2016 IL App (2d) 140420-U
No. 2-14-0420
Order filed July 26, 2016



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>MARTELL BUCKLEY,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Winnebago County.<br><br><br><br>No. 12-CF-2486<br><br>Honorable John R. Truitt, Judge, Presiding. |

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not err in its jury instructions on first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)), and the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of that charge.

¶ 2 Defendant, Martell Buckley, confronted Duane Buchanan outside a gas station in Rockford. Defendant had come to the gas station with several associates, who were nearby when defendant punched Buchanan in the face. As the two fought, gunfire broke out and Buchanan was fatally shot. Defendant was charged with Buchanan's murder. A jury convicted him, and he

was sentenced to 37 years in prison. He appeals, alleging errors in the jury instructions and challenging the sufficiency of the evidence to convict him. We reject his challenges and affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on seven counts and tried on five: counts I, II, III, IV, and VI, all of which charged first-degree murder. Count I alleged that defendant acted with intent to kill (720 ILCS 5/9-1(a)(1) (West 2010)) and count II alleged that he knew his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(2) (West 2010)). Counts III, IV, and VI charged felony murder (720 ILCS 5/9-1(a)(3) (West 2010)) predicated on, respectively, attempted armed robbery (720 ILCS 5/8-4, 18-2 (West 2010)), mob action (720 ILCS 5/25-1 (West 2010)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2010)). All five counts alleged that defendant personally discharged a firearm and so was eligible for a sentence enhancement. See 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2010).

¶ 5 The State presented the following evidence at trial. At about 8 p.m. on May 22, 2012, police were dispatched to the BP gas station at 3721 Auburn Street in Rockford in response to a report of shots fired. The police observed a crowd of onlookers gathered around a black Dodge Stratus parked near the station's store. The car's engine was still running. On the pavement in front of the Stratus lay Buchanan, who had gunshot wounds. He later died of his wounds.

¶ 6 The police canvassed the scene for evidence. The gas station's store was situated between an east lot and a west lot. To the north of the store was a car wash. On each lot was an entrance to the store and also two parallel sets of gasoline pumps. The shooting occurred on the east lot. The Stratus was parked facing north just outside the store's east entrance. To the east of the Stratus were the two gasoline pumps, each oriented north-south and spaced several feet apart (hereinafter, the east and west pumps, respectively). The police recovered from the east lot

approximately 20 spent shell casings as well as fragments of bullets and bullet jacketing. There were also multiple bullet strikes in the pavement of the east lot.

¶ 7 Three calibers of gun were represented in the spent casings: .380, .40, and .9 millimeter. The casings were in roughly five groups. First, at the south end of the area between the pumps was a group of six .40 caliber casings (group 1). Second, immediately adjacent to the southwest corner of the west pump was a cluster of five .40 caliber casings (group 2). Third, there was a group of three .9 millimeter casings between the east entrance and the west pump (group 3). Two casings were just east of the Stratus and the third was underneath the rear of the car. Fourth, there was a string of four .9 millimeter casings oriented roughly north-south, with the southernmost casing several feet off the northeast corner of the Stratus (group 4). Fifth, a cluster of three .380 caliber casings was situated several feet north of the west pump (group 5). Finally, there was a lone .40 caliber casing immediately east of the west pump. The detective who processed the scene explained at trial that a semiautomatic handgun ejects casings to the right and slightly behind the shooter. No firearm was recovered in the case. No forensic testing was done to determine if any of the casings of the same caliber were fired from the same gun.

¶ 8 The gas station had interior and exterior video surveillance cameras. The police recovered the footage recorded on the night of May 22. The State introduced at trial 24 minutes of footge—12 minutes from the interior surveillance camera and 12 minutes from the exterior camera overlooking the east lot. The extracts covered the same set of events. Both extracts begin about one minute before defendant and several companions arrive at the gas station and end about one minute and a half after Buchanan is shot. As we will recount in greater detail below, the video shows defendant, Buchanan, and several other men at the station. Defendant had arrived in the Stratus. At the 10:25 mark, defendant approaches Buchanan near the rear of

the Stratus and punches him in the face. As the two fight, two other men approach who were standing nearby. One of the men points what appears to be a handgun at Buchanan, who then falls to the ground and crawls to the front of Stratus. Defendant flees. Defendant's apparel on the videos consists of a white T-shirt with a dark design on the shoulders, medium-colored shorts, a white baseball cap with a red bill, and a rosary-style necklace. Defendant's cap and necklace fell to the pavement during his altercation with Buchanan and were later recovered by the police.

¶ 9 Rockford police detective John Eissens testified for the State. Eissens interviewed defendant on August 4, 2012. Eissens was shown a photograph of defendant from the day of the interview. Eissens opined that defendant was wearing the same white T-shirt with dark designs that he was seen wearing in the surveillance video. During the interview, defendant admitted that he was at the BP station on May 22, 2012, when Buchanan was shot. Buchanan's street name was "Dickhead." Also present at the station that night, recalled defendant, were brothers Rico and Russell Johnson and someone called "Hot Stuff." Defendant had ridden to the station in a van driven by the Johnsons. Defendant admitted that he punched Buchanan at the station. Defendant initially told Eissens that he assaulted Buchanan because he bumped into defendant when they were inside the store. Eissens questioned defendant about the accuracy of that account; Eissens told defendant that he viewed the footage from the interior surveillance camera (which, we note, does not show Buchanan bumping into defendant). Defendant then changed his account, stating that he and Buchanan "had been having words, and it started a couple of weeks ago at a party." Defendant testified that his altercation with Buchanan happened near the rear of the Stratus. Defendant was losing the fight. As he had his head down fighting, defendant heard

gunshots and took off running. He ran around the front of the Stratus and got into a car driven by Dominique Patterson, who is the Johnsons' sister.

¶ 10 Kadijah Bailey testified for the State that she witnessed an incident at the BP station on the night of May 22. She spoke to officers at the scene that night. The next day, she spoke with Eissens at the police station and gave him a written statement of her observations the night before. She reviewed the statement for accuracy and signed it.

¶ 11 Bailey testified that, on the night of May 22, she drove with her friend Ciara to a nail salon in a strip mall at the corner of Auburn and Central in Rockford. The mall's parking lot adjoined the BP station. Because the mall's lot was full, Bailey began to back her car out to leave. As she did so, her car was facing the gas station. Bailey did not recall observing anything unusual as she was backing out. To refresh her recollection, the State showed Bailey a document that she recognized as the written statement she provided Eissens on May 23. Bailey then recalled telling police that she heard gunshots from the BP station as she was backing out of the mall lot. Bailey looked toward the station and saw several people running. Bailey saw "the victim," a black man, lying on the ground in front of a black car. The victim's head was raised and he was looking left and right. Bailey then saw another black man run around the front of the car near the victim and get into the front passenger seat of a tan and burgundy van. Bailey could not recall what the man did as he ran past the victim. Bailey acknowledged that she twice told police, first in a squad car and later at the station, that the man shot the victim as he passed. Bailey clarified that she only assumed that the man shot the victim, because the victim's head dropped when the man passed. At the time of her testimony, she did not recall seeing the man shoot the victim or even hold a gun. Bailey explained that she was focused on the victim when the other man passed. Asked about the discrepancy between her statements to police and her

testimony, Bailey claimed she did not know that she "needed to be specific" in speaking with the police.

¶ 12 Bailey testified that she saw a third black male at the gas station. This man, who wore dreadlocks and a white T-shirt, was running north toward the station's car wash and was shooting back south toward the area between the west pump and the black car. Bailey knew "[f]rom out on the streets" that the man's name was Demario.

¶ 13 Bailey recalled providing a written statement to defense investigator Robert Faulkner in November 2012. Bailey recalled stating to Faulkner that she did not see the man who ran by the victim carry a gun and that she only assumed that the man shot the victim.

¶ 14 After Bailey's testimony, the State recalled Eissens, who testified that he took a written statement from Bailey on May 23, 2012. Bailey initialed each paragraph and signed each page. The court admitted as substantive evidence those portions of Bailey's statement that were inconsistent with her trial testimony. See Ill. R. Evid. 801(d)(1) (admission of prior inconsistent statements by a witness). Bailey wrote in her statement that the man who came around the front of the black car shot the victim as he lay on the ground.

¶ 15 Another witness to the incident on May 22 was Dewaun Glover. He was 15 years old at the time of trial. He acknowledged prior juvenile adjudications for theft, robbery, residential burglary, and resisting arrest. He also had pending charges at the time of trial.

¶ 16 Glover testified that, at about 7:30 p.m. on May 22, he was walking with his twin brother Marquan near the BP station. Glover heard screaming and then about 20 gunshots. Glover described in more detail what he observed. As he was walking near the gas station, he saw four or five black males standing near a van parked at a gas pump. The men, none of whom Glover recognized, were arguing with a black man standing at the front of a black car. Glover

recognized the man by the car as "Duane" or "Dickhead." Duane's argument with the men by the van turned into a physical fight. Some of the men by the van began to shoot and Duane fell down near the car. Glover could see that Duane was hurt. Glover then observed the van make a U-turn and drive away. Glover did not see the men standing by the van get into that vehicle afterward and was not sure what happened to them.

¶ 17 Glover testified that, the following day, May 23, he spoke to police officers at Kennedy Middle School, where he was a student. Glover did not recall speaking to Officer Jamie Martin. Glover denied that he knew anyone named Manny.

¶ 18 Robert Saunders testified for the State that he went to the BP station for gas at 6:30 or 7:00 p.m. on May 22. Saunders drove in his dark gray Honda Odyssey minivan. When Saunders arrived, the lot was full of vehicles. Saunders got in line behind "an older van that was white or cream colored with a green stripe." The van was parked at the west pump. Saunders also observed a black car parked close to the store. After two or three minutes passed without the van moving, Saunders backed up and moved to the east pump. He parked facing south. Almost immediately after he parked, Saunders heard four to six loud sounds that he thought were fireworks. Saunders then saw a young black man run past the van from the rear. The man passed the van on the right (west) side and ran in a southeasterly direction. The man was wearing a white T-shirt, dark pants, and a red baseball cap. He had a handgun in his right hand. Saunders then realized that the fireworks he heard were actually gunshots. The man ran out of sight and Saunders did not see where he went. After calling 911, Saunders got out of his car to pump gas and now noticed a man lying on the ground in front of the black car that was parked by the store. Saunders called 911 again.

¶ 19 Pathologist Mark Peters testified that Buchanan had gunshot wounds to the chest, left forearm, and left buttock. According to Peters, Buchanan died of internal bleeding caused by the gunshots to the torso. Peters saw no evidence, such as gunpowder stippling or soot, of a shot fired at close range, *i.e.*, within 24 inches. Peters recovered a bullet fragment from Buchanan's forearm but could not identify its caliber.

¶ 20 The State played the interior and exterior surveillance videos for the jury. The videos have no audio. The video was recorded at four frames per second, where most television shows are recorded at 21 frames per second. Motion on the video is choppy and strobe-like and the video resolution is poor. The farther subjects are from the camera the more difficult it is to see their finer movements and distinguishing features. This is more of a problem with the exterior footage because of the greater distances involved. Despite these difficulties, one can identify and track individuals adequately enough to understand the main action. One subject can be discerned holding what appears a handgun.

¶ 21 The exterior camera was mounted on the northeast corner of the store and pointed southeast across the east lot. The 12-minute footage from that camera freezes for a time at two points: between markers 2:41 and 3:43, and then from markers 4:30 to 6:00. When the exterior video begins, there are three cars parked at the pumps. A dark car, its significance becoming evident as the video progresses, is parked facing south at the east side of the west pump. The car remains at the pump until marker 10:05, when it pulls ahead slightly in order to allow another car to use the pump. The dark car stays in this new position for the next 20 seconds until Buchanan is attacked, at which point the car moves south to the edge of the lot.

¶ 22 Fifty seconds into the video, a green and white van arrives and parks, facing south, on the west side of the west pump, directly across from the dark car. Defendant and three other black

males exit the van. Defendant, as noted, is wearing a white T-shirt with a dark design on the shoulders, medium-colored shorts, a white baseball cap with a red bill, and a rosary-style necklace. His three companions are dressed as follows: (1) white T-shirt and gray pants (no hat) (Male 1); (2) red hat, black T-shirt, and red shorts (Male 2); and (3) tan shirt and tan shorts (no hat) (Male 3).

¶ 23 For approximately the next 10 minutes until defendant's confrontation with Buchanan (at marker 10:23), defendant and his companions loiter at the gas station. Defendant's companions wander in and out of the store while he remains near the van for most of the video. He gets in and out of the van twice. At one point, between markers 6:33 and 6:53, defendant walks to the east side of the west pump and appears to spend some time near the dark car. At marker 4:20, a dark red van arrives and parks, facing north, at the east side of the east pump. The van remains there until after the shooting.

¶ 24 At marker 8:45, two additional vehicles of note arrive. The first is a gray minivan, which initially gets in line, facing south, behind the green and white van. The appearance and movements of this van match Saunders' account of his time at the station in his Honda minivan. The second vehicle is the Stratus, which parks facing north between the green and white van and the store. Buchanan exits the Stratus. He is wearing dark clothing and a red and black baseball cap. Defendant sees him exit and walks immediately ahead of him into the store. Closely following Buchanan into the store is Male 3. As they enter the store, Buchanan turns to look back at Male 3. As Buchanan stands inside at the counter, defendant and his companion linger behind him. The two leave and Buchanan remains in the store.

¶ 25 At marker 9:23, while defendant is still inside the store, a black man in a red shirt (Male 4) walks from the dark van to the green and white van and stands at the open side door. When

defendant and Male 3 emerge from the store at marker 9:25, Male 3 walks to the van to join Males 1 and 4. The three stand at the front of the van. Another figure comes over from the dark van (Male 5) and begins to walk back and forth between the dark car and the green and white van. At marker 9:27, defendant, who is holding a drink, begins to pace in front of the store's entrance, peering into the Stratus as he passes. During this time, the gray minivan, consistent with Saunders' testimony, leaves its place behind the green and white van and moves over to the east pump. At marker 10:05, defendant pauses his pacing to place his drink in the green and white van. As defendant walks north past the entrance to resume his pacing, Buchanan emerges from the store (marker 10:21). At this point defendant is north of the entrance with his back to Buchanan. While defendant is still facing away from Buchanan, Male 1 begins to walk toward Buchanan. When defendant turns around, he steps toward Buchanan and punches him. Buchanan fights back and they exchange blows and grapple. Defendant's hat and necklace fly off during the struggle. Male 1 now hurries over and appears to join the physical struggle. Male 4 also runs over and appears to extend his left arm toward Buchanan. Though the video resolution is poor, Male 4's left hand appears to hold an object shaped like a firearm. Male 4 runs back to the green and white van as Male 1 and defendant continue to struggle with Buchanan for another second before he falls to the ground on the driver's side of the Stratus. As Buchanan collapses, a black man in a white T-shirt and white pants (Male 6) exits the front passenger side of the Stratus and runs northeast with his arm extended backward. Male 4 appears to extend his arm in the direction of Male 6 as he flees. Meanwhile, Male 1 appears to bend down and pick up objects from the ground at the back of the Stratus.

¶ 26 Also notable is the reaction of Male 5. He is obscured much of the time by the pumps and vehicles, but one can follow his movements. When the fight begins between defendant and

Buchanan, Male 5 begins to run. He first runs west near the front of the green and white van. However, when Male 6 emerges from the Stratus, Male 5 switches direction and runs back east past the front of the gray minivan parked at the west side of the east pump. After passing the minivan, Male 5 turns north and runs along the east side of the east pump to the dark van, which is still parked on the east side of the east pump. Male 4 runs the same path to the dark van and enters it behind Male 5.

¶ 27 Meanwhile, defendant ends up in the dark car after running a circuitous route. After Buchanan collapses, defendant runs south and then west, disappearing around the corner of the store. He reappears several seconds later and runs north to the front of the Stratus, where Buchanan has in the meantime crawled. Defendant then runs to the east in front of Buchanan. As he passes Buchanan, defendant extends his right arm in an ambiguous gesture. He then runs south past the green and white van and eventually enters the dark car, which is now at the south end of the lot, having pulled forward when the skirmish started. The dark car leaves the lot and turns west on Auburn Street. The two vans pull away from the pumps at about the same time. The dark van proceeds north out of the camera's range, while the green and white van proceeds south out of the lot and turns west on Auburn.

¶ 28 At the close of the State's case, the defense moved for a directed verdict. The trial court granted the motion as to count III, which charged felony murder predicated on attempted armed robbery. The court saw no evidence of intent to commit a robbery. The court denied the motion as to counts I and II (intentional murder and knowing murder) and IV and VI (felony murder predicated on mob action and aggravated discharge of a firearm).

¶ 29 The defense called Jamie Martin, a Rockford police school liaison officer. On May 23, 2012, she was at Kennedy Middle School when a teacher informed her that a student reported

having witnessed a shooting at the BP station the night before. Martin met with the student, who was Glover. He told Martin and he and his brother were walking near the BP station on the night of May 22 when they saw a white van pull into the station. Five black men exited the van. They wore dark hoodies with the hoods up. They began to argue with Buchanan, who was by his black Pontiac. The front passenger of the van then pulled out a gun and shot Buchanan, who fell to the ground. The man continued to shoot at Buchanan as he lay on the ground. At this point, another car pulled around from the southwest corner of the gas station's store. This car stopped and a black male whom Glover knew as "Manny" exited. The men from the van shot at Manny before getting back into their van and driving off. Manny got back into the car and it drove off.

¶ 30 Robert Faulkner was the defense's second and final witness. He was an investigator for defense counsel. On November 4, 2013, Bailey and Ciara came to counsel's office. Faulkner took a written statement from Bailey but not from Ciara.

¶ 31 At the close of his case, defendant renewed his motion for a directed verdict. The trial court denied the motion. In closing argument, the State submitted that defendant shot Buchanan as he ran around the front of the Stratus where Buchanan lay. Even if defendant did not shoot Buchanan, the State argued, the shooter was at least one of defendant's associates, and so defendant would be liable under principles of accountability because he precipitated the violence by punching Buchanan.

¶ 32 The jury convicted defendant on counts II, IV, and VI, but acquitted him on count I (intentional murder). In a special verdict form, the jury found that defendant did not personally discharge a firearm during the incident. Defendant subsequently filed a motion for a new trial, which the trial court denied. At sentencing, the court merged counts IV and VI into count II and sentenced defendant to 37 years on that one count. Defendant filed this timely appeal.

¶ 33 II. ANALYSIS

¶ 34 A. Preliminary Discussion

¶ 35 Defendant's two contentions on appeal are that the State failed to prove him guilty beyond a reasonable doubt and that there were multiple errors in the jury instructions.

¶ 36 Defendant's challenges pertain to all three counts. The trial court, however, imposed sentence only on count II, which charged first-degree murder based on knowledge of a strong probability of death or great bodily harm (see 720 ILCS 5/9-1(a)(2) (West 2010)). "[I]t is axiomatic that there is no final judgment in a criminal case until the imposition of sentence, and, in the absence of a final judgment, an appeal cannot be entertained[.]" *People v. Flores*, 128 Ill. 2d 66, 95 (1989). This principle was illustrated in *People v. Caballero*, 102 Ill. 2d 23 (1984). The defendant in that case was convicted of murder, unlawful restraint, and armed violence. In the supreme court on direct review, the defendant contended that his armed violence convictions were improper because the jury instructions on those counts departed from the language of the indictment. The court refused to consider the challenge because the trial court had imposed sentence only on the murder convictions, and so the remaining convictions were not before the court on appeal. *Id.* at 50-1. See also *People v. Neely*, 2013 IL App (1st) 120043, ¶ 15 (the defendant's conviction for aggravated unlawful use of a weapon was not before the court as it was merged into another conviction and no sentence was imposed on it).

¶ 37 Based on the principle in *Caballero*, we lack authority to address defendant's challenges to counts IV and VI since no sentence was imposed on them. We would have authority to remand those counts for sentencing if we were to reverse the conviction on count II (see *People v. Dixon*, 91 Ill. 2d 346, 353–54 (1982)), but in fact we uphold that conviction against

defendant's challenges. We note that, even if we had authority to review the convictions on counts IV and VI, such review would be unnecessary as long as count II withstood challenge.

¶ 38 B. Sufficiency of the Evidence

¶ 39 We address first defendant's contention that the State failed to carry its burden of proving him guilty beyond a reasonable doubt. Again, we are concerned only with the conviction on count II for knowing murder (720 ILCS 5/9-1(a)(2) (West 2010)).

¶ 40 We set forth the procedural and substantive law guiding our review. We first note the State's burden of proof and our standard of review. "The due process clause of the fourteenth amendment to the United States Constitution safeguards an accused from conviction in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979)). "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *Id.* "This standard of review 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Id.* (quoting *Jackson*, 443 U.S. at 319). A reviewing court will allow only reasonable inferences from the evidence. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). "[A] a criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 41 Next, we note the governing substantive law. Count II charged defendant with first degree murder under section 9-1(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-

1(a)(2) (West 2010)), which states that a "[a] person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: *** he knows such acts create a strong probability of death or great bodily harm to that individual or another[.]" According to the State's pathologist, Buchanan died of gunshot wounds. Count II charged defendant with killing Buchanan by shooting him with a firearm. The jury made a special finding that defendant did not *personally* discharge a firearm during the incident. Despite this finding, which the State cannot challenge in this court (see *People v. Leezer*, 385 Ill. App. 3d 1148, 1148 (2008)), the jury found defendant guilty under count II. This means, necessarily, that the jury held defendant responsible for the killing of Buchanan by gunshots fired by another. The jury's legal authority for this determination was the concept of accountability, on which it received instructions. According to section 5-1 of the Code (720 ILCS 5/5-1 (West 2010)), "[a] person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, *or that of another and he is legally accountable for such conduct* as provided in Section 5-2 [of the Code (720 ILCS 5/5-2 (West 2010)], or both." (Emphasis added.)

¶ 42 Section 5-2 of the Code sets forth various grounds on which a defendant may be held legally accountable for the conduct of another. The jury was instructed pursuant to subsection (c) of section 5-2, which states:

> "When accountability exists. A person is legally accountable for the conduct of another when:
>
> * * *
>
> (c) either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to

> aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010).

Thus, the elements of accountability under subsection (c) are: (1) the defendant solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of the offense; (2) the defendant's participation took place before or during the commission of the offense; and (3) the defendant had the concurrent intent to promote or facilitate the commission of the offense. "[T]o prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that *either* (1) the defendant shared the criminal intent of the principal, *or* (2) there was a common criminal design." (Emphasis added.) *People v. Fernandez*, 2014 IL 115527, ¶ 13. Subsection (c) elaborates on the doctrine of common design:

> "When 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts. Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of a crime, however, may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5/5-2(c) (West 2010).

A consequence of the common design doctrine is that, "where a defendant agrees or attempts to aid another person in the planning or commission of an offense, his liability attaches *to any resulting offense, albeit one different from the planned and intended offense*." (Emphasis added.) *People v. Garrett*, 401 Ill. App. 3d 238, 245 (2010).

¶ 43 Defendant's challenge relates to the State's proof on the element of intent. He contends that the State presented no evidence that he intended to promote or facilitate another's crime

against Buchanan. Defendant does not, we stress, dispute that he himself intended to commit a physical assault on Buchanan. He claims, rather, that the State failed to prove that he shared a design with *others*—including, most significantly, the shooter—to harm Buchanan.

¶ 44 First, he asserts that the State did not establish at trial the identity of the person who shot Buchanan. According to defendant, the shooter could have been anyone on the video, and might even have been someone not seen on the video. Defendant claims that he "cannot be held accountable for a shooter (or shooters) when the identity of the shooter (or shooters) has not been shown." Defendant cites *Garrett* and *People v. Cowart*, 2015 IL App (1st) 113085, as authority. Both cases are distinguishable, as we will show.

¶ 45 We begin with *Garrett*, where the defendant was convicted of felony murder based on a theory of accountability. The predicate offense was attempted armed robbery. The State's evidence consisted of the defendant's out-of-court confession and the testimony of officers who investigated the death of an employee at the store that the defendant admitted he planned with others to rob. The defendant's confession was as follows. He planned with three other men to rob the store. The plan was that the defendant would drive the getaway car for the three men. A fifth cohort was a female employee of the store who would facilitate the robbery from the inside. On the date of the incident, the defendant dropped off the other men at the store and waited in the car. Only one of the three men returned to the car, and he and the defendant fled. The defendant did not mention in his statement that there was a plan to use a weapon during the robbery or that any of the men had a gun when the defendant dropped them off. *Garrett*, 401 Ill. App. 3d at 242.

¶ 46 The testimony of officers was that, at 11:30 a.m. on the day of the incident, a patrol officer was passing the store when an employee gestured as if something was occurring inside.

The officer entered the store and saw two men, later identified as two of the defendant's cohorts—Timothy Burton and Demario Bolden—quickly exit the building. The officer did not see any illegal conduct occur within the store and did not hear any gunshots. The officer also did not see any guns on the men, but believed they had them by the position of their hands. When the officer called for the men to stop, they ran. After a pursuit, one of the men, Bolden, was apprehended and found with a gun. An employee, Marcel Hunt, was found dead inside the store of a gunshot wound. The store's manager told police that no one had demanded money or threatened him with a gun that day. The police recovered from the store three unfired .30 caliber cartridges and a fired bullet. The officer who inventoried the gun taken from Bolden said that he placed his initials on the gun to aid later identification. When, however, the officer was shown an inventoried gun at trial, he could not find his initials, but still believed it was the gun recovered from Bolden. The State's forensic expert could not " 'identify or eliminate' " the fired bullet as having been fired from the inventoried gun. *Id.* at 240-42.

¶ 47 The appellate court reversed the defendant's conviction for felony murder, finding no causal link between the attempted armed robbery, of which the court found adequate proof, and the murder of Hunt. The court found "a total absence of evidence proving or even suggesting who caused Marcel Hunt's demise." *Id.* at 247. The court explained:

> "Although there is clearly evidence placing two members of the group (Timothy Burton and Demario Bolden) inside the premises and putting a weapon in Bolden's possession, there simply is no evidence suggesting that the gun was the murder weapon or, for that matter, that any weapon was fired contemporaneously with the entry or presence of the defendant's group within the Family Dollar Store. No one testified that a gunshot was ever heard. Indeed, Officer Rogers, who was patrolling the immediate vicinity while the

attempted robbery was occurring, affirmatively testified that he did not hear a gunshot. The proof is problematic and entirely lacking as to the missing link of causation.

*** No physical evidence or testimony was offered to conclusively link any of the criminal confederates with the shooting death of Mr. Hunt or that one of them had even fired a gun on the day of the incident. Evidence consisting of Officer Rogers' testimony placing Demario Bolden and Burton at the Family Dollar with a gun that did not conclusively fire the killing bullet, with nothing more, is patently insufficient to prove defendant accountable for the victim's murder beyond a reasonable doubt, even in light of the considerable deference we afford to a trier of fact.

*** Here, the only physical evidence of the murder consisted of the bullet which killed Mr. Hunt, which did not match the recovered gun. *** [T]here was no other evidence suggesting that the victim died as a result of the predicate offense and thus there was no evidence that defendant shared a common design with whoever shot the victim, leading to a fatal lack of proof of causation. The evidence at trial here only shows that defendant shared a common design with those that committed the attempted armed robbery, for which he could have been held accountable, but not the murder." *Id.* at 247-48.

¶ 48 The State's case in *Cowart* suffered from a similar gap in proof. The defendant in *Cowart* was convicted on an accountability basis of the first-degree murder of Lee Floyd, who was killed when fighting broke out at a street party attended by hundreds of people. The defendant was present and armed with a handgun, as were some of his associates. Many other men at the gathering were also armed. A physical altercation broke out between a group of men and a group of women. Gunfire ensued. Witnesses described the scene as chaotic and claimed to have heard multiple gunshots. The defendant was seen firing at two women, Iesha Parker and

Elaina Riley, as they fled. One of the defendant's associates was seen firing into the air. At some point during the melee, Lee was shot and killed, but the shooter was never identified. *Cowart*, 2015 IL App (1st) 113085 ¶¶ 4-14.

¶ 49 The appellate court reversed the defendant's murder conviction, finding no evidence of a common design between the defendant and whoever shot Lee:

> "[H]undreds of people attended the party, where most of the men were armed and not all of them belonged to the defendant's 'crew,' and forensic evidence recovered from the scene revealed that at least 28 gunshots from seven different firearms had been fired during the shooting—yielding the possibility of numerous unknown potential shooters who may or may not have been associated with the defendant. The police only recovered one out of the seven firearms during their investigation. Because the fatal bullet that struck Lee had exited his body, its caliber remained unknown and it could not be traced to a particular weapon or shooter.
>
> We note that individuals committing crimes in the vicinity of each other cannot automatically be held accountable for each other's criminal acts. Rather, where there were multiple shooters at the party, the State must show that Lee's unidentified shooter shared in the defendant's alleged criminal design thereby establishing the 'common' link between them. [Citation.] Absent this showing, it is not difficult to imagine other scenarios by which Lee was shot. For example, someone who had a personal grudge against Lee, could have used the chaos and confusion of the brawl and shoot-out at the party as a convenient pretext to shoot him with minimal risk of detection. [Citation.] Based on the evidence, we find that the State has not established a factual link between the bullet that killed Lee and any shooter in general, let alone any shooter sharing an

alleged common criminal design with the defendant to shoot Iesha and her friends." *Id.* ¶¶ 35-36.

¶ 50 In *Garrett* and *Cowart* the shooting deaths were not linked to any individual or even group of individuals associated with the defendant. The holdings in those cases are best understood in contrast to two other cases, *People v. Cooper*, 194 Ill. 2d 419 (2000), and *People v. Cooks*, 253 Ill. App. 3d 184 (1993), cited with approval in *Cooper*.

¶ 51 In *Cooper*, the supreme court upheld the two co-defendants' convictions for aggravated battery with a firearm. The evidence did not establish which defendant shot the victim, but the court found this failure immaterial since both defendants were charged on an accountability basis, the victim was shot in the course of the defendants' common design of violent retaliation against a rival gang, and the evidence showed that one of them had to be the shooter. *Cooper*, 194 Ill. 2d at 436.

¶ 52 In *Cooks*, the defendant and the victim, Michael Thomas, belonged to rival gangs. Both were present at the defendant's home when the defendant had a confrontation with one of Thomas's fellow gangsters. The defendant drove off saying he was going to get a gun. Later, the defendant and several of his fellow gangsters confronted more rival gangsters, and the defendant threatened one with a gun. The defendant then proceeded to a tavern, arriving as Thomas and some companions were leaving. Upon seeing the defendant, Thomas and the others attempted to reenter the tavern but became locked in the vestibule. A witness heard the defendant say that he was going to kill Thomas. The defendant fired a gun through one of the tavern windows, striking Thomas in the leg. The defendant then kicked open the vestibule door and fired again, striking and killing Romelle Gales. After this, "[t]he arm of an unidentified individual *** stuck a shotgun through the tavern door and fired it once, striking Thomas in the

stomach and killing him." *Cooks*, 253 Ill. App. 3d at 186-87. No witness saw or could identify the person who fired the shotgun. *Id.* at 187.

¶ 53 The defendant appealed his conviction for first-degree murder based on accountability. The appellate court affirmed, finding sufficient evidence of "a common design and a community of unlawful purpose between defendant and the second unidentified individual." *Id.* at 190. The court elaborated:

> "Although there is no evidence that defendant entered into an agreement specifically with the second unidentified shooter, it is logical to conclude that defendant aided him by virtue of his shooting the victim first, thereby making Thomas more vulnerable and prone to a second attack. Defendant's first shot facilitated the second and, therefore, the offense. [Citation.] Furthermore, the 'common-design rule' is applicable where defendant 'set in motion' the series of events which eventually culminated in Thomas's death. [Citation.] Defendant 'rounded up' fellow gang members to look for and harm rival gang members, including Thomas whom he actually shot, and then fled the scene only to hide from the police. [Citation.] The manner in which defendant and the 'arm' approached the group in the vestibule was nearly simultaneous, suggesting joint action. [Citation.] This, coupled with defendant's failure to intervene or voice opposition to the actions of the 'arm', are sufficient to establish that defendant assented to and aided the 'arm' in the commission of the murder of Thomas. [Citation.]" *Id.* at 189-90.

¶ 54 The foregoing authorities demonstrate that lack of proof at trial as to the identity of the shooter does not undermine an accountability theory if the State can nonetheless establish that the shooter had a common criminal design with the defendant. In *Cooper*, the State established that the victim was shot by either of the two co-defendants, who shared a criminal design.

*Cooks*, *Garrett*, and *Cowart* all concerned shooters who were never identified or apprehended. The difference in *Cooks*, however, was that the State was able to establish that the shooter was one of the individuals who accompanied the defendant in his efforts to hunt down and harm the victim, and therefore shared his criminal design.

¶ 55 In this respect *Cooks* illustrates an important aspect of the accountability doctrine. The State's case based on accountability may proceed by showing that the defendant "voluntarily attached himself to a group bent on illegal acts with knowledge of its design[.]" *In re W.C.*, 167 Ill. 2d 307, 338 (1995). Where the defendant throws in his lot with such a group while knowing its illegal aims, there is an inference that he "share[s] the [group's] common purpose" (*id.*), and under section 5-2(c), he is responsible for any acts committed in furtherance of that common design (720 ILCS 5/5-2(c) (West 2010)). Since the defendant is deemed to have endorsed the common aim of the group, it matters not which particular member of the group commits the offense as long as the offense furthers that shared aim. In *Cooks*, the shooter was simply "the arm," but nonetheless was found to have shared the defendant's common design.

¶ 56 The present case is closer to *Cooks* than to *Garrett* or *Cowart*. The jury could have reasonably identified one or more individuals in the video as the shooter(s) and also reasonably concluded that the shooter(s) shared a criminal design with defendant.

¶ 57 First, as we will explain, the jury was able to identify a shooter or shooters from the video footage, witness testimony, and distribution of spent casings at the scene. Defendant, however, suggests that it is not a "far-fetched" possibility that some of the casings were left from a prior shooting. Defendant notes a reference in the record to a shooting that occurred at the same gas station several months after this incident. Defendant insinuates that shootings may not be uncommon in that location. This is far, however, from establishing that a shooting on a business

lot in a commercial area would not have drawn attention and investigation, including the recovery of evidence such as shell casings. We reject, therefore, the possibility that the State might have based its case on unrecovered evidence from a prior shooting.

¶ 58 Moving to the evidence, we note that the exterior video footage shows Males 1 and 4 running toward Buchanan and defendant as they fight on the west side of the Stratus. Male 1 reaches them first and appears to join the physical struggle. When Male 4 arrives, he extends his left hand, which holds an object shaped like a handgun, toward Buchanan. A second later, Buchanan collapses. He is injured, judging by the way he crawls to the rear of the Stratus. A reasonable inference is that Buchanan was felled by gunfire from Male 4. Male 1 possibly had fired as well, but there is no gun visible in his hands and his gestures are not as overtly suggestive of it as Male 4's.

¶ 59 The trial testimony supports the impression that Buchanan was shot during his interaction with defendant and Males 1 and 4. Glover testified that he observed a group of black males standing by a van and arguing with "Duane" or "Dickhead" as he stood by a black car. The argument turned into a physical altercation. The black males by the van ultimately started shooting, and Buchanan collapsed near the black car. Buchanan appeared hurt to Glover. Similarly, in his interview with Martin, Glover stated that he saw several black males exit a van and one of them shoot Buchanan, who fell near his car. Detective Eissens testified that defendant told him that shots rang out as defendant was fighting with Buchanan at the rear of the Stratus. Bailey's testimony was also corroborative in the sense that she witnessed defendant lying on the ground in front of a black car.

¶ 60 Possibly indicative of shots fired by Males 1 or 4, or both, on the west side of the Stratus is casings group 3, a cluster of three .9 millimeter casings underneath and just east of the Stratus.

As the State points out, however, the objects that Male 1 is seen picking up on the exterior footage just after Buchanan collapses might have been casings. We might expect, then, not to find all, or any, casings from this shooting, and possibly group 3 might instead be the southern extension of casings group 4, which are also .9 millimeter. Male 6, the front passenger in the Stratus, is seen on the exterior footage extending his arm behind him as he flees north from the Stratus. The orientation of group 4 supports what Male 6's gesture suggests: he was firing shots south as he fled. Indeed, Bailey testified that she observed a man she knew as Demario run northward while shooting southward. Thus, groups 3 and 4 might both have been from Male 6's gun.

¶ 61 The testimony, video footage, and distribution of spent casings are also consistent with the movements of Males 4 and 5 after the shooting. When the altercation begins, Male 5 is seen running west toward the green and white van, and then back east past the front of the gray minivan, which presumably was Saunders' vehicle. Notably, Male 4 traverses the same path along the south end of the pumps before entering the dark van. Either individual may have been the man Saunders saw just after hearing gunshots. Saunders observed that man pass Saunders' van on the right (west) side, heading southeast. He was holding a gun in his right hand. Two groups of spent .40 caliber casings, groups 1 and 2, were found along the path that Males 4 and 5 traverse on the video. The video does not confirm whether Male 5 fired shots or was even armed, but he is obscured for most of the footage by the gas pumps and vehicles.

¶ 62 A fifth group of spent casings, group 5, was located several feet northeast of the northernmost casing in group 4. The group 5 casings were .380 caliber and do not obviously correlate to any persons seen on the video. They were probably fired off-screen, perhaps by someone in the dark van as it drove north.

¶ 63 The foregoing review of the evidence shows that the individuals who shot Buchanan were most likely Males 1 or 4. The jury could have reasonably found that either, or both, shot Buchanan. With such abundant evidence tying Buchanan's death to individuals depicted on the video, we reject defendant's suggestion that the shooter could have been *anyone*, even someone off-camera. We also note that, as *Cooks* instructs, the fact that Males 1 and 4 were unidentified would not have undermined the State's accountability theory if the State nonetheless proved that defendant intended to promote or facilitate the shooting of Buchanan.

¶ 64 Defendant's second point of contention concerns precisely this issue of intent. He claims that there is no evidence that he was part of a scheme to shoot Buchanan. We stress at the outset that defendant could be held accountable for the shooting of Buchanan even if he did not specifically intend that Buchanan be shot. Defendant himself acknowledges that "[t]o prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that *either* (1) the defendant shared the criminal intent of the principal, *or* (2) there was a common criminal design." (Emphases added.) *Fernandez*, 2014 IL 115527, ¶ 13. As the court in *People v. Phillips* explained,

> "Under the common design rule, the State need not prove that the defendant and the principal shared the same intent vis-à-vis the charged crime. Instead, *** 'the State need only prove the accused had the specific intent to promote or facilitate a crime. Once the State proves the accused intended to promote or facilitate *a* crime, it has established the accused's responsibility for *any* criminal act done in furtherance of the intended crime." (Emphases in original.) 2014 IL App (4th)120695, ¶ 43 (quoting *People v. Houston*, 258 Ill. App. 3d 364, 369 (1994)).

¶ 65 An example is *Fernandez*, where the defendant was driving with an acquaintance, Gonzalez, in a SUV belonging to the defendant's sister. Gonzalez asked the defendant to pull into a church lot so that Gonzalez could burglarize cars parked there. The defendant did so, and Gonzales exited the car while the defendant remained inside. As Gonzalez was reaching into a car after breaking its window, an off-duty police officer approached and announced that he was an officer. Gonzalez walked back toward the SUV, and the defendant pulled forward slowly toward him. The defendant stopped the SUV, and then Gonzalez stepped up onto the passenger running board of the SUV and fired at the officer. The officer returned fire and wounded the defendant. *Id.* at ¶¶ 3, 8.

¶ 66 The defendant was charged on an accountability basis with one count of burglary and two counts of aggravated discharge of a firearm in the direction of a peace officer. He was convicted on all three counts, and the trial court merged them into a single conviction for aggravated-discharge. Defendant appealed, arguing that there was no evidence that he intended to facilitate or promote the specific offense of aggravated discharge. The court agreed with the defendant that there was no evidence that he knew Gonzalez was armed, let alone that he would discharge a gun in the direction of a peace officer. The court nonetheless affirmed the conviction:

> "[D]efendant concedes that he aided Gonzalez in the planning and commission of the burglary. That being the case, defendant is legally accountable for any criminal act that Gonzalez committed in furtherance of the burglary, which in this case was the aggravated discharge of a firearm in the direction of a peace officer. Under well-established accountability principles, the evidence in this case more than supports defendant's conviction. *Id.* ¶ 18.

¶ 67 Defendant does not dispute that he intended to commit a crime, namely a physical assault of Buchanan, as indeed the video shows he accomplished. Under the common-design rule, if there is evidence that others shared in his criminal design of harming Buchanan, then defendant would be liable for their crimes in furtherance of that scheme, even if they are not the crimes that defendant specifically intended.

¶ 68 Defendant denies that there is evidence showing that he banded together with others in a common design to harm Buchanan. According to defendant, "there was no evidence linking [him] to any of the people that were at the station." Defendant inexplicably denies the obvious. The video shows him arrive with Males 1, 2, 3, in the green and white van. Also, between markers 6:33 and 6:53, he spends time near the dark car, which would ultimately be his instrumentality of flight from the scene. Defendant's companions from the van are seen associating with Males 4 and 5, who have walked over from the dark van. Males 4 and 5 linger at the station together with defendant's companions from the green and white van as defendant waits outside the store for Buchanan. They all appear to be anticipating defendant's move. The jury could have reasonably inferred not just the obvious association between defendant and his companions from the green and white van, but also an association between defendant and the occupants of the dark van and the dark car.

¶ 69 Defendant next asserts that his confrontation with Buchanan "was simply a random encounter ***, not something that was planned or prepared for." Defendant's denial is not that he planned to harm Buchanan, but that others (most importantly, the shooter(s)) shared that plan. He does not, that is, deny that his purpose in hovering near the store's entrance between markers 9:27 and 10:21 was to assault Buckley when he exited. Indeed, there is no plausible innocent explanation for that conduct when considered in context: defendant clearly is stalking Buchanan.

Defendant's claim, rather, is that the State "presented no evidence that the fatal bullet was fired by someone that shared [defendant's] criminal design to fight Buchanan."

¶ 70 We disagree. As noted, Males 1 and 4 were likely the individuals who shot Buchanan. Male 1 arrives at the station at marker 0:50 with defendant and two other men. All four loiter at the station, remaining there up to and beyond Buchanan's arrival at marker 8:45. They spend the time milling about in and out of the store and the van. At marker 9:23, defendant's associates from the green and white van are joined by Male 4 while Male 5 stands just to the west. These men remain at or near the front of the van as defendant waits for Buchanan. Of these, Males 1 and 4 are closest to the store's entrance; they remain with an unobstructed view of it. They and their companions are, it is reasonable to infer, anticipating something. When Buchanan exits the store, Male 1 starts toward him even while defendant's back is still toward Buchanan. Once defendant turns and strikes Buchanan, Male 1 hurries his pace and reaches the two just ahead of Male 4. Buchanan is then shot by either Male 1 or 4, or both. The totality of this conduct—loitering with defendant for several minutes before and after Buchanan arrives, approaching Buchanan even before defendant does, and joining with lethal force in the assault on Buchanan—suggests that these men shared defendant's intent to criminally assault Buchanan. Lending support to the inference is Glover's testimony and statement to police that he witnessed a *group* of black men argue with Buchanan and then begin shooting. Also supportive is defendant's initial claim to Eissens that his reason for punching Buchanan was that he bumped into defendant inside the store. Defendant retracted this assertion when confronted with the fact that the surveillance video showed no such provocation, and he stated instead that he and Buchanan had quarreled on a prior occasion. The jury could have reasonably inferred that

defendant's initial reason for denying a *prior* motive for harming Buchanan was to protect those with whom he had planned in advance to harm Buchanan.

¶ 71 Defendant claims that, for his own safety, he would not have condoned the shooting of Buchanan during their fight, when they were at such close quarters. The harsh truth for defendant in the accountability doctrine is that where he shares with others a criminal design, in this case the criminal assault of Buchanan, he runs the risk that his associates' crimes in furtherance of that scheme—for which the law holds him accountable—will occur in a time and manner not to his liking. Moreover, defendant's response to the shooting was not that of a man who was horrified by his associates' lethal escalation of the skirmish and who wanted to distance himself from the perpetrators. On the contrary, defendant fled in a car driven by a sibling of two of his associates and did not report the shooting. See *People v. Perez*, 189 Ill. 2d 254, 267 (2000) ("Proof that the defendant was present during the perpetration of the offense, that he fled from the scene, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the crime are all factors that the trier of fact may consider in determining the defendant's legal accountability.")

¶ 72 Accordingly, we find that the evidence supports defendant's conviction for first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)).

¶ 73 C. Jury Instructions

¶ 74 We address next defendant's challenges to the jury instructions. He claims that the trial court gave the following instructions against the direction of the committee on pattern jury instructions: (1) separate instructions for the different types of first-degree murder charged; (2) Illinois Pattern Jury Instructions, Criminal, No. 7.02X (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 7.02X), which states that the jury may not find the defendant guilty of first-degree

murder (felony murder) unless it finds him guilty of the predicate felony; and (3) the definition of "proximate cause" in Illinois Pattern Jury Instructions, Criminal, No. 4.24 (4th ed. Supp. 2011).

¶ 75 Defendant acknowledges that he did not raise any of these challenges below, which would normally result in their forfeiture. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). He invokes the plain-error rule, which bypasses normal forfeiture principles and permits a reviewing court to consider, in limited circumstances, an unpreserved claim of error. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Absent error, however, there is no plain error (*People v. Cosby*, 231 Ill. 2d 262, 273 (2008)), and defendant has not demonstrated any error here. Indeed, contentions (2) and (3) do not even have any pertinence, as we explain, to the conviction on count II.

¶ 76 We begin with contention (1), which does relate to count II. Defendant points to the committee's comment to IPI Criminal 4th No. 7.02, the issues instruction for first-degree murder:

> "This instruction—and only one of this instruction—should be given to the jury to explain the issues in first degree murder. Do *not* give separate issues instructions for each of the different ways first degree murder can be charged under Sections 9-1(a)(1) through (a)(4). Instead, use the appropriate paragraphs within the Second Proposition. [*People v. Johnson*, 250 Ill. App. 3d 887, 904 (1995)]." (Emphasis in original).

"While committee comments are not the law, the trial court is allowed to deviate from the suggested instructions and format only where necessary to conform to unusual facts or new law[.]" *People v. Banks*, 287 Ill. App. 3d 273, 280 (1997). A deviation from committee

recommendations, however, will not result in reversal unless there is a serious risk that the jury convicted the defendant because it did not understand the law. *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 73. The sufficiency of a jury instruction is ultimately an issue of whether, taken as a whole, it fairly and accurately states the law and is sufficiently clear as not to mislead the jury. *People v. Miller*, 363 Ill. App. 3d 67, 77 (2005).

¶ 77 The trial court, contrary to the committee's recommendation of a single instruction for first-degree murder, gave separate instructions for each of the four remaining counts of first-degree murder. However, a similar deviance occurred in *Johnson*, the very case cited by the committee in its comment to IPI Criminal 4th No. 7.02, yet the appellate court in that case did not reverse the defendant's convictions. The trial court in *Johnson* gave the jury "five different instructions on the issues of first degree murder, one for each count of murder." 250 Ill. App. 3d at 904-03. The defendant noted that this procedure departed from the committee's admonition, but he failed to develop his contention of error. He "alleged the instructions were erroneous and confusing, [but] provided no argument in support of this contention[.]" *Id.* at 904. Similarly here, defendant points to the court's departure from the committee comments but does not explain in what way the instructions deviated from the substantive law or had potential to mislead the jury. Therefore, contention (1) fails.

¶ 78 Contention (2) does not pertain to count II. Defendant's argument relates to the trial court's submission of IPI Criminal 4th No. 7.02X, which is entitled, "Explanation To Jury That It May Not Find Defendant Guilty Of Felony Murder And Not Guilty Of Underlying Felony." The court gave the instruction twice, once for each of the two counts of felony murder. The instruction, as adjusted for this case, read:

> "To sustain the charge of first degree murder (Type B), the State must prove that when the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of Duane Buchanan, Jr., the defendant was committing the offense of [ ]. Accordingly, you may find the defendant guilty of first degree murder (Type B) only if you also find the defendant guilty of [ ].
>
> If you find the defendant not guilty of [ ], then you must find the defendant not guilty of first degree murder (Type B)."

Defendant points to the committee's comment that IPI Criminal 4th No. 7.02X "should be used to avoid legally inconsistent verdicts that could arise when the jury is to be instructed on first degree murder under Instruction 7.02 and the *sole* basis for conviction is the felony murder doctrine" (emphasis in original). Defendant claims that the instruction was inappropriate here because the felony murder doctrine was *not* the sole basis for the first-degree murder charges, but rather the State also charged intentional murder and knowing murder.

¶ 79 This issue pertains only to the felony murder counts. The convictions on those counts are not properly before us because no sentence was imposed on them. See *Caballero*, 102 Ill. 2d at 51. Therefore, we decline to address contention (2).

¶ 80 Contention (3) also is directed at the felony murder counts. To explain, we note that the issue defendant raises in contention (3) is whether the trial court erred by giving the jury the definition of proximate cause in IPI Criminal 4th No. 4.24. Defendant points to the committee's comment that IPI Criminal 4th No. 4.24 is limited to cases involving "statutory offenses or sentencing enhancement factors" employing the concept of "proximate cause." IPI Criminal 4th No. 4.24, Committee Comments. The instruction "should not be given when causation is an issue in intentional, knowing, or reckless homicide cases" or when "causation is an issue in

felony murder cases." *Id.* In homicide cases involving, like the present case, felony murder *and* either intentional, knowing, or reckless homicide, the appropriate instructions on causation are IPI Criminal 4th No. 7.15 (causation in intentional, knowing, or reckless murder cases) and IPI Criminal 4th No. 715A (causation in felony murder cases). IPI Criminal 4th No. 7.15, Committee Comments. Here, the trial court gave IPI Criminal 4th No. 4.24 as well as both IPI Criminal 4th No. 7.15 and IPI Criminal 4th No. 7.15A.

¶ 81 Defendant's contention (3) focuses on the differences between IPI Criminal 4th No. 4.24, the proximate cause instruction, and IPI Criminal 4th No. 7.15A, the instruction on causation in felony murder cases. Defendant notes that IPI Criminal 4th No. 7.15A reads in part:

> "A person commits the offense of first degree murder when he commits the offense of _____, and the death of an individual results as a direct and foreseeable consequence of a chain of events set into motion by his commission of the offense of _____."

Defendant compares this language to that of IPI Criminal 4th No. 4.24, which, as given by the trial court, read:

> "The term 'proximate cause' means any cause which, in the natural or probable sequence, produced the death of another person. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause which in combination with it, causes with death of another person."

¶ 82 Defendant argues that IPI Criminal 4th No. 4.24,

> "by omitting any reference to 'direct and foreseeable' consequences, makes it easier to convict and is obviously inappropriate. Indeed, the general proximate cause definition would allow the jury to convict Mr. Buckley if it believed that the fistfight 'concurs with'

> the shooting. Under the appropriate instruction, the jury was required to find that the shooting was a 'direct and foreseeable consequence' of the fistfight. This is a huge difference—the two events occurred concurrently, but the shooting was not a direct and foreseeable consequence of the fistfight."

Later in his opening brief, defendant reiterates this specific challenge to the adequacy of the instructions on the causation element of felony murder:

> "[T]he improper definition of proximate cause was given in a felony murder case, [which] misled the jurors as to the State's burden on a central issue in the case—whether the shooting was a foreseeable consequence of the fistfight."

Again, the convictions on counts IV and VI, the felony murder counts, are not before us as the trial court did not impose sentence on them. See *Caballero*, 102 Ill. 2d at 51.

¶ 83 In his reply brief, defendant initially seems to hint at the possibility that the influence of IPI Criminal 4th No. 4.24 extended also to the knowing-murder charge under count II. Defendant notes that IPI Criminal 4th No. 7.02, the general issues instruction for first-degree murder, states as an element that the defendant "performed the acts which caused the death" of the victim. Defendant proceeds to argue that

> "[t]he jury could easily have used the definition of proximate cause in conjunction with the issues instruction for first degree murder, thereby convicting Mr. Buckley *if it believed that the fistfight 'concurred with' the shooting.* Indeed, the fact that the other instructions did not specifically use the term 'proximate cause' likely caused the jury to speculate as to where the instruction fit in and look for a place to apply it. By misleading the jurors as to the State's burden on a central issue in the case—*whether the shooting*

> *was a foreseeable consequence of the fistfight*—this error was significant." (Emphasis added.)

Despite initial appearances, this argument is essentially a reiteration of the claim that the instructions confused the jury as to what manner of causal relationship the State had to prove existed between the fistfight and the shooting. Thus, the claim pertains to the felony murder charges and not to the charge of knowing murder, which was not premised on any causal relationship between the fistfight and the shooting.

¶ 84 We note that, at oral argument, defense counsel made the broader claim that IPI Criminal 4th No. 4.24's definition of proximate cause could have confused the jury with respect to *any* charge of which causation was an element, including the charge of knowing murder. This contention is forfeited because it was raised for the first time at oral argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 85 For the foregoing reasons, we hold that defendant has not established error with respect to the jury instructions. Consequently, he has not shown plain error and forfeiture applies.

¶ 86

¶ 87 III. CONCLUSION

¶ 88 For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 89 Affirmed.