2018 IL App (1st) 152031-U

No. 1-15-2031

Order filed on October 9, 2018.

Modified upon denial of rehearing on November 13, 2018.

Second Division

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. 12 CR 9682 (01)
	)	
JOHN GIVENS,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree felony murder is affirmed over his contention that his co-offender's death was not a foreseeable consequence of his burglary offense. Defendant's conviction for aggravated battery under an accountability theory is also affirmed where sufficient evidence showed that co-defendant knowingly caused bodily harm to Officer Papin. Furthermore, the trial court did not abuse its discretion in excluding evidence of the Chicago Police Department's general order regarding the use of force against a vehicle, and did not err in denying defendant's motion to dismiss the felony murder indictment. Finally, defendant's forfeited claims do not constitute plain error.

¶ 2 Following a jury trial, defendant John Givens was found guilty of first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2012)), aggravated battery to a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2012)), burglary (720 ILCS 5/19-1(a) (West 2012)), and possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2012)). Defendant was sentenced to three consecutive prison terms, which included 20 years for felony murder, 6 years for aggravated battery and 6 years for possession of a stolen motor vehicle.

¶ 3 On direct appeal, defendant argues (1) he was not proved guilty beyond a reasonable doubt of felony murder where his co-offender's death was an unforeseeable consequence of the burglary; (2) he was not proved guilty beyond a reasonable doubt of aggravated battery under an accountability theory because the evidence was insufficient to show that co-defendant, as the principal, knowingly caused bodily harm to Officer Papin; (3) the trial court abused its discretion in excluding evidence of the Chicago Police Department's (CPD) general order regarding the use of force against a vehicle; (4) the court erred in denying his motion to dismiss the felony murder indictment where the State committed prosecutorial misconduct; (5) the trial court violated Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)), during *voir dire*; (6) the court improperly instructed the jury on accountability and felony murder combined, as well as on causation in felony murder; and (7) the State misstated the law during closing argument. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant's convictions arose out of a burglary commission, after one of defendant's co-offenders, David Strong, was killed during their attempt to escape from the police. Co-defendant, Leland Dudley, was also convicted of first degree felony murder, aggravated battery to a peace officer and possession of a stolen motor vehicle based on the same burglary commission, which

was affirmed by this court (*People v. Dudley*, 2018 IL App (1st) 152039). Defendant and co-defendant were tried jointly by a jury.

¶ 6 Briefly stated, the evidence at trial generally showed that in the early morning hours on April 30, 2012, defendant, co-defendant and Strong burglarized Mike's Electronics. The store, owned by Miguel Gutierrez, sold car stereo equipment and was located at 2459 South Western Avenue. At the time of the burglary, the store consisted of a small showroom on the first floor, an attached garage where the merchandise could be installed into vehicles, and an apartment on the second floor, which was occupied by Sergio Hernandez. Defendant and his co-offenders apparently entered the store through an air conditioning vent.

¶ 7 At trial, Hernandez testified that on April 30, 2012, he was asleep in his apartment when he was awoken by some "thumping" noises and voices coming from the store below. Hernandez called the police, who arrived at the scene "less than a minute" later. As Hernandez went downstairs to open the door for the police, he noticed that one of the store's windows that opened into the garage was broken. When Hernandez looked through that window into the garage, he saw three men getting into Gutierrez's minivan.

¶ 8 Hernandez testified that the police tried to kick down the store's interior door that led to the garage, as it had been barricaded shut with a two-by-four. He further testified that the police continuously announced their presence as they tried to open that door. Hernandez then looked through the broken window and saw the three men reverse Gutierrez's van and break through the closed garage door. Hernandez also testified that several police officers, who were outside the garage door, began shooting at the van after it hit an officer. When the van broke through the garage door, it crashed into Hernandez's truck parked in the driveway outside and pushed the truck into a squad car before ultimately coming to a stop.

¶ 9 Officer Mendez testified that he approached the van after it stopped and observed that the gearshift was still in drive. Officer Curry testified that, after observing all three occupants had been shot, he called two ambulances to the scene. Defendant, who was sitting in the rear passenger's seat, had been shot six times, in the arms, legs, chest and neck. Co-defendant, who was sitting in the driver's seat, had been shot in the head, shoulders and back. Strong, who was sitting in the front passenger's seat, had been shot in the head, chest, arms and legs.

¶ 10 Gutierrez testified that on the date of the incident, 11 security cameras were installed and functioning properly throughout the building, including the interior and exterior of both the store and the garage. The video surveillance footage, which was admitted at trial and shown to the jury, generally reflected the above-stated events. Specifically, it showed that around 2:40 a.m., defendant, co-defendant and Strong took merchandise from the store's showroom and put it inside Gutierrez's minivan in the garage. The video footage also showed that while the men were taking the merchandise, lights were flashed inside the showroom from outside the store, apparently by the police. Subsequently, two of the men ran from the showroom to the garage, while the third man ducked behind a display inside the showroom, crouched down and then ran out of the room. Ultimately, defendant, co-defendant and Strong were inside the garage, attempting to open the garage door.

¶ 11 Surveillance further showed that a police officer approached the garage door from the outside and attempted to open it. Lights flashed inside the garage and, immediately thereafter, one of the men hid. Officer Lopez testified that, after unsuccessfully trying to open the interior door to the garage, he and Officer Gonzalez kicked a small hole through that door, while continuously yelling, "Chicago police officers, come out, you're surrounded, just come out." Officer Pratscher testified that, as he attempted to open the garage door from the outside, he

heard movement inside the garage, and subsequently began yelling, "Police, come out now, there is [nowhere] for you to go." After receiving no response, Officer Pratscher went to the store's front entrance and shone his flashlight inside the showroom. The video footage also showed Officers Curry and Papin walking towards the garage door from the outside at about 2:45 a.m. Seconds later, the van broke through the garage door and defendant, co-defendant and Strong were met by the police waiting outside.

¶ 12 Officer Papin testified that he was standing directly in front of the garage door when the van crashed through it, but he had no time to move out of the way. The rear driver's side of the van struck his left hip. Additionally, Officers Lopez, Pratscher, Curry and Mendez all testified that the van's driver made an "up and down" motion with his right arm, "motioning up by where the gearshift area was," and that the van lurched forward towards the other officers. Officer Lopez added that the van was moving at a high rate of speed. Officer Lopez, believing, albeit incorrectly, that he saw an officer "roll underneath the wheels of [the van]," shot at the van's driver six times to prevent the van from moving forward. Officer Pratscher similarly testified that he was standing to the right of the garage door when the van crashed through and hit Officer Papin. Believing that Officer Papin was trapped under the van, Officer Pratscher shot at the van's driver 11 times to stop the van from moving. Officer Curry testified that he also saw the van strike Officer Papin and shot at it to stop it from moving. According to Officer Mendez, he attempted to fire his weapon to stop the van, but his weapon malfunctioned. Sergeant Benigno testified that when he arrived at the scene at about 3:30 a.m., he examined the van and observed that it was still in drive. At that time, Strong was pronounced dead.

¶ 13 It was stipulated that Strong's autopsy revealed he had been shot nine times, and the cause of death was multiple gunshot wounds, in the manner of homicide. The defense rested

without presenting any evidence and the jury found defendant guilty of first degree felony murder predicated on his burglary offense, aggravated battery to a peace officer based on an accountability theory for co-defendant's actions, burglary and possession of a stolen motor vehicle. The trial court denied defendant's motion for a new trial, as well as defendant and co-defendant's joint motion for directed finding. At defendant's sentencing hearing, the court merged defendant's burglary conviction into his felony murder conviction, and sentenced him to 20 years in prison for felony murder, 6 years for aggravated battery and 6 years for possession of a stolen motor vehicle. Defendant now appeals.

¶ 14 II. ANALYSIS

¶ 15 A. First Degree Felony Murder

¶ 16 In this direct appeal, defendant contests only his convictions for first degree felony murder and aggravated battery.

¶ 17 As an initial matter, we note that defendant's brief violates Illinois Supreme Court Rule 341(a) (eff. Nov. 1, 2017), insofar as the text appears to have one-and-one-half-inch spacing, rather than the required double-spacing. Although apparently a minor deficiency, this error carries much more weight when we consider that defendant filed a motion to submit a brief in excess of the required 50-page limit when preparing his appeal. See Ill. S. Ct. R. 341(b) (eff. Nov. 1, 2017). When his motion was denied, he filed a motion to reconsider, which was also denied. Instead of honoring this court's rulings, and our Supreme Court rules, defense counsel then utilized the one-and-one-half spacing as an end run around our authority and the requirements. That is, had defense counsel submitted a proper, double-spaced brief, that brief undoubtedly would have violated the above-stated page limit.

¶ 18 Adherence to the proper format of briefs is not an inconsequential matter. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 15 (1995). We reemphasize that Supreme Court rules are neither suggestive nor optional, and where a party's brief lacks compliance with the high court's rules, that party risks this court's discretionary power to strike the brief and dismiss the appeal. *Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 18. Although we cannot condone counsel's practice and caution counsel to refrain from such non-compliance going forward, we find this deficiency insufficient to strike appellant's brief and thus proceed in considering the merits of defendant's appeal. See *id.*

¶ 19 In challenging his convictions, defendant first argues he was not proven guilty beyond a reasonable doubt of felony murder. Specifically, he argues the evidence was insufficient to establish that Strong's death was a foreseeable consequence of his burglary offense because it was directly attributable to the police shooting. When reviewing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. *People v. Mefford*, 2015 IL App (4th) 130471, ¶ 45. In doing so, we allow all reasonable inferences in favor of the State. *Id*. Furthermore, a conviction will not be set aside unless the proof is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Id.*; *People v. Martinez*, 342 Ill. App. 3d 849, 855-56 (2003).

¶ 20 First degree felony murder is defined under section 9-1(a)(3) of the Illinois Code of Criminal Procedure (Code) (720 ILCS 5/9-1(a)(3) (West 2012)), which provides that "[a] person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death *** he is attempting or committing a forcible felony other than

second degree murder." Section 2-8 of the Code (720 ILCS 5/2-8 (West 2012)), defines burglary as a forcible felony for purposes of liability under the felony murder statute.

¶ 21 At issue in this appeal is whether the felony murder statute applies where someone resisting the underlying felony, namely the police, as opposed to the defendant, fired the fatal shots which killed the victim. Based on the plain language of the statute, however, we fail to see how the legislature intended that the statute apply only to those deaths which are directly caused by a defendant or those acting in concert with him.

¶ 22 In determining whether the felony murder statute applies to a death which is committed by someone resisting the felony, Illinois adheres to the proximate cause theory of liability. *People v. Hudson*, 222 Ill. 2d 392, 401 (2006); *People v. Lowery*, 178 Ill. 2d 462, 465 (1997). Under this theory, liability attaches for *any* death proximately resulting from a defendant's unlawful activity, notwithstanding the fact that the killing was committed by someone resisting the crime, and not the defendant. *Lowery*, 178 Ill. 2d at 465. Simply put, a defendant is liable for felony murder if the decedent's death is a direct and foreseeable consequence of the defendant's underlying felony. See *id*. at 470 (citing *People v. Payne*, 359 Ill. 246, 255 (1935). Furthermore, a defendant will not be relieved of liability for the death of a co-felon, which is directly attributable to a third-party who is resisting the felony. *Hudson*, 222 Ill. 2d at 402.

¶ 23 It is well-settled that encountering resistance during the commission of a forcible felony, even in the form of deadly force, is a direct and foreseeable consequence of that felony. See *People v. Hickman*, 59 Ill. 2d 89, 94 (1974) ("Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape."). It is unimportant that the defendant did not anticipate the precise sequence of events following his initial unlawful act, to be liable for the consequences thereof. *Id*. Moreover, this court has

continuously held that the period of time and activities involved in a defendant's escape to a place of safety are party of the crime itself. See *id*. (citing *People v. Golston*, 32 Ill. 2d 398, 408-09 (1965) (stating that a plan to commit robbery would be futile if it did not contemplate an escape with the proceeds of the crime)).

¶ 24 Defendant offers several arguments in an attempt to avoid the proximate cause theory of liability under our felony murder statute. First, defendant argues that the proximate cause theory violates his right to due process because he never intended to kill Strong, as his death was directly attributable to the police shooting. Alternatively, defendant argues that we should abandon the proximate cause theory, and adopt the majority-followed agency theory of liability for felony murder. We decline to do so.

¶ 25 Initially, we note that defendant's claims do not amount to as-applied challenges because they seek to invalidate the statute's intent element which is more akin to a facial challenge.[1] *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 or that his sentence imposed under the statute is unconstitutional. See *People v. Jenkins*, 190 Ill. App. 3d 115, 144 (1989) ("A statutory minimum sentence for murder has been held constitutional.").

¶ 26 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

[1]To the extent defendant argues that pursuant to Rule 352 (Ill. S. Ct. R. 352(a) (eff. July 1, 2018), "this Court's order refusing to grant oral argument in this case based on the lack of a substantial question was in error," his proximate cause theory challenges certainly do not present novel issues that "have not been addressed by an Illinois court." See *Hudson*, 222 Ill. 2d at 392; *Lowery*, 178 Ill. 2d at 462; *People v. Jones*, 376 Ill. App. 3d 372, 387 (2007). As no substantial question has been presented, we find no error. Ill. S. Ct. R. 352(a) (eff. July 1, 2018).

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. That said, 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 nonfelon, however, our statutory and case law dictate a different, and we believe preferable, result. See *Hickman*, 59 Ill. 2d at 95.

¶ 27 The purpose behind our felony murder statute is to limit the violence accompanying forcible felonies, by automatically subjecting felons to a murder prosecution charge 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).

¶ 28 In this case, the proximate cause theory serves that purpose because defendant committed a forcible felony and Strong was killed as a result of the violence accompanying that felony. Stated differently, had defendant, co-defendant and Strong not committed that burglary, Strong would not have been shot and killed. Thus, we decline to abandon the proximate cause theory.

¶ 29 Furthermore, we categorically reject defendant's contention that Strong's death was not a foreseeable consequence of his burglary commission because he was unaware that the police were outside the store and, given that defendant and his co-offenders were unarmed, it was not

reasonably foreseeable that the police would use deadly force in shooting at the van. See *Martinez*, 342 Ill. App. 3d at 856 (affirming the defendant's felony murder conviction where his co-offender was killed by a victim resisting residential burglary, such resistance was an entirely foreseeable consequence of the burglary); *Hickman*, 59 Ill. 2d at 89, 94-95 (affirming the defendant's felony murder conviction where a police officer was killed by another officer resisting the escape of the fleeing burglars, such resistance was a direct and foreseeable consequence of the burglary); *Payne*, 359 Ill. at 246 (affirming the defendant's felony murder conviction, where it was foreseeable that the victim could be shot and killed while attempting to prevent the robbery, regardless of who fired the fatal shot).

¶ 30 First, Hernandez testified that the police continuously announced their presence after they arrived. Officer Pratscher testified that as he attempted to open the garage door, he heard movement inside the garage, and began yelling, "Police, come out now, there is [nowhere] for you to go." More notably, the video footage showed that when lights flashed inside the showroom, one of the offenders immediately ducked behind a display before running to the garage. Similarly, the footage showed that at least one offender hid when lights flashed inside the garage. Finally, before the van crashed through the garage door, Officers Lopez and Gonzalez broke a hole through the interior door to the garage and continuously yelled, "Chicago police officers, come out, you're surrounded, just come out." Thus, defendant had reason to know that once the van crashed through the garage door, a police officer would be in the vehicle's path. Moreover, defendant's argument that it was not foreseeable because he was unarmed disregards that the van itself was a deadly weapon. See *People v. Schmidt*, 392 Ill. App. 3d 689, 704 (2009) (citing *Belk*, 203 Ill. 2d at 196). Accordingly, the evidence was sufficient to sustain defendant's felony murder conviction.

¶ 31 B. CPD General Order

¶ 32 Next, defendant contends that the trial court erred in excluding the CPD general order during cross-examination of the police officers because it was relevant to show that Strong's death was an unforeseeable consequence of the burglary. That order generally provides that, when confronted by an oncoming vehicle, officers are authorized to fire at it to prevent death or great bodily harm to themselves or others, but if it is known that the vehicle is the only force being used, officers should move out of the vehicle's path. We find no abuse of discretion. *People v. Hill*, 2014 IL App (2d) 120506, ¶¶ 45, 47; see *People v. Hiller*, 92 Ill. App. 3d 322, 326 (1980) (stating that evidentiary rulings, as well as the scope of cross-examination, are within the sound discretion of the trial judge whose determinations will not be disturbed on appeal absent a clear abuse of discretion).

¶ 33 It is well-settled that proffered evidence is admissible if it tends to prove or disprove the offense charged, and that evidence is only relevant if it tends to make the question of guilt more or less probable. *Hill*, 2014 IL App (2d) 120506, ¶ 50. Defendant argues that the order is relevant because it shows it was unforeseeable that the police would shoot in violation of that order and that someone would be killed. His argument, however, misconstrues the law under our proximate cause theory for felony murder. *Cf. People v. Sago*, 2016 IL App (2d) 131345, ¶ 12 (allowing an instruction on the use of force, despite the defendant's claim that it impermissibly shifted the jury's determination of whether his co-offender's *death* was a foreseeable consequence of the robbery, to instead, whether the *officer's* actions were foreseeable).

¶ 34 The issue here is whether Strong's *death* was a foreseeable consequence of defendant's burglary, not whether the police *shooting* was foreseeable. More importantly, defendant has never claimed that he was even aware of the CPD order at the time he committed the burglary, or

that it could have impacted what was foreseeable to him. Consequently, we reject defendant's claim that, because it was unforeseeable that the police would violate the CPD order by shooting at the van, the shooting was a direct and intervening cause of Strong's death which relieves him of liability.[2] See *Lowery*, 178 Ill. 2d at 471 (stating that to relieve a defendant of liability, the intervening cause must be entirely unrelated to the defendant's underlying criminal acts).

¶ 35 Finally, the CPD order is also not relevant to show a bias or motive simply because, according to defendant, "the officers had every reason to testify in a manner that would favorably impact" an alleged Independent Police Review Authority investigation. *Cf. People v. Chavez*, 338 Ill. App. 3d 835, 842 (2003) (finding that the officer's purported statement to the defendant that "[he] was not going to see a dime from [his] lawsuit" was relevant to show bias or motive). Proffered evidence purporting to reveal bias or motive, which is based on pure speculation, is inadmissible. See *People v. Cameron*, 189 Ill. App. 3d 998, 1002-03 (1989); see also *Hiller*, 92 Ill. App. 3d at 327. The trial court did not abuse its discretion in excluding the CPD order which had little probative value due to its remoteness or uncertainty. See *Hill*, 2014 IL App (2d) 120506, ¶ 50.

¶ 36 C. Motion to Dismiss

¶ 37 We also reject defendant's contention that the trial court erred in denying his motion to dismiss the felony murder counts of the indictment because the prosecutor prevented the grand jury from hearing certain testimony regarding CPD policy on the use of force and police misconduct. As the essential facts regarding the grand jury proceedings are undisputed, we

[2]For the same reasons stated above, we reject defendant's claim in his motion to supplement the record on appeal, that "[t]he officers' IPRA statements and the OEMC recording provide further documentation of whether or not the responding officers complied with their own policies and show that, had the trial court allowed Givens to present his defense to the jury, he would have had ample evidence to support that defense."

review *de novo* whether defendant suffered a prejudicial denial of due process warranting dismissal. See *People v. Mattis*, 367 Ill. App. 3d 432, 435-36 (2006).

¶ 38 To warrant dismissal of an indictment based on prosecutorial misconduct, a defendant must show that the prosecutor deliberately or intentionally misled the grand jury, knowingly used perjured or false testimony, or presented other deceptive or inaccurate evidence, such that the jury was prevented from returning a meaningful indictment. *People v. DiVincenzo*, 183 Ill. 2d 239, 257-58 (1998). Defendant does not argue, however, that the prosecutor misled the grand jury or presented false evidence. Instead, he asserts that the prosecutor deliberatively prevented evidence from being presented to the jury. Defendant has not cited any case supporting his proposition that the exclusion of evidence can warrant dismissal of an indictment. Instead, he has cited several cases containing general propositions of law governing grand jury proceedings. *Cf. People v. Barton*, 190 Ill App. 3d 701, 707-09 (1989) (affirming the dismissal of the defendant's indictment, while noting that dismissal would not have been justified had the *special prosecutor* not misled the grand jury). We find no prosecutorial misconduct.

¶ 39 Here, defendant argues that the prosecutor prevented the jury from hearing evidence of the CPD policy on the use of force against vehicles when the prosecutor interrupted the grand juror's question to Detective Benigno. The prosecutor stated, "I don't feel like my detective should have to answer a question that I don't feel comfortable with or understand." Even if the prosecutor's remark would have been better left unsaid, we nonetheless conclude that it does not rise to the level of unethical or deliberate prosecutorial misconduct. *People v. Cora*, 238 Ill. App. 3d 492, 503-04 (1992).

¶ 40 Even assuming, *arguendo*, that some prosecutorial misconduct occurred, it did not prejudice defendant because there was some evidence presented, independent of any alleged

impropriety, connecting defendant to Strong's death. See *People v. J.H.*, 136 Ill. 2d 1, 17 (1990) (stating that there need only be some evidence connecting a defendant to the charged offense to support a grand jury indictment). Here, the grand jury was presented with undisputed evidence that defendant, co-defendant and Strong committed burglary and that Strong was shot and killed during their escape. Accordingly, we find no error.

¶ 41 D. Aggravated Battery

¶ 42 Next, defendant argues that his aggravated battery conviction under an accountability theory should be reversed because the State failed to prove that co-defendant, as the principal, knowingly caused bodily harm to Officer Paper. We note that defendant does not dispute his involvement with his co-offenders.

¶ 43 When reviewing a challenge to the sufficiency of the evidence, once the jury has determined that proof has been made, we will not overturn that decision and set aside a conviction unless, after examining the evidence in its light most favorable to the State, we conclude that no reasonable trier of fact could have found that proof had been made. *Cameron*, 189 Ill. App. 3d at 1007. Furthermore, a valid conviction may be sustained entirely upon circumstantial evidence, and the trier of fact's conclusion that a defendant is legally accountable will not be set aside unless the evidence is so improbable or unsatisfactory that a reasonable doubt as to the defendant's guilt exists. See *People v. Kimball*, 243 Ill. App. 3d 1096, 1100 (1993) (stating that evidence of a defendant's voluntary attachment to a group bent on illegal acts which are dangerous in nature, makes him criminally liable for any wrongdoings committed by the group in furtherance of their common purpose or which occur as a natural or probable consequence thereof).

¶ 44 A person commits aggravated battery when, in committing a battery, other than by the discharge of a firearm, he knows the individual battered to be a peace officer. 720 ILCS 5/12-3.05(d)(4) (West 2012). A person acts knowingly or with knowledge of (1) the "nature or attendant circumstances of his *** conduct, described by the statute defining the offense, when he *** is consciously aware that his *** conduct is of that nature or that those circumstances exist" or (2) the "result of his *** conduct, described by the statue defining the offense, when he *** is consciously aware that the result is practically certain to be caused by his conduct." 720 ILCS 5/4-5 (West 2012). Additionally, knowledge of a material fact includes awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5(a) (West 2012). It should also be noted while proving a defendant's state of mind is difficult, an inference arises that a person intends the natural and probable consequences of his actions. See *Cameron*, 189 Ill. App. 3d at 1007.

¶ 45 In his brief, defendant states that "[a]lthough the [surveillance] video indicates that one of the men was aware that the police were outside the storefront, there is no indication that the men were aware of the *extent* of the police presence outside of the garage." (Emphasis added.) Thus, defendant apparently concedes that they were aware of some police presence outside the store and garage. Aside from that concession, the surveillance videos also showed that a police officer, apparently Officer Pratscher, attempted to open the garage door from outside and that defendant, co-defendant and/or Strong hid after lights flashed inside the garage. More importantly, Officer Pratscher yelled that defendant and his co-offenders were surrounded by the police, rebutting defendant's suggestion that co-defendant was unaware of the extent of the police presence. Furthermore, Officers Lopez and Gonzalez broke a hole through the interior door to the garage, while continuously announcing that defendant and his co-offenders were surrounded by the

police. Given the foregoing, the evidence supports the jury's determination that co-defendant was aware it was practically certain he would hit a police officer in driving through the garage door.

¶ 46 To the extent defendant argues that co-defendant acted recklessly, we reject his reliance on *Schmidt*, where the court reversed four of the defendant's aggravated battery convictions after finding that the defendant's conduct was reckless, rather than knowing. 392 Ill. App. 3d 689, 707 (2009). Specifically, *Schmidt* found that the defendant's conduct with respect to those convictions was reckless because he was intoxicated, was driving too fast, and attempted to slow down in effort to avoid hitting the family in the crosswalk. *Id*. at 706-07. Absent from defendant's argument, however, is any acknowledgement that *Schmidt* also affirmed the defendant's aggravated battery conviction for hitting a police officer with the side mirror on the stolen SUV he was driving. *Id*. at 705. The evidence established that the defendant was aware of the officer's location next to the vehicle and it was practically certain he would hit the officer. *Id*. Similar to the conviction affirmed in *Schmidt*, here, the evidence showed co-defendant acted knowingly where he was told he was surrounded by the police and it was practically certain he would hit an officer in driving through the garage door. Accordingly, we affirm defendant's aggravated battery conviction.

¶ 47 D. Forfeited Contentions

¶ 48 Defendant offers several forfeited contentions on appeal, which we will address in turn. As an initial matter, however, it should be noted that a fair trial is different from a perfect trial, and that the doctrine of plain error does not instruct reviewing courts to consider all forfeited errors. See *People v. Herron*, 215 Ill. 2d 167, 177 (2005) (stating that the doctrine of plain error is not a general savings clause preserving for review all errors affecting substantial rights

whether or not they have been brought to the attention of the trial court, but rather, is a narrow and limited exception to the general forfeiture rule).

¶ 49 Defendant asserts that the trial court violated Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)), in questioning the venire. We review this issue *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 50 At the time of defendant's trial, Rule 431(b) provided that during *voir dire* examination, the trial court must ask each potential juror, individually or as a group, whether that juror understands and accepts each of the following principles:

> "(1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

Defendant now contends, and the State does not dispute, that the trial court failed to ask the potential jurors whether they both understood and accepted the principles set forth in Rule 431(b). See *Belknap*, 2014 IL 117094, ¶ 46. While defendant concedes he forfeited this issue by failing to object at trial or raising it in a posttrial motion, defendant argues nonetheless that we review his claim as plain error. See *id*. ¶ 47.

¶ 51 Under the plain error doctrine, forfeited claims are reviewable if (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error was so fundamental and of such

magnitude that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of evidence. *Id*. ¶ 48. In both instances, however, the burden of persuasion showing the error was prejudicial remains with the defendant. See *Herron*, 215 Ill. 2d at 187. Here, defendant argues that the evidence was closely balanced. In evaluating whether it was closely balanced, reviewing courts consider the evidence in totality and conduct a qualitative, commonsense assessment of that evidence within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53. More specifically, we assess the evidence on the elements of the charged offenses, along with any evidence regarding the witnesses' credibility. *Id*.

¶ 52 Notwithstanding clear error, the evidence in this case was not closely balanced because it is undisputed that defendant committed burglary, along with co-defendant and Strong, and that they stole the van and drove it through the closed garage door in an attempt to escape. This was corroborated by the store's surveillance videos. The jury was entitled to determine that such actions would lead the police to shoot, and no evidence otherwise suggested that the police would not shoot under those circumstances. *Cf. id*. ¶¶ 62-63 (holding that the evidence was closely balanced because the guilty verdict necessarily involved a contest of credibility where both parties presented opposing versions of the events, without providing any extrinsic evidence corroborating or contradicting either version). We reiterate that, even if the excluded CPD general order indicated the police would not shoot in this situation, defendant never claimed to have been aware of that order, and under no circumstances would it have impacted what was foreseeable to him. Accordingly, we find no plain error.

¶ 53 Having determined that the evidence was not closely balanced, we also find that defendant has not shown that plain error occurred in instructing the jury on accountability and felony murder together, or in instructing the jury on causation in felony murder. In any event, the

jury instructions were proper here. The adequacy of tendered jury instructions should be considered as a whole and not in isolation to determine whether they fully and fairly stated the law. See *People v. Nash*, 2012 IL App (1st) 093233, ¶¶ 26, 28. Moreover, the trial court's tendered instructions will not be disturbed on appeal absent an abuse of discretion. *Id*. ¶ 26.

¶ 54 This issue is well-settled in *Nash*, where the defendant was convicted of felony murder of his co-felon, who killed by a police officer resisting the felony. *Id*. ¶ 3. There, the trial court instructed the jury on accountability and felony murder, as well as causation in felony murder. *Id*. ¶ 28. The court found that collectively, the instructions accurately stated the law on the proximate cause theory of liability for felony murder. *Id*. That is, the jury was instructed that the defendant, or one for whose conduct he was legally responsible, committed an unlawful act and the death of an individual resulted as a direct and foreseeable consequence of the parties committing the unlawful act. *Id*.

¶ 55 Like *Nash*, here, defendant was convicted of felony murder of Strong, who was killed by the police resisting their burglary, and the trial court instructed the jury on accountability and felony murder, and causation in felony murder. *Cf. People v. Dennis*, 181 Ill. 2d 87, 105 (1987) (where the defendant only participated in the escape from the robbery and was not a principal in the robbery commission, finding that he could not be held guilty for accountability-based felony murder); *People v. Shaw*, 186 Ill. 2d 301, 239 (1998) (same). Additionally, the trial court properly tendered Illinois Pattern Jury Instructions, Criminal, Nos. 5.03 and 5.03A (2012) (hereafter, IPI Criminal Nos. 5.03 and 5.03A). See *People v. Ramey*, 151 Ill. 2d 498, 537 (1992) (stating that IPI Criminal No. 5.03A is a proper statement of law on accountability for felony murder)); IPI Criminal No. 5.03A, Committee Comments (stating that this instruction should be given "only in *addition to*—not in lieu of—Instruction 5.03" (Emphasis added.)). To that end,

the instructions were not improper in stating that defendant could be found guilty where "the deceased was killed by one of the parties committing [the] unlawful act." See *People v. Allen*, 56 Ill. 2d 536, 540-41 (1974) (citing *People v. Johnson*, 55 Ill. 2d 62, 67 (1973)) (holding that the defendant could be found guilty where it was unknown if the victim was shot by the felon(s) or the officer resisting the crime, because "where murder is committed during a robbery all participants in the robbery are who fired the fatal shot").

¶ 56 Moreover, the court also properly submitted Illinois Pattern Jury Instructions, Criminal, Nos. 7.15 and 7.15A (2012) (hereafter, IPI Criminal Nos. 7.15 and 7.15A), because defendant was charged with felony murder, and causation was an issue. See IPI Criminal No. 7.15, Committee Comments (stating that "when felony murder (720 ILCS 9-1(a)(3)) is charged and causation is an issue, Instruction 7.15A *should also be given*"(emphases added)); IPI Criminal No. 7.15A, Committee Comments (stating that "[w]hen causation is an issue under section 720 ILCS 5/9-1(a)(1) (intentional murder), 720 ILCS 5/9-1(a)(2) (knowing murder) or 720 ILCS 5/9-3(a) (reckless homicide) as well as felony murder[,] then Instruction 7.15 *should also be given*" (emphasis added)); *People v. Walker*, 2012 IL App (2d) 110288, ¶ 22 (stating that IPI Criminal No. 7.15 is the proper instruction to be given for the charged offense of felony murder).

¶ 57 Because we have already concluded the evidence in this case was not closely balanced, defendant's challenge to the State's closing arguments must satisfy second-prong to constitute plain error. See *People v. Buckley*, 282 Ill. App. 3d 81, 88 (1996) (stating that to satisfy the second-prong, the defendant must show the error was so substantial that the jury may have reached a contrary verdict had no error occurred). Additionally, a misstatement of the law during closing argument, while improper, generally does not constitute reversible error if the jury was properly instructed on the law. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 36. To determine

whether a misstatement of the law constituted substantial prejudice to a defendant, the test is whether the jury would have reached a contrary verdict had the misstatement not been made. *Id.*

¶ 58 Defendant argues that the State repeatedly mischaracterized the elements required to prove felony murder because it "minimized the extent to which the jury had to decide whether the police shooting of Strong was a foreseeable consequence of the burglary." His argument, however, once again misconstrues the law under our proximate cause theory for felony murder. *Cf. People v. Weinstein*, 35 Ill. 2d 467, 471-72 (1996) (where the State repeatedly told the jury during closing argument that it was the defendant's burden to introduce evidence creating a reasonable doubt of her guilt for the pre-meditated murder of her husband, the court found that the defendant was deprived of a fair trial). The question was whether the death of his co-offender was foreseeable, not whether the police shooting was foreseeable. Even if the State had misstated the law, however, it would not amount to reversible error because the jury was properly instructed. Moreover, defendant has not shown that the jury would have reached a contrary verdict had any misstatement not been made. We find no error, let alone plain error.

¶ 59 Finally, defendant's claim that trial counsel was ineffective in failing to pursue those issues below also fails. See *Mefford*, 2015 IL App (4th) 130471, ¶ 81 (stating that a defendant who alleges ineffective assistance of counsel must demonstrate that, but for his counsel's errors, the outcome would have been different). As established, *supra*, defendant has not shown that the jury would have reached a contrary outcome had those errors not occurred. Therefore, we conclude that none of the asserted errors would have changed the result here.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, we affirm the trial court's judgment.

¶ 62 Affirmed.