THIRD DIVISION
November 2, 2016

No. 1-14-1575

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 16417
	)	
BRANDON HINTON,	)	Honorable
	)	Garritt E. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for first-degree murder affirmed over his contention that the trial court erred in refusing to provide the jury with an instruction on involuntary manslaughter because any error committed by the court was harmless. We order defendant's mittimus be corrected to reflect 10 additional days of presentence custody credit.

¶ 2 Following a jury trial, the jury returned a general verdict finding defendant Brandon Hinton guilty of two counts of first-degree murder. The trial court merged the counts and sentenced him to 35 years' imprisonment. On appeal, defendant contends that (1) the trial court erred in refusing to provide the jury with an instruction on involuntary manslaughter where there

was evidence he acted recklessly in causing his victim's death and (2) he is entitled to an additional 10 days of presentence custody credit. We affirm defendant's conviction and order his mittimus be corrected to reflect 10 additional days of presentence custody credit.

¶ 3 Defendant was charged with two counts of first-degree murder in connection with the September 2, 2011, death of John Costulas. Count 1 alleged that defendant intentionally or knowingly struck and killed Costulas with his elbow (720 ILCS 5/9-1(a)(1) (West 2010)), *i.e.*, intentional murder. Count 2 alleged that defendant struck and killed Costulas with his elbow during the commission of a robbery (720 ILCS 5/9-1(a)(3) (West 2010)), *i.e.*, felony murder.

¶ 4 At trial, the State presented evidence that, on September 2, 2011, John Costulas was 61 years old, approximately 5-feet, 3-inches tall and weighed around 120 pounds. He walked slowly using the assistance of a cane, had thick glasses due to poor eyesight and wore two hearing aids. At approximately 5:15 a.m., while defendant, who weighed approximately 260 pounds, and his friend, Parrish Morris, were walking on the north sidewalk of Howard Street, Costulas was walking in the opposite direction on the same side of the sidewalk. After Costulas passed them, defendant used his elbow to hit Costulas in the head once. Immediately, Costulas fell to the ground. As he lay there, defendant reached into his pockets and took $10 from him. Defendant and Parrish then went to the nearby house of Valerie Morris, Parrish's mother.

¶ 5 Kevin Tuft was riding his bicycle down Howard Street when he observed Costulas on the ground bleeding from his face and nose. Tuft called 911. Costulas was breathing and moaning, but was otherwise unresponsive. Evanston police officer Brian Hicks arrived and observed Costulas lying face down on the sidewalk with a puddle of blood around his face. Hicks attempted to communicate with Costulas, but he was unresponsive. Hicks also noticed that

Costulas' pockets were turned inside out and next to Costulas were personal items such as a cane, a CTA transit card and a dollar bill. Tuft had been in the area a few minutes prior to observing Costulas on the ground. During that time, he saw defendant and Parrish standing together and saw Costulas walking on the sidewalk a little further away. Tuft gave Hicks a description of defendant and Parrish.

¶ 6 Costulas was taken to St. Francis Hospital, where he remained unresponsive until he died on September 10, 2011. A medical examiner determined that Costulas' cause of death was "blunt head trauma due to an assault," based on an impact to the right side of Costulas' head. The medical examiner agreed that the injuries to Costulas' head, which had caused his death, were consistent with being struck in the head one time.

¶ 7 The police spent several days investigating the crime, including obtaining surveillance video from various locations near the scene of the crime. They disseminated to the media photographs of defendant and Parrish taken from the surveillance video. The video was played for the jury.

¶ 8 On September 12, 2011, a citizen identified Parrish to the police as one of the men in the photographs and directed them to Parrish's residence. While the police were outside the residence, Valerie appeared. They brought her to the police station where she identified defendant from a photo array. She told the police that, on September 2, 2011, after Parrish and defendant had arrived at her residence, Parrish told her that defendant had hit someone. Parrish appeared at the police station later that day with an attorney.

¶ 9 The police arrested defendant later that day and brought him to the police station. They placed him in an interview room, informed him of his *Miranda* rights and interviewed him. The interview was video recorded and played for the jury at trial.

¶ 10 During the interview, as shown by the video recording, defendant initially denied any wrongdoing. He acknowledged that, on the morning in question, he had been drinking with Parrish at a bar. Defendant stated that, after they left the bar, they got on a CTA train and rode it to the Howard Street station. He told the detectives that he and Parrish arrived at the train station around 5 a.m., and for the next two hours, they "chill[ed]" near the train station before heading their separate ways. The detectives subsequently informed defendant that they had already talked to Parrish and Valerie, in addition to reviewing surveillance video from the morning in question and speaking to other witnesses. Defendant continued to deny any wrongdoing and specifically denied hitting anyone that morning.

¶ 11 After further questioning, defendant stated that, on the morning in question, he was intoxicated and, while he was walking toward Parrish's residence, he walked past Costulas. He hit Costulas with his elbow, which caused Costulas to fall. While Costulas was on the ground, defendant reached into his pockets and took $10. Defendant told the detectives that Costulas had never said a word to him. Defendant stated that, after he and Parrish left the scene, they walked to an alley where defendant told Parrish "what the f*** did I just do that stupid s*** for?" Defendant told the detectives that he felt remorse for hitting Costulas but acknowledged that neither he nor Parrish called 911.

¶ 12 The detectives asked defendant if he knew what happened to Costulas, but defendant did not know. The detectives informed defendant that Costulas had died. Defendant began to cry,

explaining that he "didn't want [Costulas] to die." Defendant denied having a plan to rob anyone or hit anyone that morning. He stated he did not select Costulas for any particular reason other than he was the first person he remembered seeing. Defendant told the detectives that, earlier that morning, he had walked into a 7-Eleven to buy cigarettes, but the price was too high and he only had $7 or $8 in his pocket. He acknowledged thinking to himself that he needed money, but told the detectives he did not hit Costulas because he needed the money. He explained it just happened spontaneously while he was intoxicated. Although defendant acknowledged hitting Costulas, he maintained throughout the rest of the interview that he did not intend to kill Costulas.

¶ 13 After the State rested its case, defendant unsuccessfully moved for a directed finding on only the felony murder count. Defendant did not present any witnesses.

¶ 14 At the jury instructions conference, the State proposed an instruction defining first-degree murder. Defense counsel objected and proposed a jury instruction on involuntary manslaughter. The trial court denied the involuntary manslaughter instruction, stating "[i]t will be given as the State's proposed 7.01 over the defendant's objection." The State also proposed two general verdict forms: a guilty of first-degree murder form and a not guilty of first-degree murder form. Defense counsel did not object.

¶ 15 The jury returned a general verdict finding defendant guilty of first-degree murder. Defendant filed an unsuccessful motion for a new trial, arguing, *inter alia*, the trial court erred in denying his proposed jury instruction on involuntary manslaughter. The court subsequently merged defendant's two counts of first-degree murder and sentenced him to 35 years' imprisonment on Count 1 (intentional murder). This appeal followed.

¶ 16 Defendant first contends that the trial court erred in refusing to provide the jury with an instruction on involuntary manslaughter. He argues that his statements to the police, in which he acknowledged spontaneously hitting Costulas while intoxicated but maintained that he did not intend to kill Costulas and did not have a preconceived plan to rob any one, provided sufficient evidence to demonstrate he acted recklessly in causing Costulas' death, thus warranting the instruction. He therefore requests that we reverse his conviction and remand the matter for a new trial.

¶ 17 If there is "some evidence" supporting a jury instruction, the trial court should provide the jury with the instruction. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 77. "Very slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Jones*, 175 Ill. 2d 126, 132 (1997). When deciding whether evidence exists supporting an instruction, the court does not weigh the evidence or ascertain the credibility of that evidence. *People v. Willett*, 2015 IL App (4th) 130702, ¶ 93; *Smith*, 2014 IL App (1st) 103436, ¶ 77. The applicable standard of review for a court's refusal to provide a jury instruction is currently unclear. See *People v. Collins*, 2016 IL App (1st) 143422, ¶ 33 (contrasting *People v. Washington*, 2012 IL 110283, ¶ 19, a case applying *de novo* review, with *People v. Jones*, 219 Ill. 2d 1, 31 (2006), a case applying the abuse of discretion standard). However, we need not resolve this conflict as our determination is the same under either standard.

¶ 18 Involuntary manslaughter is a lesser-included offense of first-degree murder. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). The difference between the two offenses is the mental state that accompanies the act causing the victim's death. *Id.* Whereas first-degree intentional murder requires an intentional mental state (720 ILCS 5/9-1(a)(1) (West 2010)), involuntary

manslaughter occurs when a defendant "recklessly" performs acts that are likely to cause death or great bodily harm to an individual. 720 ILCS 5/9-3(a) (West 2010). "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 *** and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2010).

¶ 19 We find that, even if the trial court erred in failing to provide the jury with an instruction on involuntary manslaughter, the error was harmless under the one-good-count rule. Under this rule, " 'if one count in an indictment be good, although all the others are defective, it will be sufficient to support a general verdict of guilty.' " *People v. Smith*, 233 Ill. 2d 1, 19 (2009) (quoting *Curtis v. People*, 1 Ill. 256, 260 (1828)). As a corollary to this rule, when the defendant is charged with multiple counts arising out of a single act and the jury returns a general verdict, "the effect is that the defendant is guilty as charged in each count." (Internal quotation marks omitted.) *People v. Davis*, 233 Ill. 2d 244, 265 (2009) (quoting *People v. Morgan*, 197 Ill. 2d 404, 448 (2001)).

¶ 20 In the present case, the State charged defendant with two theories of first-degree murder, intentional murder and felony murder, for the single act of killing Costulas. During the jury instructions conference, the State proposed, without objection from the defense, general verdict forms to submit to the jury on first-degree murder. Under a general verdict, the jury could find defendant either guilty of first-degree murder or not guilty of first-degree murder, without making a finding as to the specific manner in which the murder was committed, *i.e.*, intentional murder or felony murder. See *People v. Calhoun*, 404 Ill. App. 3d 362, 375 (2010).

¶ 21 The jury returned the general verdict finding defendant guilty of first-degree murder, which raised the presumption that defendant was found guilty on both counts of first-degree murder. *People v. Baney*, 229 Ill. App. 3d 770, 775 (1992). By its general verdict of guilty, the jury implicitly found that the State had met its burden of proving defendant intended to kill or do great bodily harm to Costulas (720 ILCS 5/9-1(a)(1) (West 2010)), or killed Costulas during the commission of the forcible felony of robbery (720 ILCS 5/9-1(a)(3) (West 2010)). See *Baney*, 229 Ill. App. 3d at 775.

¶ 22 While involuntary manslaughter is considered a lesser-included offense of intentional murder (*Smith*, 2014 IL App (1st) 103436, ¶ 78), it is not a lesser-included offense of felony murder, as the indictment charging defendant with felony murder contained no culpable mental state concerning the killing. See *People v. Davis*, 213 Ill. 2d 459, 476-77 (2004) (finding involuntary manslaughter is not a lesser-included offense of felony murder when the indictment for felony murder does not include a culpable mental state as to the killing). Indeed, "the statutory definition of felony murder does not indicate a mental state for the killing (720 ILCS 5/9-1(a)(3) (West [2010]))." *Davis*, 213 Ill. 2d at 476. Unlike intentional murder, which requires the mental state of intent, felony murder requires no mental state other than to commit the forcible felony. *Baney*, 229 Ill. App. 3d at 775. Consequently, any error in refusing the involuntary manslaughter instruction, an offense which requires a reckless mental state, could only be attributed to the intentional murder count. *Id.*

¶ 23 Under the one-good-count rule, defendant's murder conviction "may be affirmed where proof is sufficient on one good count in [the] indictment." *People v. Perry*, 2011 IL App (1st) 081228, ¶ 56. Here, there was overwhelmingly proof that defendant committed felony murder.

To prove defendant committed felony murder, the State had to prove that he, (1) while committing a robbery, (2) performed the acts that caused Costulas' death (3) without lawful justification. 720 ILCS 5/2-8 (West 2010); 720 ILCS 5/9-1(a)(3) (West 2010). To prove defendant committed a robbery, the State had to prove that defendant took property "from the person or presence of" Costulas "by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2010); see *People v. Hay*, 362 Ill. App. 3d 459, 465 (2005).

¶ 24 Defendant does not dispute, nor based on his admissions to the police officers could he, that he took property from Costulas by the use of force and thus committed a robbery. Furthermore, the evidence at trial unquestionably proved that defendant's act of elbowing Costulas in the head caused Costulas' death and defendant did so without lawful justification. The evidence therefore demonstrably supports the finding that defendant committed felony murder.

¶ 25 Under the one-good-count rule, we may affirm defendant's conviction for first-degree murder because the proof was sufficient on the felony murder count in the indictment. See *Perry*, 2011 IL App (1st) 081228, ¶ 56. We therefore conclude that any error in failing to provide the jury with an involuntary manslaughter instruction was harmless because, even if the trial court provided the jury with an instruction on involuntary manslaughter, he would have still been found guilty of first-degree (felony) murder. See *Davis*, 233 Ill. 2d at 263 (applying harmless-error analysis to the trial court's failure to provide a jury instruction under the one-good-count rule).

¶ 26 Defendant, however, argues that the State "should not be permitted to use the felony murder charging instrument as both a sword and a shield." We find this argument without merit.

At trial, defendant could have requested separate verdict forms as to each manner of first-degree murder, intentional murder and felony murder, which would have required the jury to make a separate finding on each theory of murder. He did not, and he failed to object when the State proposed the general verdict forms. Accordingly, we affirm defendant's conviction.

¶ 27 Defendant finally contends, and the State correctly concedes, that his mittimus should be corrected to reflect 10 additional days of presentence custody credit. A defendant held in custody for any part of a day should be given credit against his sentence for that day (*People v. Williams*, 2013 IL App (2d) 120094, ¶ 37; see 730 ILCS 5/5-4.5-100(b) (West 2010)), excluding his day of sentencing. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 37.

¶ 28 The record shows that defendant was arrested on September 12, 2011, and remained in custody until he was sentenced on February 6, 2014, for a total of 878 days of presentence custody credit. The trial court granted defendant 868 days of credit. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1), and our ability to correct a mittimus without remand (see *People v. Hill*, 408 Ill. App. 3d 23, 31 (2011)), we order the clerk of the court to correct defendant's mittimus to reflect 10 additional days of presentence custody credit, for a total of 878 days.

¶ 29 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 30 Affirmed as modified.