the defendant confesses. *People v. Lee*, 2012 IL App (1st) 101851, ¶ 34. Defendant concedes that the detectives did not promise him a specific benefit in exchange for a confession. We further observe that, shortly before defendant admitted his involvement in the shooting, the detective interviewing him expressly stated that he did not have the power to make "deals" or "guaranties." While defendant contends that the detectives' "repeated suggestions that it was in [d]efendant's best interests to admit to perpetrating the shooting by mistake added to the coercive environment that ultimately compelled [d]efendant to confess," he provides no direct support for this proposition. For the other reasons discussed herein, we do not consider the environment wherein defendant was questioned to be "coercive."

¶ 62 We also reject any suggestion that the detectives threatened defendant. For example, defendant notes on appeal that he "asked if the death penalty had been abolished in Illinois, and Detective Young told [d]efendant he did not think so." After that exchange, however, defendant indicated that he believes in a "life for a life," whereas the detective stated that he did not support the death penalty. Any portrayal of the interrogation as containing threats or coercion presents an "out-of-context view" of the detectives' comments and questions. See *People v. Kronenberger*, 2014 IL App (1st) 110231, ¶ 47.

¶ 63 Defendant next contends that his "physical condition must be taken into account." He characterizes himself as a "worn-out drug addict" who smoked crack and "drank alcohol the night prior through to the morning hours on the day of his arrest." Prior to his confession, he

was taken to the hospital after falling ill and appears to have been provided with medication. Citing *People v. Kincaid,* 87 Ill. 2d 107 (1981), defendant argues that a confession induced by drug use, whether or not the drug was self-administered, is involuntary and inadmissible. The appellate court in *Kincaid*, however, held that the trial court did not err in denying the defendant's motion to suppress where he had confessed to the police approximately one hour and 50 minutes after he was injected at a hospital with Haldol, a "major tranquilizer." *Id.* at 113, 120.

¶ 64 As in *Kincaid*, the "tenor of defendant's statement is inconsistent with that of one whose will is overborne." *Id.* at 120. Not only were his answers generally coherent and responsive, but he also denied being "dope sick" or otherwise ill several times during questioning. See, *e.g.*, *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 90 (affirming denial of motion to suppress where the defendant did not "exhibit any signs of severe heroin withdrawal that would render his statement unknowing and involuntary").

¶ 65 Defendant also contends that the length of the interrogation was oppressive. We share the view of the circuit court, however, that the "total timeframe" from defendant's arrest to his inculpatory statement was "short" and "reasonable." While "[t]here is no bright-line rule in Illinois regarding the allowable length of an interrogation" (*Green*, 2014 IL App (3d) 120522, ¶ 61), courts have found confessions to be voluntary despite longer periods in custody than that of the defendant herein. *E.g.*, *People v. Nicholas*, 218 Ill. 2d 104, 116, 120 (2005) (35 hours); *People v. Macias*, 371 Ill. App. 3d 632, 642 (2007) (57 hours).

¶ 66 Although defendant appears to have rested or possibly slept using the bench and a chair in the interview room, he contends on appeal that his sleep deprivation intensified the coercive atmosphere. When we consider the totality of the circumstances herein, however, the absence of

a bed or other sleeping accommodations in the interview room is not dispositive. *People v. House*, 141 Ill. 2d 323, 378-79 (1990) (condemning the police practice of holding suspects for lengthy periods in interview rooms not equipped with basic facilities but noting that the "stark environment" of the interview room "is not so weighty a factor as defendant contends" given that "[a] jail cell is hardly a paradise for the senses"). Furthermore, defendant did not appear "visibly groggy" during the police interviews. Compare *People v. Travis*, 2013 IL App (3d) 110170, ¶¶ 64-65 (suppressing recorded confession where the 15-year-old defendant confessed during an interview shortly after being awoken from a brief nap on a mattress on the floor in the police station, one of the detectives had made misleading promises of leniency, and the defendant was "visibly groggy" during the interview).

¶ 67 Other factors support a finding of voluntariness. Defendant was not a stranger to the criminal justice system. He was 26 years old and had prior felony convictions. During his communications with the detectives, he displayed intelligence and comprehension. The video demonstrates that the police provided defendant with food, coffee, cigarettes, bathroom breaks, and clothing. In rejecting the allegations in the motion to suppress, the circuit court found the State's witnesses had respected defendant's *Miranda* rights and were otherwise credible. "[F]indings of fact and credibility determinations made by the circuit court are accorded great deference because that court is in the best position to observe the conduct and demeanor of the parties and the witnesses, to assess their credibility, and to give appropriate weight to the evidence." *Richardson*, 234 Ill. 2d at 265. Based on the totality of the circumstances, we agree with the trial court that defendant's inculpatory statements were voluntary, and we uphold the trial court's denial of defendant's motion to suppress. Finding no error, we need not address the parties' arguments regarding whether the admission of the defendant's statements constituted

harmless error. *Id.* at 265-66.

¶ 68 Ineffective Assistance – Second Degree Murder

¶ 69 During opening statements, defendant's trial counsel conceded that he "is guilty of second degree murder." On appeal, defendant argues that such concession constituted deficient performance. Defendant asserts that a second degree murder instruction was never issued to the jury because "[n]either the facts as framed by defense counsel during opening statements nor the evidence introduced at trial supported a finding of guilty for second degree murder." He also argues that his counsel's concession of guilt to second degree murder prejudiced his theory of the case because it "undermined his proposed theories of compulsion and necessity" and "negated the defense of involuntary manslaughter."

¶ 70 The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), stated that a "convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." First, the defendant must show that his counsel's performance was deficient. *Id.* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial[.]" *Id.* Unless both prongs are met, it cannot be said that the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

¶ 71 In accordance with *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be

considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Matters of trial strategy generally will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). "In recognition of the variety of factors that go into any determination of trial strategy, courts have held that such claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002).

¶ 72 Section 9-2 of the Criminal Code of 1961 provides, in part:

> "§ 9-2. Second Degree Murder. (a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:
>
> (1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or
>
> (2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable." 720 ILCS 5/9-2(a) (West 2008).

First degree murder and second degree murder share the same elements, including the same mental states, but second degree murder requires the presence of a mitigating circumstance.

People v. Guyton, 2014 IL App (1st) 110450, ¶ 41. Second degree murder is a lesser mitigated offense of first degree murder. *People v. Parker*, 223 Ill. 2d 494, 504 (2006).

¶ 73 The second degree murder statute defines "serious provocation" as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2008). Illinois courts have traditionally recognized four different categories of serious provocation: substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. *People v. Yarbrough*, 269 Ill. App. 3d 96, 101 (1994). Under section 9-2(a)(2) of the Criminal Code, "[a] person commits second degree murder when he commits the offense of first degree murder and at the time of the killing he believes the circumstances to be such that they justify the use of deadly force under the principles of self-defense, but his belief is unreasonable." *People v. Blue*, 343 Ill. App. 3d 927, 936 (2003). See also 720 ILCS 5/7-1 (West 2008).

¶ 74 The State contends that, in the face of "overwhelming evidence of guilt," defense counsel "mounted the only realistic defense—the theory that defendant committed the murder, but that his actions were mitigated because of coercion in the form of compulsion or necessity." Like the trial court, we consider such defense to constitute a "trial strategy," albeit an ultimately unsuccessful one. "A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense." *People v. Ganus*, 148 Ill. 2d 466, 474 (1992).

¶ 75 Defendant relies on *People v. Hattery*, 109 Ill. 2d 449, 465 (1985), wherein our supreme court stated that "[c]ounsel may not concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel's strategy." Unlike in *Hattery*, the record in the instant case is clear that defendant was questioned by the court and

expressly consented to this strategy. See, *e.g.*, *People v. Page*, 155 Ill. 2d 232, 263 (1993) (stating that "the defendant's express consent to the strategy adopted by counsel forestalls any objection, under *Hattery*, that counsel was ineffective for having initially chosen a theory of defense based on voluntary manslaughter"); *Ganus*, 148 Ill. 2d at 473-74 (noting that the defendant consented to his counsel's strategy).

¶ 76 Even if we were to find counsel's performance deficient, defendant was not prejudiced by such performance. *Patterson*, 217 Ill. 2d at 438 (concluding that the failure to satisfy either *Strickland* prong precludes a finding of ineffective assistance of counsel). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. Defendant contends on appeal that, by telling the jury that defendant was guilty of second degree murder, defense counsel undercut the defenses of compulsion and necessity, conceded that the State would prove the elements of first degree murder, and admitted defendant acted with a mental state at conflict with involuntary manslaughter. As discussed below, we reject this assessment.

¶ 77 During the jury instructions conference, the trial court declined to give instructions on compulsion or necessity. Under the compulsion statute, a person is not guilty of an offense "by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct." 720 ILCS 5/7-11(a) (West 2008). Under the necessity statute, "[c]onduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater

than the injury which might reasonably result from his own conduct." 720 ILCS 5/7-13 (West 2008). "Compulsion implies complete deprivation of free will and the absence of choice; necessity involves choice between two or more admitted evils." *People v. Roberson*, 335 Ill. App. 3d 798, 801 (2002).

¶ 78 Defendant does not challenge the trial court's denial of defense counsel's request for jury instructions on compulsion or necessity. Neither defense was available based on the evidence presented at trial. See, *e.g.*, *People v. Rodriguez*, 30 Ill. App. 3d 118, 120 (1975) (noting that compulsion defense is available only where the compulsion has arisen without the negligence or fault of the defendant); *People v. Brown*, 341 Ill. App. 3d 774, 782 (2003) (stating that the accused must be without blame in occasioning or developing the situation under the necessity statute). Defendant instead contends that counsel's concession of defendant's guilt on second degree murder undercut his otherwise "sound trial strategy" to argue jury nullification. *E.g.*, *People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 28 (noting that counsel may not argue that jurors should ignore the law but may present a defense evoking the compassion, empathy, sympathy or understanding of the jurors).

¶ 79 As the evidence did not support compulsion or necessity, any purported "undercutting" of such defenses ultimately did not prejudice defendant. Furthermore, because the jurors were never instructed on second degree murder, counsel's limited references to second degree murder during opening statements did not result in prejudice to defendant. It is highly improbable that jurors would be aware of the incompatibility of an involuntary manslaughter instruction and a concession of guilt on second degree murder, particularly in light of counsel's consistent position that defendant did not intend to shoot anyone. Because they were not ultimately instructed on second degree murder, the jurors also would not know that first and second degree murder share

the same mental states. Based on the foregoing, we conclude defendant has not met either prong of the test for ineffective assistance of counsel.

¶ 80 Ineffective Assistance – Recklessness Definition

¶ 81 Defendant contends that his trial counsel's failure to request a jury instruction defining recklessness constitutes ineffective assistance of counsel. Section 9-3(a) of the Criminal Code, which defines involuntary manslaughter, provides, in part: "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly[.]" 720 ILCS 5/9-3(a) (West 2006).

¶ 82 "Jury instructions are intended to guide the jury in its deliberations and to assist the jury in reaching a proper verdict through application of legal principles to the evidence and law." *Parker*, 223 Ill. 2d at 501. The trial court gave I.P.I. 7.07, which defines involuntary manslaughter. The Committee Note to I.P.I. 7.07 states: "Give Instruction 5.01, defining 'recklessness.' " I.P.I. 5.01 provides, in part: "A person [(is reckless) (acts recklessly)] when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." Defense counsel did not request, and the court did not provide, I.P.I. 5.01 to the jury.

¶ 83 Defendant cites *People v. Bolden*, 103 Ill. App. 2d 377, 382 (1968), wherein the appellate court found that "the failure of the jury instructions *** to mention and define the particular mental state, i.e., recklessness, which is one of the essential elements of statutory involuntary manslaughter in our State, was prejudicial error and deprived the defendant of a fair trial." A critical distinction between *Bolden* and the instant case, however, is that the concept of

recklessness was expressly presented to the jury as part of I.P.I. 7.07, whereas it was omitted in *Bolden.*

¶ 84 Defendant also argues that counsel's failure to request the definitional instruction was "squarely addressed" in *People v. Howard*, 232 Ill. App. 3d 386, 390-91 (1992). The defendant in *Howard* asserted that he was denied effective assistance of counsel for failure to tender a jury instruction defining recklessness. The appellate court agreed because, among other things, "[t]he evidence does not overwhelmingly support a verdict of murder in this case." *Id.* at 392. Conversely, in the instant case, the evidence overwhelmingly supports a verdict of first degree murder. Hess and Parisi both testified that the shooter pointed the weapon at Himle. An Illinois State Police expert confirmed that the shooter – admittedly defendant – would have pulled the trigger in order to fire the weapon. "There is a presumption of an intent to kill where one voluntarily commits an act, the natural tendency of which is to destroy another's life." *People v. Medrano*, 271 Ill. App 3d 97, 103-04 (1995). The fact of firing a gun at a person supports the conclusion that the person acted with an intent to kill. *People v. Mitchell*, 209 Ill. App. 3d 562, 569 (1991).

¶ 85 As the State accurately observes, "it made no difference at all to defendant's conviction of felony murder whether the jury received a definitional instruction of the term 'reckless.' " The felony murder statute provides that a person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death, "he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 2008). In this case, defendant shot Himle during his attempted armed robbery of Hess. Consistent with the statutory definition of felony murder, defendant's indictment for felony murder does not reference any mental state with respect to the killing. "In contrast, the

statutory definition of involuntary manslaughter specifies that a defendant must have a reckless mental state to be guilty of that offense." *People v. Phillips*, 383 Ill. App. 3d 521, 545 (2008). Because he was convicted of felony murder, the failure to instruct regarding recklessness did not prejudice defendant.

¶ 86 Finally, the State contends that counsel's performance did not fall below an objective standard of reasonableness because his "non-tender of the definition was clearly a matter of trial strategy." Defendant challenges this assertion based on, among other things, the defense argument in its posttrial motion that the court erred in failing to instruct the jury on the definition of recklessness. In light of our conclusion that defendant was *not* prejudiced, we need not consider whether counsel's failure to request a jury instruction defining recklessness satisfied the *Strickland* performance prong. *Strickland*, 466 U.S. at 687. For the reasons discussed herein, we conclude that trial counsel's failure to tender a jury instruction on recklessness did not constitute ineffective assistance of counsel. *E.g.*, *People v. Carlson*, 79 Ill. 2d 564, 584-85 (1980); *People v. Callahan*, 334 Ill. App. 3d 636, 645 (2002).

¶ 87 CONCLUSION

¶ 88 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 89 Affirmed.