

2018 IL App (1st) 151778-U
No. 1-15-1778
Order filed December 21, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 11205
)	
TIMOTHY JONES,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held:*

- (1) Trial counsel did not provide ineffective assistance for not requesting a jury instruction on intervening cause.
- (2) The trial court properly instructed the jury on the issue of causation in felony murder.
- (3) The trial court properly instructed the jury on the felony murder escape rule.
- (4) Defendant's 28-year prison sentence for felony murder was not an abuse of the trial court's discretion.

- (5) This court continues to follow Illinois Supreme Court precedent regarding the applicability of the proximate cause theory of felony murder, which does not violate due process as applied to defendant.

¶ 2 Defendant Timothy Jones and two co-offenders fled the scene of a residential burglary in a vehicle and were pursued by police officers in a high-speed chase. A police vehicle pursuing defendant's vehicle crashed into another car, killing the driver. Defendant was found guilty by a jury of first-degree murder predicated on residential burglary. The trial court sentenced him to 28 years' imprisonment.

¶ 3 On appeal, defendant argues that (1) trial counsel provided ineffective assistance by failing to tender an instruction on intervening cause to the felony murder charge; (2) the trial court erred by giving nonpattern jury instructions on felony murder; (3) the trial court improperly instructed the jury on the felony murder escape rule; (4) defendant's 28-year prison sentence for felony murder is excessive; (5) Illinois' proximate cause theory of felony murder should be rejected and the felony murder statute violates due process as applied to defendant.

¶ 4 For the reasons that follow, we affirm the judgment of the circuit court.¹

¶ 5 I. BACKGROUND

¶ 6 Defendant was arrested for entering the home of a couple, taking their property and fleeing the police in a car at a high rate of speed, which resulted in the death of the driver of another car when a police vehicle collided with that car. The State proceeded to trial on charges of first degree murder, home invasion, armed robbery and residential burglary.

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 7 At the jury trial, the State presented evidence showing that, on the morning of May 8, 2013, defendant Timothy Jones and Tremaine Scott forced their way into the apartment of Charese Taylor and Lee Davis while Davis was home with his daughter. Davis testified that Scott held a semiautomatic handgun when the pair entered Davis's apartment and defendant later took that gun from Scott and pointed it at Davis during the incident. Defendant and Scott demanded money and ultimately took a shoebox with Air Jordan shoes as well as an iPhone, iPad, cash, and bankcards from Davis's wallet.

¶ 8 Defendant and Scott fled the apartment on foot, and Davis retrieved his handgun and followed them. Taylor, who was just leaving the building before the incident, heard some commotion and saw defendant and Scott run down the stairwell and out the building. Taylor and Davis followed the two offenders down the street. Police officers arrived, and Taylor and Davis directed them towards the offenders. A chase then ensued.

¶ 9 Officer Ronald Pittman followed defendant and Scott, who crossed through a park. Defendant, who was holding the handgun, and Scott entered a parked black sedan with a third offender, later identified as John. Defendant was in the driver's seat, Scott was in the front passenger's seat, and John was in the backseat. Defendant's car sped off, zigzagged down the street and hit a curb. Defendant exited his car, and Officer Pittman exited his vehicle, drew his gun, and ordered defendant to show his hands. Defendant lay down on the ground while Scott and John ran in different directions. As Officer Pittman relayed these events over his police radio, defendant reentered his car and drove off. Officer Pittman reentered his vehicle and followed defendant because he had the handgun. Officer Pittman was driving a marked police vehicle and his emergency lights were activated.

¶ 10 Defendant fled through the neighborhood, drove through stop signs and red lights without slowing down, and accelerated to approximately 40-60 miles per hour through streets where the speed limit was 30 miles per hour. Officer Pittman slowed down before proceeding through the intersections as he followed defendant, who drove an escape route that was shaped like a square. During defendant's second lap, Officer James Sivicek, with his partner Officer Jairo Valeriano, joined the pursuit, following behind defendant's car with their vehicle's emergency lights activated. Defendant continued driving through stop signs and red lights without slowing down as the officers pursued him. At each intersection, Officer Sivicek would slow down to ensure the intersection was clear and safe before proceeding through it. Officer Valeriano also monitored traffic from the passenger seat while Officer Sivicek drove.

¶ 11 Defendant proceeded through a red light at the intersection of Yates Boulevard and 76th Street without slowing down. Officer Sivicek was approximately 30 yards behind defendant. Officer Sivicek testified that other cars had pulled over to the side of the road and he tried to ensure the intersection was clear of traffic before proceeding through it. When Officer Sivicek noticed a blue car proceeding through the intersection, he braked but collided with the blue car. The driver of the blue car, Jacqueline Reynolds, was killed in that collision. A witness, another driver stopped at the intersection where the collision occurred, testified that defendant traveled through the intersection without slowing down at a speed of approximately 50-60 miles per hour with officers following at about the same speed. The jury viewed surveillance footage of the police pursuit.

¶ 12 Shortly after the collision, Officer Sellers Williams found defendant crouching by a building about three to five blocks from the intersection of the collision. Defendant was holding

car keys in his hand and started to walk away when he saw the officers. The officers identified him as the burglary suspect based on an identification card found near the scene of the burglary. Officer Williams drove defendant to the scene of the burglary, and Taylor identified him as one of the offenders. At the police station, a detective interviewed defendant, who admitted that he took the Air Jordan shoes from someone's home, drove the car, saw the police, and ran through stop signs. The firearm was never recovered.

¶ 13 Officers Pittman, Sivicek, and Valeriano testified that they were aware of Chicago Police Department General Order G03-03-01, which requires officers to conduct a balancing test when engaging in vehicle pursuits of offenders. The officers testified that this balancing test gives officers discretion to weigh the totality of the circumstances surrounding the pursuit. They should balance the severity of the crime against driving conditions like traffic flow, pedestrian traffic, and weather conditions. If an officer determines that a pursuit would be too dangerous based on these conditions, the officer radios a supervisor, who then makes a final decision on whether to terminate the pursuit. The officers testified that the severity of the crime, as they were informed by the police radio, was an armed home invasion with the offenders fleeing the scene with a handgun near a park and a school. Regarding the driving conditions, the officers testified that although some pedestrians were present and the pursuit was near a school zone, it was not rush hour, it was a sunny day, and there was no retail or large major development on the street. None of the officers determined that the chase was too dangerous to proceed, and no supervisor ordered them to terminate their pursuit.

¶ 14 Defendant testified that Davis, whom he knew from high school, owed him \$7,000 for credit cards defendant and Scott had sold to Davis. The day before the offense, defendant went to

Davis's apartment and asked about the money, and Davis said that he would have it the next day. When defendant and Scott went to Davis's apartment the next day, Scott and Davis began pushing each other. Defendant took a shoebox containing money from Davis's bedroom and an iPad and iPhone. Davis threatened to get his gun, so defendant and Scott fled the apartment. Defendant did not have a gun and never saw Scott with a gun. Defendant and Scott entered a car driven by John, who crashed it into a parked car. Officer Pittman arrived and pointed a gun at them. Defendant exited the car and put his hands up but John and Scott fled. Defendant then got in the driver's seat and drove off.

¶ 15 Defendant testified that he lost sight of Officer Pittman. Defendant claimed that he blew his horn and slowed down as he drove through stop signs and red lights. A police car with activated lights but no siren started to follow him, but he was not afraid of getting arrested because he knew he had not done anything wrong. However, when he realized that he had just been in a high speed chase, he did not stop because he did not want to go to jail. He did not know that a collision had occurred between the police vehicle and another car. He thought that he had gotten away from the police, so he parked the car and started walking. A police officer approached him, questioned him, and took him into custody.

¶ 16 The defense argued that defendant was not responsible for Ms. Reynolds' death because either the police did not comply with department regulations when pursuing defendant or he had reached a place of safety before the fatal car crash.

¶ 17 During deliberations, the jury submitted notes to the court. The jury asked, "If [defendant] is voted guilty for any one of the crimes, armed robbery, home invasion, residential burglary, is the guilty [*sic*] of first degree murder automatic? How do we leave that out if not?"

Defense counsel asked the court to point the jury to the instruction on causation. The court denied counsel's request, reasoning that the court could not speculate about what the jury was thinking and considering. The court stated, "If there is some misstatement of the law or if there is some other statement with respect to the law that I need to make that is clear from their question, then I might venture down that road; otherwise, that's not a road I plan to go down." The court offered to reread the instructions to the jury, but the parties agreed to let the jury continue deliberating.

¶ 18 Later, the jury sent another note that asked, "Re: First degree murder. Does the law state verbatim a third person trying to **prevent** the commission?" (Emphasis in original.) In response, the parties agreed that the court should reread all of the instructions to the jury, and the court did so.

¶ 19 The jury found defendant guilty of first-degree murder and residential burglary. Thereafter, the trial court denied defendant's posttrial motion, merged the residential burglary count into the felony murder count, and sentenced him to 28 years' imprisonment. Defendant timely appealed.

¶ 20

II. ANALYSIS

¶ 21 On appeal, defendant argues that (1) trial counsel provided ineffective assistance by failing to tender an instruction on intervening cause to the felony murder charge; (2) the trial court erred by giving nonpattern jury instructions on felony murder; (3) the trial court improperly instructed the jury on the escape rule to felony murder; (4) defendant's sentence for felony murder should be reduced; and (5) Illinois' felony murder statute violates due process as applied to defendant and the proximate cause theory of felony murder should be rejected.

¶ 22

A. Ineffective Assistance of Counsel

¶ 23 Defendant argues that trial counsel provided ineffective assistance by failing to tender a jury instruction explaining that grossly negligent behavior by a third party is an intervening cause and an intervening cause completely unrelated to defendant's acts would relieve him of criminal liability for felony murder. Defendant contends that such an instruction was consistent with the defense and was supported by the evidence because the pursuing officers were negligent and failed to comply with the police department's pursuit guidelines, which required them to terminate a high-speed vehicle pursuit when the potential danger outweighed the need for immediate capture. Although trial counsel argued that Officer Sivicek's conduct was the proximate cause of Ms. Reynolds' death, counsel failed to offer the jury a legal route to acquittal based on that argument. Defendant asserts that trial counsel's failure to request a jury instruction consistent with the defense and supported by the evidence cannot be trial strategy because it deprived defendant of a fair trial.

¶ 24 Defendant contends that counsel's failure to tender an intervening cause instruction prejudiced the defense because there was a reasonable probability the court would have given the instruction if requested and the jury would then have acquitted him of felony murder. To support this claim of prejudice, defendant cites the jury's question during deliberations about whether defendant was automatically guilty of felony murder if he was found guilty of a predicate offense and the trial court's willingness to consider a necessary response to make the law clear to the jury. Also, defendant argues that his acquittal by the jury of the home invasion and armed robbery charges indicates that the jury rejected some of the officers' testimony and apparently did not believe that defendant and his accomplice Scott had a gun.

¶ 25 A defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing that (1) “counsel’s performance was deficient” and (2) the deficient performance “prejudiced the defense.” To satisfy the first prong (*i.e.*, deficient performance), the defendant must show “that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To satisfy the second prong (*i.e.*, prejudice), 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then that course should be taken and the court does not need to consider the quality of the attorney’s performance. *Id.* at 697. We review whether counsel was ineffective *de novo*. *People v. Williams*, 391 Ill. App. 3d 257, 269 (2009).

¶ 26 A defendant is entitled to an instruction on his theory of the case if there is some foundation in the evidence for that instruction. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). Failing to request an instruction for an affirmative defense constitutes ineffective assistance of counsel if the failure was not the result of trial strategy. Compare *People v. Haynes*, 408 Ill App. 3d 684, 689-91 (2011) (counsel was not ineffective because defendant’s refusal to comply with the police did not warrant a self-defense instruction to resisting arrest) with *People v. Parker*, 260 Ill App. 3d 942, 948 (1994) (counsel was ineffective for failing to request a second-degree murder instruction because the closely balanced evidence suggested that defendant acted under a cloud of fear).

¶ 27 Under the felony-murder statute, a felon is responsible for the direct and foreseeable consequences of his actions. *People v. Lowery*, 178 Ill. 2d 462, 470 (1997). The purpose behind the felony murder statute is to limit the violence that accompanies the commission of forcible felonies so that anyone engaged in such violence will be automatically subject to a murder prosecution should someone be killed during the commission of a forcible felony. *People v. Shaw*, 186 Ill. 2d 301, 322 (1998).

¶ 28 Illinois courts apply the proximate cause theory of felony murder, under which a defendant may be found guilty “for any death proximately resulting from the unlawful activity— notwithstanding the fact that the killing was by one resisting the crime.” *Lowery*, 178 Ill. 2d at 465. “It has long been the rule in Illinois that a defendant may be held responsible for death that occurs during an escape following the commission of a forcible felony.” *People v. Klebanowski*, 221 Ill. 2d 538, 546 (2006). However, an intervening cause completely unrelated to acts of the defendant is a valid defense to felony murder and relieves a defendant of criminal liability. *People v. Domagala*, 2013 IL 113688, ¶ 39. Gross negligence is considered an intervening cause. *Id.* Nevertheless, Illinois law does not require that the defendant’s acts must be the sole and immediate cause of death. *People v. Brackett*, 117 Ill. 2d 170, 176 (1987).

¶ 29 We conclude that defendant cannot establish the prejudice necessary to support his claim of ineffective assistance of counsel because there is no reasonable probability that the result of the proceeding would have been different if trial counsel had tendered an instruction regarding intervening cause. Our review of the record establishes that defendant’s frantic attempt to flee the scene of his residential burglary offense made it reasonably foreseeable that his conduct would result in a high-speed police chase that could cause a fatal collision. Furthermore, any alleged gross negligence by the police for pursuing defendant was not an intervening cause

completely unrelated to defendant's acts. Defendant fled the scene of his residential burglary offense by speeding off in a car with his co-offenders. He drove the car and thereby determined the route, speed and duration of his flight. He sped down streets, disobeyed traffic control signals and stop signs, and refused to stop and surrender. Accordingly, the safety risks involved in the police pursuit were immediately within defendant's control. If he had surrendered, the police would not have pursued him through the intersection at Yates Boulevard and Ms. Reynolds would not have died as a result. See *People v. Hickman*, 59 Ill. 2d 89, 94 (1974) (defendants' acts of armed burglary and fleeing set in motion the pursuing officer's mistaken shooting of a fellow officer, which was a direct and foreseeable consequence of the defendants' actions); *People v. Burnom*, 338 Ill. App. 3d 495, 507 (2003) (affirming conviction of first degree murder predicated on attempted armed robbery where the officers' use of force that killed the victim was in direct response to the defendant's conduct); see also *United States v. Pineda-Doval*, 614 F.3d 1019, 1030 (9th Cir. 2010) (the officers' potentially incorrect use of a strike strip during a high-speed pursuit was not a superseding cause of the fatal accident because it was reasonably foreseeable that the pursuing officers would use a strike strip to stop defendant and the defendant's dangerous driving would result in an accident). Consequently, the evidence does not support a theory of intervening cause completely unrelated to defendant's acts, and defendant cannot establish prejudice.

¶ 30 Defendant cites *Rivera v. Garcia*, 401 Ill. App. 3d 602 (2010), and *Suwanski v. Village of Lombard*, 342 Ill. App. 3d 248 (2003), to support his claim that the officers' alleged departure from department pursuit guidelines amounted to gross negligence that relieved him of criminal liability. Defendant's reliance on these cases, however, is misplaced.

¶ 31 In *Rivera*, off-duty officers investigated a robbery of one of the officers' sons. *Id.* at 603-04. The investigation "quickly morphed into a high-speed chase and shootout in a residential neighborhood that injured one and killed another occupant of the vehicle [the police] were pursuing." *Id.* At trial, an expert testified that the officers' use of a covert (*i.e.*, unmarked) vehicle and gunfire in neighborhood streets and alleys constituted a reckless and dangerous departure from police practices and displayed a conscious disregard for the safety of others. *Id.* at 606-07. Furthermore, the officers admitted that their conduct violated department procedures. *Id.*

¶ 32 *Rivera*, which was a civil case, is distinguishable from the instant case. Here, the officers did not use a covert vehicle, fire their guns, or concede that their conduct violated the department's pursuit guidelines. Furthermore, the court in *Rivera* did not determine that a departure from police guidelines was *per se* gross negligence, but instead stated that "reckless abandonment of studied and published pursuit policies can hardly be claimed to be incapable of being linked to injuries and/or death at the conclusion of the chase." *Id.* at 611.

¶ 33 In *Suwanski*, another civil case, an offender suspected of driving under the influence and auto theft was pursued by an officer who drove in a residential and commercial suburban area at speeds that reached 100 miles per hour. *Id.* at 252. On appeal, the court held that summary judgment was improper because a reasonable jury could have found that the officer acted willfully and wantonly. *Id.* at 257. The court remanded the case for the jury to determine whether the officer "showed an utter indifference to or conscious disregard for the safety of others or their property." *Id.* at 259. Unlike the officer in *Suwanski*, the pursuing officers here believed that defendant had committed a Class X felony with a firearm near a park and school. Although there was conflicting evidence regarding exactly how fast the officers drove, no evidence suggested

that they reached speeds anywhere near the 100 miles per hour in a residential area, as had occurred in *Suwanski*.

¶ 34 Although defendant argues that a question of fact existed regarding whether defendant was relieved of criminal liability by the alleged failure of the police to comply with their department's safety regulations, the police do not necessarily act with gross negligence by failing to follow their own rules. See *Wade v. City of Chicago*, 364 Ill App. 3d 773, 781-81 (2006) (the violation of self-imposed rules or internal guidelines does not normally impose a legal duty or constitute evidence of negligence or willful and wanton conduct); see also *Shuttlesworth v. City of Chicago*, 377 Ill App. 3d 360, 367-68 (2007) (witness testimony that a police vehicle approached a car at a high speed did not rise to the level of willful and wanton conduct); *Nelson v. Thomas*, 282 Ill. App. 3d 818, 828 (1996) (pursuing officers did not proximately cause a fatal car accident where the defendant fled from police in a high-speed chase through a red light); *Urban v. Village of Lincolnshire*, 272 Ill. App. 3d 1087, 1095 (1995) (rejecting the argument that the pursuing officers proximately caused a motorcycle passenger's death when they engaged in a high-speed chase and the motorcycle passenger did not wear a helmet).

¶ 35 The evidence does not show a reasonable probability that the jury, if instructed differently, would have determined that the officers acted with gross negligence and that the high-speed chase was completely unrelated to defendant's misconduct. The evidence showed that the pursuing officers had discretion under department guidelines to determine whether the chase would be too dangerous to continue and they determined that it was not. During the pursuit, the officers believed that defendant had committed a home invasion while armed with a firearm and fled the scene with the firearm near a park and a school. The officers also testified

that the driving conditions did not pose a significant safety hazard that outweighed the public safety need to immediately apprehend defendant. The officers testified that they proceeded cautiously through intersections during the pursuit, and the jury weighed all of the available evidence, including potentially contradicting witness testimony and video of the pursuit.

¶ 36 We reject as too speculative defendant's assertion that the jury's questions during deliberations indicated that the jury was practically begging for a way to acquit him of felony murder on the basis of an intervening cause. Courts are cautioned against speculating into a jury's reasoning behind its questions during deliberations. *People v. Spears*, 112 Ill. 2d 396, 409 (1986) (the court will not "attempt to metaphysically divine a jury's collective intent from a single question that may well have only embodied the curiosity or concern of a single juror."); *People v. Peoples*, 2015 IL App. (1st) 121717, ¶ 106 ("We may not guess as to why a jury did what it did, no matter how obvious it may seem to us"). The jury's notes do not show that the jury would have reached a different result under different instructions. The jury rendered a verdict after the court responded to the jury's questions by rereading the instructions to the jury, and the verdict is "the only unequivocally clear manifestation of a jury's intent." *Spears*, 112 Ill. 2d at 409. Furthermore, as discussed below, the record shows that the jury was properly instructed on the issue of causation in felony murder; the jury received Illinois Pattern Jury Instructions, Criminal, No. 7.15A (4th ed. 2000) (IPI Criminal 4th No. 7.15A) and a modified version of the issues instruction for first degree murder, which explained that the victim's death must result as a direct and foreseeable consequence of the chain of events set into motion by defendant's commission of the predicate felony offense.

¶ 37 We conclude that defendant's claim of ineffective counsel fails because defendant does not show that there was a reasonable probability that the result of the proceeding would have been different if counsel had tendered an intervening cause instruction.

¶ 38 B. Felony Murder Causation Instructions

¶ 39 Defendant argues that the trial court abused its discretion by giving nonpattern jury instructions on felony murder because the pattern instructions accurately stated the relevant law and the nonpattern instructions used at trial were misleading and confusing. Specifically, defendant challenges the trial court's decision to modify Illinois Pattern Jury Instructions, Criminal, No. 7.02 (4th ed. 2000) (IPI Criminal 4th No. 7.02), the issues instruction for first degree murder, and Illinois Pattern Jury Instructions, Criminal, No. 5.03A (4th ed. 2000) (IPI Criminal 4th No. 5.03A), the accountability felony murder instruction, to include causation language even though the jury was already provided with IPI Criminal 4th No. 7.15A, the causation in felony murder cases instruction. Defendant argues that the modified instructions improperly combined the legally distinct theories of felony murder and accountability under a single umbrella of legal responsibility and might have confused the jury to erroneously think he was accountable for the actions of the police officers even if the jury did not find that his acts in committing residential burglary were the proximate cause of Ms. Reynolds' death.

¶ 40 The State responds that the modified instructions were proper because the modifications conformed the causation language of IPI Criminal 4th Nos. 7.02 and 5.03A to the language found in IPI Criminal 4th No. 7.15A. Furthermore, using the unmodified IPI Criminal 4th No. 5.03A might have confused the jury because Ms. Reynolds was not killed by an accomplice to the predicate felony. The State also argues that defendant forfeited review of this argument

because, even though trial counsel initially objected to these modifications and included this claim in defendant's posttrial motion, counsel withdrew his objection at trial.

¶ 41 In criminal cases, a defendant preserves an issue for review by (1) raising it in either a motion *in limine* or a contemporaneous trial objection, and (2) including it in the posttrial motion. *People v. Denson*, 2014 IL 116231, ¶ 11. The purpose of this rule is “to encourage defendants to raise issues in the trial court, thereby ensuring both that the trial court has an opportunity to correct any errors prior to appeal and that the defendant does not obtain a reversal through his or her own inaction.” *Id.* at ¶ 13. Under Illinois Supreme Court Rule 451(c) (eff. April 8, 2013), “substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require.”

¶ 42 Our review of the record establishes that defense counsel repeatedly objected to the court's modified jury instructions both before and during the trial. During a jury instruction conference, defense counsel reiterated his objection that modification of the pattern jury instructions was not necessary. When the trial court asked defense counsel, “How could the original accurately state the circumstances of this case?”, counsel withdrew his objection. The court, however, specifically stated that it modified the pattern instructions over defendant's objections. Accordingly, the trial court had a “full and fair opportunity to consider and rule upon the issue.” *Denson*, 2014 IL 116231 at ¶ 13. Furthermore, defendant included this claim in his posttrial motion. Based on these facts, we conclude that defendant has not forfeited this issue for review. Determining otherwise would be inconsistent with the purpose of the forfeiture rule.

¶ 43 The primary goal of jury instructions is to provide the jury with correct principles of law so that the jury may apply those principles to the relevant facts and arrive at a correct conclusion

according to the law and the evidence. *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). Illinois courts give preference to applicable pattern instructions over nonpattern instructions (*People v. Buck*, 361 Ill. App. 3d 923, 942 (2005)), and Illinois Supreme Court Rule 451(a) (eff. April 8, 2013) requires trial courts to use applicable pattern instructions in criminal cases unless the court determines that the pattern instruction does not accurately state the law. If a pattern instruction does not accurately state the law, the trial court may modify it. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). Consequently, the decision to provide nonpattern instructions rests within the sound discretion of the trial court. *Id.* A trial court's proper use or abuse of this discretion will depend on whether the nonpattern instruction is an accurate, simple, brief, impartial, and nonargumentative statement of the law. *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). However, we review *de novo* whether the jury instructions accurately explained the law. *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 24.

¶ 44 According to the record, the parties agreed to and the trial gave the following instruction based on IPI Criminal 4th No. 7.15A regarding causation in felony murder cases:

“A person commits the offense of first degree murder when he commits the offense of home invasion, or armed robbery, or residential burglary, 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 offenses of home invasion, or armed robbery, or residential burglary.

It is immaterial whether the killing is intentional or accidental or committed by a confederate without the connivance of the defendant or

committed by a third person trying to prevent the commission of the offense of home invasion, or armed robbery, or residential burglary.”

¶ 45 The trial court, noting that it was doing so over defendant’s objection, gave, in relevant part, this modified version of IPI Criminal 4th No. 7.02:

“To sustain the charge of first degree murder, the State must prove the following propositions:

First: That the defendant, or one for whose conduct he is legally responsible, was committing the offense of home invasion, or armed robbery, or residential burglary; and

Second: That the death of the individual resulted as a direct and foreseeable consequence of a chain of events set into motion by the defendant, or one for whose conduct he is legally responsible, during the commission of the offense of home invasion, or armed robbery, or residential burglary, regardless of whether the killing was intentional or accidental or committed by a third person trying to prevent the commission of home invasion, or armed robbery, or residential burglary.

If you find from your consideration of all the evidence ***.”

This modified version changed the order of the propositions in the pattern instruction² and modified the language of the causation proposition to conform to the definition of causation for felony murder provided in IPI Criminal 4th No. 7.15A.

² IPI Criminal 4th No. 7.02 provides, in relevant part:
“To sustain the charge of first degree murder, the State must prove the following propositions:

¶47 In *People v. Hudson*, 222 Ill. 2d 392 (2006), the court determined that the pattern instruction for first degree murder did not, by itself, accurately state the law when a police officer, not the defendant, performed the acts that caused the victim's death. *Id.* at 399-400. The court approved the modified version of Illinois Pattern Jury Instructions, Criminal, No. 7.01 (4th ed. 2000) used in *Hudson*, which is essentially identical to the modified IPI Criminal 4th No. 7.15A provided to the jury here. *Id.* at 407-08. *Hudson* indicates that the foreseeability qualification in IPI 7.15A is properly used in cases in which a third-party causes a death during the commission of a felony. *Id.* at 400, 408.

¶48 We conclude that the trial court's use of the modified instructions was appropriate because the modifications incorporated the correct legal principles and eliminated possible confusion by ensuring that the jury received consistent instructions on causation. Without these modifications, the jury could have been confused by the reference to accountability in IPI Criminal 4th No. 5.03A "that the deceased was killed by one of the parties committing that unlawful act." That language could have misled the jury to think the evidence must establish that defendant or co-offender Scott personally killed Ms. Reynolds, even though the well-established law provides that defendant was responsible for any reasonably foreseeable deaths proximately resulting from the predicate felony. Also, the unmodified language could have misled the jury to think the evidence must establish that defendant was accountable for the police actions that resulted in the death of Ms. Reynolds, instead of defendant being responsible for setting in

³ IPI Criminal 4th No. 5.03A provides:

"To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, ____.

It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit ____, and that the deceased was killed by one of the parties committing that unlawful act."

motion a chain of events that resulted in her death. Likewise, if the jurors were instructed, based on the first proposition of IPI Criminal 4th No. 7.02, “That the defendant performed the acts which caused the death of [Ms. Reynolds],” the jury might not have understood that “the acts which caused the death” included “a chain of events set into motion by the defendant.” Because the modified instructions accurately explained the law as it applied to the facts of this case in a manner that was simple, brief, impartial and nonargumentative, we conclude that the trial court did not abuse its discretion by giving the jury the modified instructions.

¶ 49 C. Felony Murder Escape Rule Instructions

¶ 50 Defendant argues that the trial court abused its discretion when it gave the jury the following nonpattern instruction regarding escape:

“The period of time and activities in escaping to a place of safety are part of the crime itself.

It is for you to decide whether the defendant, or one for whose conduct he is legally responsible, committed the offense of home invasion, or armed robbery, or residential burglary, and if so whether the defendant had reached a place of safety.”

¶ 51 When the parties discussed this instruction, trial counsel asked the court to modify it by adding the phrase “if only temporary” at the end of the second paragraph. Trial counsel argued that the modification was warranted because the evidence showed there was possibly a period of time that defendant had reached a place of safety, even although temporary, when he initially exited the car as Officer Pittman approached with his gun drawn. The trial court responded that counsel could make that argument to the jury but, based the evidence about the escape path and

timeline, the court would not include the requested phrase in the jury instruction because it was up to the jury to decide whether defendant had somehow escaped prior to the collision with Ms. Reynolds.

¶ 52 On appeal, defendant contends that there was some evidence to support a finding that he had reached a place of temporary safety when he initially exited the car and Officer Pittman drew his gun and approached defendant. According to defendant, his predicate felony offenses were complete at that point, thus relieving him of criminal liability for the death of Ms. Reynolds during the high-speed chase. Consequently, defendant argues that the trial court abused its discretion by refusing to modify the felony murder escape rule instruction to add the phrase “if only temporary” at the end of the instruction.

¶ 53 A defendant is entitled to an instruction on his theory of the case if there is some foundation in the evidence for that instruction. *Jones*, 175 Ill. 2d at 131-32. However, as discussed above, the decision to provide nonpattern instructions rests within the sound discretion of the trial court. *Bannister*, 232 Ill. 2d at 81; *Pollock*, 202 Ill. 2d at 211. Any error in a jury instruction is harmless if the result of the trial would not have been different if the trial court had properly instructed the jury. *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003).

¶ 54 A burglary is complete upon entering with the requisite intent, irrespective of whether the intended felony or theft is accomplished. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). But a defendant may properly be held responsible for a death that occurs during an escape following the commission of a forcible felony. *Klebanowski*, 221 Ill. 2d at 549; see also *Hickman*, 59 Ill. 2d at 94 (“the period of time and activities involved in escaping to a place of safety are part of the crime itself”).

¶ 55 In *People v. Bongiorno*, 358 Ill. 171, 172 (1934), two offenders committed an armed robbery at an office suite. An officer entered the room and arrested the defendant but his co-offender fled through a window. When the arresting officer led the defendant down a hallway, the co-offender came up behind the officer and fired gunshots that killed the officer. The court rejected the defendant's claim that he was not liable for felony murder because the robbery was completed and he was already arrested and in the custody of the officer at the time of the shooting. *Id.* at 173-74. The court stated that "the crime of robbery is not complete at the time of the murder, inasmuch as the conspirators had not then won their way, even momentarily, to a place of temporary safety, and the possession of the plunder was nothing more than a scrambling possession." *Id.* The court stated that defendant used persuasion and false representations to escape the scene because he saw his co-offender come up behind the arresting officer with a gun and gave no warning of the co-offender's approach. *Id.* at 174. When the officer was shot and fell, defendant ran and attempted to hide and conceal himself until he was arrested by other police officers. *Id.*

¶ 56 Applying the relevant law, including the reasoning of *Bongiorno*, to the instant case, we conclude that the trial court did not err by giving the challenged escape rule instruction to the jury and declining defendant's request for modification. The instruction accurately conveyed the law as it applied to the facts of this case and the court properly exercised its discretion in giving it. According to Officer Pittman, defendant drove the car away from the scene of the residential burglary and stopped when his car hit the curb. As Officer Pittman approached with his gun drawn, defendant exited the car and lay on the ground while his co-offenders also exited the car. However, when the co-offenders fled in opposite directions, defendant got back into his car and

continued his flight. According to defendant's testimony, John drove the get-away car and crashed it. When Officer Pittman approached and drew his gun, defendant exited the get-away car with his hands up but his co-offenders fled the scene. Defendant then got into the driver's seat of the get-away car and fled.

¶ 57 Clearly, Ms. Reynolds' death occurred during defendant's continued attempt to escape following the commission of the residential burglary. Defendant's crime of residential burglary was not complete when the police vehicle collided with Ms. Reynolds' car because defendant had not won his way, even momentarily, to a place of temporary safety. Prior to the fatal collision, defendant falsely indicated to Officer Pittman an intent to surrender and immediately utilized the distraction created by his co-offenders' flight to resume his position in the driver's seat of his car and continue his escape from the residential burglary offense. After Ms. Reynolds' car was struck in the fatal collision with the police, defendant attempted to hide and conceal himself, crouching beside a building about three blocks from the collision until he was arrested by the police.

¶ 58 Defendant's reliance on *People v. Moore*, 375 Ill. App 3d 234 (2007), to support his claim of error is misplaced. In *Moore*, the police found the defendant in a stolen car the day after the defendant stole it, which led to a high-speed chase and another driver's death. *Id.* at 236-38. On appeal, the court determined that the defendant could not be convicted of felony murder because he had reached a place of temporary safety before the police chase in which the victim was killed where the defendant had enjoyed the use of the stolen vehicle for almost 24 hours without any police pursuit. *Id.* at 240. In contrast to *Moore*, defendant was never free from police pursuit before being captured.

¶ 59

D. Prison Sentence

¶ 60 Defendant argues that his 28-year prison term for felony murder was an abuse of discretion and should be reduced to the statutory minimum of 20 years based on the spirit and purpose of the law, the nature of the offenses given the facts of this case, and defendant's personal history, which shows that he poses no danger to society and has tremendous rehabilitative potential.

¶ 61 Specifically, defendant states that he was a 20-year-old college student, his criminal history consisted of a single misdemeanor conviction of reckless conduct for riding on the hood of a car swerving down the road, and he had no intent to kill Ms. Reynolds, who died because the police officers collided with her vehicle. He also argues that the predicate offense of residential burglary involved minimal harm and his presentence investigation report showed that he had no history of gang involvement or substance abuse. He contends that his acquittal by the jury of the home invasion and armed robbery charges indicates that the jury did not believe that he had a gun or used force or the threat of force when he committed the residential burglary. Also, the jury's questions during its deliberations indicate that the jury was resistant to finding him guilty of felony murder. He adds that his mitigation evidence included the testimony of a witness who said that she was the murder victim's best friend and asked the court to show defendant mercy.

¶ 62 Defendant acknowledges that he failed to preserve this issue for review but asks this court to apply the plain error analysis because the evidence at his sentencing hearing was closely balanced.

¶ 63 In general, a defendant preserves an issue for review by timely objecting to it and including it in a posttrial motion. *Denson*, 2014 IL 116231, ¶ 11. However, forfeited claims of

error are reviewable under the plain error rule, which is a narrow and limited exception to forfeiture. *People v. Hiller*, 237 Ill. 2d 539, 545 (2010). To obtain relief under this rule, defendant must show that a clear or obvious error occurred. *Id.* In the sentencing context, the defendant bears the burden of persuading the court that either (1) the evidence at the sentencing hearing was so closely balanced (regardless of the seriousness of the error) as to severely threaten to tip the scales of justice against the defendant, or (2) the error was so serious (regardless of the closeness of the evidence) as to deny the defendant a fair sentencing hearing and challenge the integrity of the judicial process. *Id.* In order to determine whether the plain error doctrine should be applied, we must first determine whether any error occurred. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 64 The sentencing court has broad powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. *Id.* An abuse of discretion occurs in the sentencing context when the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). The sentencing court "is presumed to know the law and apply it properly, and its decision regarding sentencing will be presumed to be proper absent an affirmative showing of error." *People v. Smith*, 176 Ill. 2d 217, 260 (1997). The reviewing court considers the record as a whole to determine whether a sentence was improper. *People v. Ward*, 113 Ill. 2d 516, 526 (1986).

¶ 65 Defendant concedes that his 28-year prison sentence is within the statutory range of 20 to 60 years for the offense of first degree murder. See 730 ILCS 5/5-4.5-20(a) (West 2012). Furthermore, the trial court's detailed findings demonstrate that it thoughtfully considered all the

evidence and the factors in aggravation and mitigation, which include a defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, education, and the nature and circumstances of the crime and the defendant's conduct in its commission. See *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94.

¶ 66 According to the record, the evidence in aggravation included a certified copy of defendant's misdemeanor conviction for assault at Lincoln University in Missouri; a detective's testimony that he investigated a robbery and learned that defendant was involved in the offense while his co-offender pointed a BB gun at the victim; the testimony of jail correctional officers that on two occasions in 2014 defendant ignored their orders to return to his cell; the testimony of a jail correctional officer that he was conducting lock checks in 2014 and defendant demanded to be let out, swore and threatened to harm the officer, and thereby prompted other inmates housed along the same wall to make threats; and the testimony of a jail correctional officer that in 2014 defendant tried to escape from a van while being transported to another facility.

¶ 67 We do not reweigh the evidence or substitute our judgment for that of the sentencing court. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010); *People v. Streit*, 142 Ill. 2d 13, 19 (1991). We find no error in the trial court's exercise of discretion in fashioning defendant's sentence within the statutory range based on properly considered aggravating and mitigating factors.

¶ 68 E. Due Process and the Proximate Cause Theory of Felony Murder

¶ 69 Defendant argues that Illinois' felony murder statute violates due process as applied to him because the felony murder prosecution in this case was not rationally related to the statute's purpose of furthering public safety. Although the proximate cause theory of liability for felony

murder has been challenged unsuccessfully several times in Illinois, defendant believes that the circumstances of his case warrant a reexamination of the constitutionality of Illinois' application of the felony murder rule. Defendant argues that Illinois' proximate cause theory violates his right to due process because it is at odds with the fundamental notion of our criminal justice system that an injury can only amount to a crime when inflicted by intent. According to defendant, Illinois' proximate cause theory eliminates any requirement that a criminal defendant have or the State prove a *mens rea* for the homicide. Defendant asserts that the majority of jurisdictions apply an agency theory of liability for felony murder and argues that Illinois should join those jurisdictions and stop adhering to a proximate cause theory of liability for felony murder. Moreover, even though strict liability crimes are not *per se* unconstitutional, such crimes are disfavored and the United States Supreme Court has required, consistent with the rule of lenity, a *mens rea* in cases where a statute does not include a mental state. See *U.S. v. U.S. Gypsum Co.* 438 U.S. 422, 437-38 (1978).

¶ 70 Initially, we note that defendant's claim does not amount to an as-applied challenge because it seeks to invalidate the statute's intent element, which is more akin to a facial challenge. *Cf. People v. Brady*, 369 Ill. App. 3d 836, 847-48 (2007) (stating that an as-applied challenge requires the defendant to show that the statute, as-applied in the particular context in which he has acted, is unconstitutional). In any event, defendant has failed to show that our felony murder statute is unconstitutional.

¶ 71 It is well-settled that a defendant may be found guilty of felony murder regardless of a lack of intent to commit murder. *Jones*, 376 Ill. App. 3d at 387. "Felony murder derives its mental state from the underlying intended offense." *Id.* Ultimately, felony murder seeks to deter

individuals from committing foreseeable felonies by holding them responsible for murder if a death results. *Id.* “Causal relation is the universal factor common to all legal liability.” *Lowery*, 178 Ill. 2d at 466-67. Because the analogies between civil and criminal cases in which individuals are injured or killed are so close, we apply the principle of proximate cause to both classes of cases. *Id.* While other jurisdictions have determined that a felon is not responsible for the lethal acts of a non-felon, our statutory and case law dictate a different result. See *Hickman*, 59 Ill. 2d at 95.

¶ 72 The purpose behind our felony murder statute is to limit the violence accompanying forcible felonies by automatically subjecting felons to a murder prosecution when someone is killed during the commission of a forcible felony. *People v. Belk*, 203 Ill. 2d 187, 192, (2003). It is equally consistent with reason and sound public policy to hold that when a felon commits a forcible felony that sets into motion a chain of events, which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death, which by direct and almost inevitable sequence, occurs as a result of the underlying felony. *Hudson*, 222 Ill. 2d at 402 (citing *Lowery*, 178 Ill. 2d at 467).

¶ 73 In this case, the proximate cause theory serves that purpose because defendant committed a forcible felony and Ms. Reynolds was killed as a result of his reckless attempt to flee the scene of that felony, which involved the presence of firearms. Stated differently, had defendant and his co-offenders not committed that burglary, Ms. Reynolds would not have died in a collision with the police vehicle that was pursuing the offenders as they attempted to flee the scene of the crime. Thus, we decline to abandon the proximate cause theory.

¶ 74 To the extent that defendant argues he is not liable because Ms. Reynolds’ death is directly attributable to the police engaging in a high-speed chase, his argument improperly rests

on an agency theory of liability for felony murder that our supreme court has not adopted. See *Lowery*, 178 Ill. 2d at 465, 471 (stating that the purpose of the felony murder statute would be defeated if resistance, even in the form of deadly force, could be considered a sufficient intervening circumstance to terminate a defendant's liability for felony murder). Our supreme court has unequivocally held that Illinois adheres to the proximate cause theory of liability. *Id.* at 465; *Hudson*, 222 Ill. 2d at 401. We therefore decline to abandon the proximate cause theory of liability for felony murder, as defendant has suggested. See *Lowery*, 178 Ill. 2d at 467-68.

¶ 75

III. CONCLUSION

¶ 76 For the foregoing reasons, we affirm defendant's conviction.

¶ 77 Affirmed.